295 US 555
↳ retroactive - vested interests

Tab 1

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 23--DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
DIVISION A--ATOMIC ENERGY
SUBCHAPTER XIII--GENERAL AUTHORITY OF COMMISSION

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Current through P.L. 107-11, approved 5-28-01

§ 2212. Contractor liability for injury or loss of property arising out of atomic weapons testing programs

(a) Short title

This section may be cited as the "Atomic Testing Liability Act".

(b) Federal remedies applicable; exclusiveness of remedies

(1) Remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, by the Act of March 9, 1920 (46 U.S.C.App. 741-752), or by the Act of March 3, 1925 (46 U.S.C.App. 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

(2) Exclusivity

The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such title and shall be subject to the limitations and exceptions applicable to those actions.

(c) Procedure

A contractor against whom a civil action or proceeding described in subsection (b) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (b) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

(d) Actions covered

The provisions of this section shall apply to any action, within the provisions of subsection (b) of this section, which is pending on November 5, 1990, or commenced on or after November 5, 1990. Notwithstanding section

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2401(b) of Title 28, if a civil action or proceeding to which this section applies is pending on November 5, 1990, and is dismissed because the plaintiff in such action or proceeding did not file an administrative claim as required by section 2672 of that title, the plaintiff in that action or proceeding shall have 30 days from the date of the dismissal or two years from the date upon which the claim accrued, whichever is later, to file an administrative claim, and any claim or subsequent civil action or proceeding shall thereafter be subject to the provisions of section 2401(b) of Title 28.

(e) "Contractor" defined

For purposes of this section, the term "contractor" includes a contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or any of its predecessor agencies).

CREDIT(S)

1995 Main Volume

(Pub.L. 101-510, Div. C, Title XXXI, § 3141, Nov. 5, 1990, 104 Stat. 1837.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-665, House Conference Report No. 101- 923, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 2931.

References in Text

Act of March 9, 1920, referred to in subsec. (b)(1), is a reference to the Suits in Admiralty Act, Act Mar. 9, 1920, c. 95, 41 Stat. 525, as amended, which is classified generally to chapter 20 (section 741 et seq.) of the Appendix to Title 46, Shipping. For complete classification of this Act to the Code, see Short Title note set out under section 741 of the Appendix to Title 46 and Tables.

Act of March 3, 1925, referred to in subsec. (b)(1), is a reference to the Public Vessels Act, Act Mar. 3, 1925, c. 428, 43 Stat. 1112, which is classified generally to chapter 22 (section 781 et seq.) of the Appendix to Title 46, Shipping. For complete classification of this Act to the Code, see Short Title note set out under section 781 of the Appendix to Title 46 and Tables.

Codifications

Section was enacted as part of the National Defense Authorization Act for Fiscal Year 1991, and not as part of the Atomic Energy Act of 1954, which comprises subchapters I to XVII of this chapter.

Prior Provisions

A prior section 2212, Pub.L. 98-525, Title XVI, § 1631, Oct. 19, 1984, 98 Stat. 2646, relating to similar subject matter, was repealed by Pub.L. 101- 426, § 13, as added Pub.L. 101-510, Div. C, Title XXXI, § 3140, Nov. 5, 1990, 104 Stat. 1837.

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AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

LIBRARY REFERENCES

American Digest System

Claims against the United States; statutory provisions, see United States 94.

Claims against United States founded on contracts, see United States 95.

Encyclopedias

Claims against the United States; statutory provisions in general, see C.J.S. United States § 137.

Claims against United States founded on contract in general, see C.J.S. United States § 138.

6 Am Jur 2d, Atomic Energy §§ 48, 53.

NOTES OF DECISIONS

Constitutionality 1
Substitution of United States party 2

1. Constitutionality

Former provisions of this section providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing program did not constitute taking under Fifth Amendment as applied to pending actions. In re Consolidated U.S. Atmospheric Testing Litigation, C.A.9 (Cal.) 1987, 820 F.2d 982, certiorari denied 108 S.Ct. 1076, 485 U.S. 905, 99 L.Ed.2d 235.

By enacting former provisions of this section substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedies for those injuries, thereby retroactively abolishing widow's cause of action in tort for death of her husband from radiation, Congress abridged no vested rights of widow, as rights in tort do not vest until there is a final, unreviewable judgment. Hammond v. U.S., C.A.1 (Mass.) 1986, 786 F.2d 8.

2. Substitution of United States party

Former provisions of this section, providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs, required claims to be pursued in action solely against United States. Contractors were to be dismissed from such suits. In re Consolidated U.S. Atmospheric Testing Litigation, N.D.Cal.1985, 616 F.Supp. 759, affirmed 820 F.2d 982, certiorari denied 108 S.Ct. 1076, 485 U.S. 905, 99 L.Ed.2d 235.

42 U.S.C.A. § 2212

42 USCA § 2212

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Tab 2

Supreme Court of the United States

Ed PLAUT, et ux., et al., Petitioners,
v.
SPENDTHRIFT FARM, INC., et al.

No. 93-1121.

Argued Nov. 30, 1994.
Decided April 18, 1995.

Securities fraud plaintiffs moved to reinstate their time-barred Securities Exchange Act § 10(b) claims. The United States District Court for the Eastern District of Kentucky, Joseph M. Hood, J., 789 F.Supp. 231, denied motion. Plaintiffs appealed. The Sixth Circuit Court of Appeals, 1 F.3d 1487, affirmed. Certiorari was granted. The United States Supreme Court, Justice Scalia, held that Securities Exchange Act section § 27A(b), providing that any § 10b suit started before and dismissed as time barred after June 19, 1991 (day before Supreme Court decided *Lampf* case establishing uniform limitations period for federal securities fraud actions) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments.

Affirmed.

Justice Breyer concurred in judgment and filed opinion.

Justice Stevens dissented and filed opinion, in which Justice Ginsburg joined.

West Headnotes

[1] Statutes ⚿174
361k174 Most Cited Cases

Judicial construction of statute is an authoritative statement of what statute meant before as well as after decision of case giving rise to construction.

[2] Securities Regulation ⚿2.30
349Bk2.30 Most Cited Cases

There is no reasonable construction of Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for securities fraud cases) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, that would not require federal courts to reopen final judgments. Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. § § 78j(b), 78aa-1(b).

[3] Constitutional Law ⚿47
92k47 Most Cited Cases

Supreme Court will first consider narrowest of alternate grounds submitted for claim that congressional statute is unconstitutional.

[4] Federal Courts ⚿4
170Bk4 Most Cited Cases

Article III of Constitution gives federal judiciary power, not merely to rule on cases, but to decide them, subject to review only by superior courts, with understanding that judgment conclusively resolves case. U.S.C.A. Const. Art. 3, § 1 et seq.

[5] Constitutional Law ⚿57
92k57 Most Cited Cases

[5] Securities Regulation ⚿2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud cases) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. §§ 78j(b), 78aa-1(b).

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[6] Constitutional Law ⚷57
92k57 Most Cited Cases

[6] Securities Regulation ⚷2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud cases) which would have been timely under laws existing on that date was to be reinstated on motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments, even though it was Congress that established what constituted finality of judgments. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. § § 78j(b), 78aa-1(b).

[7] Constitutional Law ⚷52
92k52 Most Cited Cases

[7] Constitutional Law ⚷186
92k186 Most Cited Cases

Having achieved finality, judicial decision becomes last word of judicial department with regard to particular case or controversy, and Congress may not declare by retroactive legislation that law applicable to that very case was something other than what court said it was. U.S.C.A. Const. Art. 3, § 1 et seq.

[8] Constitutional Law ⚷57
92k57 Most Cited Cases

[8] Securities Regulation ⚷2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit commenced before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud actions) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments even though it was claimed that reopening of whole class of cases was involved rather than particular suit, reducing perception that legislative interference with judicial judgments was prompted by individual favoritism. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. §§ 78j(b), 78aa-1(b).

[9] Constitutional Law ⚷57
92k57 Most Cited Cases

[9] Securities Regulation ⚷2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit commenced before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud actions) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments even though final judgments in question rested upon statutes of limitations, existence and length of which were entirely within congressional control. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. §§ 78j(b), 78aa-1(b).

****1449** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***211** In a 1987 civil action, petitioners alleged that in 1983 and 1984 respondents committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The District Court dismissed the action with prejudice following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbert son,* 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321, which required that suits such as petitioners' be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. After the judgment became final, Congress enacted § 27A(b) of the

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1934 Act, which provides for reinstatement on motion of any action commenced pre-*Lampf* but dismissed thereafter as time barred, if the action would have been timely filed under applicable pre-*Lampf* state law. Although finding that the statute's terms required that petitioners' ensuing § 27A(b) motion be granted, the District Court denied the motion on the ground that § 27A(b) is unconstitutional. The Court of Appeals affirmed.

Held: Section 27A(b) contravenes the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments entered before its enactment. Pp. 1451-1463.

(a) Despite respondents' arguments to the contrary, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*. Pp. 1451- 1452.

(b) Article III establishes a "judicial department" with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60. The Framers crafted this charter with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy. Thus, the Constitution forbids the Legislature to interfere with courts' final judgments. Pp. 1453-1456.

(c) Section 27A(b) effects a clear violation of the foregoing principle by retroactively commanding the federal courts to reopen final judgments. This Court's decisions have uniformly provided fair warning that retroactive legislation such as § 27A(b) exceeds congressional powers. ***212** See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568. Petitioners are correct that when a new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal, and must alter the outcome accordingly. However, once a judgment has achieved finality in the highest court in the hierarchy, the decision becomes the last word of the judicial department with regard to the particular case or controversy, ****1450** and Congress may not declare by retroactive legislation that the law applicable to that case was in fact something other than it was. It is irrelevant that § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit, and that the final judgments so reopened rested on the bar of a statute of limitations rather than on some other ground. Pp. 1456-1458.

(d) Apart from § 27A(b), the Court knows of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. Fed.Rule Civ.Proc. 60(b), 20 U.S.C. § 1415(e)(4), 28 U.S.C. § 2255, 50 U.S.C.App. § 520(4), and, *e.g.,* the statutes at issue in *United States v. Sioux Nation,* 448 U.S. 371, 391-392, 100 S.Ct. 2716, 2728-2729, 65 L.Ed.2d 844, *Sampeyreac v. United States,* 7 Pet. 222, 238, 8 L.Ed. 665, *Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814, and *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 15 L.Ed. 435, distinguished. Congress's prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed by the Constitution's separation of powers. The Court rejects the suggestion that § 27A(b) might be constitutional if it exhibited prospectivity or a greater degree of general applicability. Pp. 1458-1463.

1 F.3d 1487 (CA6 1993), affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post,* p. 1463. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 1466.

William W. Allen, Lexington, KY (argued), for petitioners. Michael R. Dreeben, Washington, DC (argued), for federal respondent.

***213** Theodore B. Olson (argued), Washington, DC, for private respondents.

For U.S. Supreme Court Briefs See:

1994 WL 387806 (Pet.Supp.Brief)

1994 WL 389771 (Pet.Brief)

1994 WL 496344 (Resp.Brief)

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1994 WL 596801 (Reply.Brief)

For Transcript of Oral Argument See:

1994 WL 714637 (U.S.Oral.Arg.)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether § 27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under § 10(b) of the Act, contravenes the Constitution's separation of powers or the Due Process Clause of the Fifth Amendment.

I

In 1987, petitioners brought a civil action against respondents in the United States District Court for the Eastern District of Kentucky. The complaint alleged that in 1983 and 1984 respondents had committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The case was mired in pretrial proceedings in the District Court until June 20, 1991, when we decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321. *Lampf* held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 ... must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.,* at ***214** 364, 111 S.Ct., at 2782. We applied that holding to the plaintiff-respondents in *Lampf* itself, found their suit untimely, and reinstated a summary judgment previously entered in favor of the defendant-petitioners. *Ibid.* On the same day we decided *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), in which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review. See *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 92, 113 S.Ct. 2510, 2514-2515, 125 L.Ed.2d 74 (1993). The joint effect of *Lampf* and *Beam* was to mandate application of the 1-year/3-year limitations period to petitioners' suit. ****1451** The District Court, finding that petitioners' claims were untimely under the *Lampf* rule, dismissed their action with prejudice on August 13, 1991. Petitioners filed no appeal; the judgment accordingly became final 30 days later. See 28 U.S.C. § 2107(a) (1988 ed., Supp. V); *Griffith v. Kentucky,* 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 712, n. 6, 93 L.Ed.2d 649 (1987).

On December 19, 1991, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. Section 476 of the Act-- a section that had nothing to do with FDIC improvements--became § 27A of the Securities Exchange Act of 1934, and was later codified as 15 U.S.C. § 78aa- 1 (1988 ed., Supp. V). It provides:

"(a) Effect on pending causes of action

"The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) Effect on dismissed causes of action

"Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991--

***215** "(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

"shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991."

On February 11, 1992, petitioners returned to the District Court and filed a motion to reinstate the action previously dismissed with prejudice. The District Court found that the conditions set out in §§ 27A(b)(1) and (2) were met, so that petitioners' motion was required to be granted by the terms of the statute. It nonetheless denied the motion, agreeing with respondents that § 27A(b) is unconstitutional. Memorandum Opinion and Order, Civ. Action No. 87-438 (ED Ky., Apr. 13, 1992). The United States Court of Appeals for the Sixth Circuit affirmed. 1 F.3d 1487 (1993). We granted certiorari. 511 U.S. 1141, 114 S.Ct. 2161, 128 L.Ed.2d 885 (1994). [FN1]

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FN1. Last Term this Court affirmed, by an equally divided vote, a judgment of the United States Court of Appeals for the Fifth Circuit that held § 27A(b) constitutional. *Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.,* 511 U.S. 658, 114 S.Ct. 1827, 128 L.Ed.2d 654 (1994) (*per curiam*). That ruling of course lacks precedential weight. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 73, n. 8, 97 S.Ct. 2264, 2271, n. 8, 53 L.Ed.2d 113 (1977).

II

[1][2] Respondents bravely contend that § 27A(b) does not require federal courts to reopen final judgments, arguing first that the reference to "the laws applicable in the jurisdiction ... as such laws existed on June 19, 1991" (the day before *Lampf* was decided) may reasonably be construed to refer precisely to the limitations period provided in *Lampf* itself, in which case petitioners' action was time barred even under ***216** § 27A. [FN2] It is true that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312-313, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (1994); see also *id.,* at 313, n. 12, 114 S.Ct., at 1519, n. 12. But respondents' argument confuses the question of what the law *in fact* was on June 19, 1991, with the distinct question of what § 27A ****1452** means* by its *reference* to what the law was. We think it entirely clear that it does not mean the law enunciated in *Lampf,* for two independent reasons. First, *Lampf* provides a uniform, national statute of limitations (instead of using the applicable state limitations period, as lower federal courts had previously done. See *Lampf,* 501 U.S., at 354, and n. 1, 111 S.Ct., at 2777, and n. 1). If the statute referred to *that* law, its reference to the "laws applicable *in the jurisdiction* " (emphasis added) would be quite inexplicable. Second, if the statute refers to the law enunciated in *Lampf,* it is utterly without effect, a result to be avoided if possible. *American Nat. Red Cross v. S.G.,* 505 U.S. 247, 263-264, 112 S.Ct. 2465, 2474-2475, 120 L.Ed.2d 201 (1992); see 2A N. Singer, Sutherland on Statutory Construction § 46.06 (Sands rev. 4th ed. 1984). It would say, in subsection (a), that the limitations period is what the Supreme Court has held to be the limitations period; and in subsection (b), that suits dismissed as untimely under *Lampf* which were timely under *Lampf* (a null set) shall be reinstated. To avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute "disingenuous evasion." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933).

FN2. Since respondents' reading of the statute would avoid a constitutional question of undoubted gravity, we think it prudent to entertain the argument even though respondents did not make it in the Sixth Circuit. Of course the Sixth Circuit did *decide* (against respondents) the point to which the argument was directed. See 1 F.3d 1487, 1490 (1993) ("The statute's language is plain and unambiguous.... [It] commands the Federal courts to reinstate cases which those courts have dismissed").

***217** As an alternative reason why § 27A(b) does not require the reopening of final judgments, respondents suggest that the subsection applies only to cases still pending in the federal courts when § 27A was enacted. This has only half the defect of the first argument, for it makes only half of § 27A purposeless--§ 27A(b). There is no need to "reinstate" actions that are still pending; § 27A(a) (the new statute of limitations) could and would be applied by the courts of appeals. On respondents' reading, the only consequence of § 27A(b) would be the negligible one of permitting the plaintiff in the pending appeal from a statute-of-limitations dismissal to return *immediately* to the district court, instead of waiting for the court of appeals' reversal. To enable § 27A(b) to achieve such an insignificant consequence, one must disregard the language of the provision, which refers generally to suits "dismissed as time barred." It is perhaps arguable that this does *not* include suits that are not yet *finally* dismissed, *i.e.,* suits still pending on appeal; but there is *no* basis for the contention that it includes *only* those. In short, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf.*

III

[3] Respondents submit that § 27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment. [FN3] Because the latter submission, if correct, might dictate a similar result

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in a challenge to state legislation underthe Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first. *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). We conclude that in § 27A(b) Congress has exceeded its authority by requiring the federal courts to exercise ***218** "[t]he judicial Power of the United States," U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.

> FN3. "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const., Amdt. 5.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872), where we refused to give effect to a statute that was said "[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.,* 13 Wall., at 146. Whatever the precise scope of *Klein,* however, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 441, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992). ****1453** Section 27A(b) indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively). The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case,* 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948). Yet under any application of § 27A(b) only courts are involved; no officials of other departments sit in direct review of their decisions. Section 27A(b) therefore offends neither of these previously established prohibitions.

[4] We think, however, that § 27A(b) offends a postulate of Article III just as deeply rooted in our law as those we have mentioned. Article III establishes a "judicial department" with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide ***219** them, subject to review only by superior courts in the Article III hierarchy--with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W.Res.L.Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.*

A

The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression. In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments. G. Wood, The Creation of the American Republic 1776-1787, pp. 154-155 (1969). Often, however, they chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. M. Clarke, Parliamentary Privilege in the American Colonies 49-51 (1943). See, *e.g.,* Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv.L.Rev. 208 (1902) (collecting documents from 1708-1709); 5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784-1792 (Metcalf ed. 1916). Thus, as described in our discussion of *Hayburn's Case, supra,* at 6-7, such legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments.

The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies increased the frequency of legislative correction of judgments. Wood, *supra,* at 155-156, 407-408. See also *INS v.*

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Chadha, 462 U.S. 919, 961, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 ***220** 1983) (Powell, J., concurring). "The period 1780-1787 ... was a period of 'constitutional reaction' " to these developments, "which ... leaped suddenly to its climax in the Philadelphia Convention." E. Corwin, The Doctrine of Judicial Review 37 (1914). Voices from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts. In 1786, the Vermont Council of Censors issued an "Address of the Council of Censors to the Freemen of the State of Vermont" to fulfill the council's duty, under the State Constitution of 1784, to report to the people " 'whether the legislative and executive branches of government have assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution.' " Vermont State Papers 1779-1786, pp. 531, 533 (Slade ed. 1823). A principal method of usurpation identified by the censors was "[t]he instances ... of ****1454** judgments being vacated by legislative acts." *Id.,* at 540. The council delivered an opinion

> "that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, (except where the particular circumstances of the case evidently made it necessary to grant a new trial) have exercised a power not delegated, or intended to be delegated, to them, by the Constitution.... It supercedes the necessity of any other law than the pleasure of the Assembly, and of any other court than themselves: for it is an imposition on the suitor, to give him the trouble of obtaining, after several expensive trials, a final judgment agreeably to the known established laws of the land; if the Legislature, by a sovereign act, can interfere, reverse the judgment, and decree in such manner, as they, unfettered by rules, shall think proper." *Ibid.*

So too, the famous report of the Pennsylvania Council of Censors in 1784 detailed the abuses of legislative interference with the courts at the behest of private interests and ***221** factions. As the General Assembly had (they wrote) made a custom of "extending their deliberations to the cases of individuals," the people had "been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." The censors noted that because "favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief ... [t]hese dangerous procedures have been too often recurred to, since the revolution." Report of the Committee of the Council of Censors 6 (Bailey ed. 1784).

This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. See Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am.Hist.Rev. 511, 514-517 (1925). The Convention made the critical decision to establish a judicial department independent of the Legislative Branch by providing that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's Federalist No. 48, the famous description of the process by which "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." The Federalist ***222** No. 48, pp. 333, 337 (J. Cooke ed. 1961). Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature ... in many instances decided rights which should have been left to judiciary controversy." *Id.,* at 336 (emphasis deleted). [FN4]

> FN4. Read in the abstract these public pronouncements might be taken, as the Solicitor General does take them, see Brief for United States 28-30, to disapprove only the practice of having the legislature itself sit as a court of original or appellate jurisdiction. But against the backdrop of history, that reading is untenable. Many, perhaps a plurality, of the instances of legislative equity in

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> the period before the framing simply involved duly enacted laws that nullified judgments so that new trials or judicial rulings on the merits could take place. See *supra,* at 1453.

If the need for separation of legislative from judicial power was plain, the principal effect to be accomplished by that separation was even plainer. As Hamilton wrote in his exegesis of Article III, § 1 , in The Federalist No. 81:

> **1455 "It is not true ... that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act.... A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." The Federalist No. 81, p. 545 (J. Cooke ed. 1961).

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, pp. 523, 525. *223 See also Corwin, The Doctrine of Judicial Review, at 42. The Judiciary would be, "from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution," not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. Thus, "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: ... so long as the judiciary remains truly distinct from both the legislative and executive." *Id.,* No. 78, at 522.

Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts. In *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798), the Legislature of Connecticut had enacted a statute that set aside the final judgment of a state court in a civil case. Although the issue before this Court was the construction of the *Ex Post Facto* Clause, Art. I, § 10, Justice Iredell (a leading Federalist who had guided the Constitution to ratification in North Carolina) noted that

> "the Legislature of [Connecticut] has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions.... The power ... is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Id.,* 3 Dall., at 398.

The state courts of the era showed a similar understanding of the separation of powers, in decisions that drew little distinction between the federal and state constitutions. To *224 choose one representative example from a multitude: In *Bates v. Kimball,* 2 Chipman 77 (Vt.1824), a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court even though, under the general law, the time for appeal had expired. The court, noting that the unappealed judgment had become final, set itself the question "Have the Legislature power to vacate or annul an existing judgment between party and party?" *Id.,* at 83. The answer was emphatic: "The necessity of a distinct and separate existence of the three great departments of government ... had been proclaimed and enforced by ... Blackstone, Jefferson and Madison," and had been "sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions." *Id.,* at 84. The power to annul a final judgment, the court held (citing *Hayburn's Case,* 2 Dall., at 410), was "an assumption of Judicial power," and therefore forbidden. *Bates v. Kimball, supra,* at 90. For other examples, see *Merrill v. Sherburne,* 1 N.H. 199 (1818) (legislature may not vacate a final judgment and grant a new trial); *Lewis v. Webb,* 3 Greenleaf 299 (Me.1825) (same); T. Cooley, Constitutional Limitations 95-96 (1868) (collecting cases); J. Sutherland, Statutory **1456 Construction 18- 19 (J. Lewis ed. 1904) (same).

By the middle of the 19th century, the constitutional equilibrium created by the separation of the legislative power to make general law from the

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judicial power to apply that law in particular cases was so well understood and accepted that it could survive even *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857). In his First Inaugural Address, President Lincoln explained why the political branches could not, and need not, interfere with even that infamous judgment:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit.... And while it is obviously possible that ***225** such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice." 4 R. Basler, The Collected Works of Abraham Lincoln 268 (1953) (First Inaugural Address 1861).

And the great constitutional scholar Thomas Cooley addressed precisely the question before us in his 1868 treatise:

> "If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra,* at 94-95.

B

[5] Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed. It is, of course, retroactive legislation, that is, legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred--in this case, the filing of the initial Rule 10b-5 action in the District Court. When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, at 545. Our decisions stemming from *Hayburn's Case*--although their precise holdings are not strictly applicable here, see *supra,* at 1452-1453--have uniformly provided fair warning that such an act exceeds the powers of Congress. See, *e.g., Chicago & Southern Air Lines, Inc.,* 333 U.S., at 113, 68 S.Ct., at 437 ("Judgments within the powers vested in courts by the Judiciary Article ***226** of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. O'Grady,* 22 Wall. 641, 647-648, 22 L.Ed. 772 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); *Gordon v. United States,* 117 U.S.Appx. 697, 700-704 (1864) (opinion of Taney, C.J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Hayburn's Case,* 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *id.,* at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 431, 15 L.Ed. 435 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby.... This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear ****1457** statements must either be honored, or else proved false.

[6][7] It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products,* 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994). Since that is ***227** so, petitioners argue, federal courts must apply the "new" law created by § 27A(b) in finally adjudicated

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cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower-court judgments that are final, is determined by statute, see, *e.g.*, 28 U.S.C. § 2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a *constitutional* line. But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra,* 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. See, *e.g., Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

[8] To be sure, § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. ***228** The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner--viz., with particular rather than general effect--that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but *power* is the object of the separation-of- powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

[9] It is irrelevant as well that the final judgments reopened by § 27A(b) rested on the bar of a statute of limitations. The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits. See, *e.g.*, Fed.Rule Civ.Proc. 41(b); *United States v. Oppenheimer,* 242 U.S. 85, 87-88, 37 S.Ct. 68, 69-69, 61 L.Ed. 161 (1916). Petitioners suggest, directly or by implication, two reasons why a merits judgment based on this particular ground may be uniquely subject ****1458** to congressional nullification. First, there is the fact that the length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control. But virtually *all* of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control. Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often ***229** excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery. To distinguish statutes of limitations on the ground that they are mere creatures of Congress is to distinguish them not at all. The second supposedly distinguishing characteristic of a statute of limitations is that it can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired. See, *e.g., Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). But that also does not set statutes of limitations apart. To mention only one other broad category of judgment-producing legal rule: Rules of pleading and proof can similarly be altered after the cause of action

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arises, *Landgraf v. USI Film Products, supra,* 511 U.S., at 275, and n. 29, 114 S.Ct. at 1502, and n. 29, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered. Petitioners' principle would therefore lead to the conclusion that final judgments rendered on the basis of a stringent (or, alternatively, liberal) rule of pleading or proof may be set aside for retrial under a new liberal (or, alternatively, stringent) rule of pleading or proof. This alone provides massive scope for undoing final judgments and would substantially subvert the doctrine of separation of powers.

The central theme of the dissent is a variant on these arguments. The dissent maintains that *Lampf* "announced" a new statute of limitations, *post,* at 1466, in an act of "judicial ... lawmaking," *post,* at 1467, that "changed the law," *post,* at 1468. That statement, even if relevant, would be wrong. The point decided in *Lampf* had never before been addressed by this Court, and was therefore an open question, no matter what the lower courts had held at the time. But the more important point is that *Lampf* as such is irrelevant to this case. The dissent itself perceives that "[w]e would have the same issue to decide had Congress enacted the *Lampf* rule," and that the *Lampf* rule's genesis in judicial lawmaking rather than, shall we say, legislative lawmaking, "should not ***230** affect the separation-of-powers analysis." *Post,* at 1467. Just so. The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves. The separation-of-powers question before us has nothing to do with *Lampf,* and the dissent's attack on *Lampf* has nothing to do with the question before us.

C

Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed. The closest analogue that the Government has been able to put forward is the statute at issue in *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). That law required the Court of Claims " '[n]otwithstanding any other provision of law ... [to] review on the merits, without regard to the defense of res judicata or collateral estoppel,' " a Sioux claim for just compensation from the United States--even though the Court of Claims had previously heard and rejected that very claim. We considered and rejected separation-of-powers objections to the statute based upon *Hayburn's Case* and *United States v. Klein.* See 448 U.S., at 391-392, 100 S.Ct., at 2728-2729. The basis for our rejection was a line of precedent (starting with *Cherokee Nation v. United States,* 270 U.S. 476, 46 S.Ct. 428, 70 L.Ed. 694 (1926)) that stood, we said, for the proposition that "Congress has the power to waive the res judicata effect of a prior judgment ****1459** entered in the Government's favor on a claim against the United States." *Sioux Nation,* 448 U.S., at 397, 100 S.Ct., at 2731. And our holding was as narrow as the precedent on which we had relied: "In sum, ... Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does ***231** not violate the doctrine of separation of powers." *Id.,* at 407, 100 S.Ct., at 2737. [FN5]

> FN5. The dissent quotes a passage from the opinion saying that Congress " 'only was providing a forum so that a new judicial review of the Black Hills claim could take place.' " *Post,* at 1471 (quoting 448 U.S., at 407, 100 S.Ct., at 2736). That is quite consistent with the res judicata holding. Any party who waives the defense of res judicata provides a forum for a new judicial review.

The SolicitorGeneral suggests that even if *Sioux Nation* is read in accord with its holding, it nonetheless establishes that Congress may require Article III courts to reopen their final judgments, since "if res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant." Brief for United States 27 (citing *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 850-851, 106 S.Ct. 3245, 3256-3257, 92 L.Ed.2d 675 (1986)). But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the "judicial Power" to disregard an unconstitutional statute, see *Marbury,* 1 Cranch, at 177; yet none would suggest that a litigant may never waive the

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defense that a statute is unconstitutional. See, *e.g.*, *G.D. Searle & Co. v. Cohn,* 455 U.S. 404, 414, 102 S.Ct. 1137, 1144, 71 L.Ed.2d 250 (1982). What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of res judicata are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of res judicata need not always be accepted--that trial courts may in appropriate cases raise the res judicata bar on their own motion. See, *e.g., Coleman v. Ramada Hotel Operating Co.,* 933 F.2d 470, 475 (CA7 1991); *In re Medomak Canning,* 922 F.2d 895, 904 (CA1 1990); *Holloway Constr. Co. v. United States Dept. of Labor,* 891 F.2d 1211, 1212 (CA6 1989). Waiver subject to the control of the ***232** courts themselves would obviously raise no issue of separation of powers, and would be precisely in accord with the language of the decision that the Solicitor General relies upon. We held in *Schor* that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, 478 U.S., at 849, 106 S.Ct., at 3255, we would nonetheless choose to consider his Article III challenge, because "when these Article III limitations are at issue, notions of consent and waiver cannot be *dispositive,*" *id.,* at 851, 106 S.Ct., at 3257 (emphasis added). See also *Freytag v. Commissioner,* 501 U.S. 868, 878-879, 111 S.Ct. 2631, 2638-2639, 115 L.Ed.2d 764 (1991) (finding a "rare cas[e] in which we should exercise our discretion" to hear a waived claim based on the Appointments Clause, Art. II, § 2, cl. 2). [FN6]

> FN6. The statute at issue in *United States v. SiouxNation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), seemingly prohibited courts from raising the res judicata defense *sua sponte.* See *id.,* at 432-433, 100 S.Ct., at 2749-2750 (REHNQUIST, J., dissenting). The Court did not address that point; as far as appears it saw no reason to raise the defense on its own. Of course the unexplained silences of our decisions lack precedential weight. See, *e.g., Brecht v. Abrahamson,* 507 U.S. 619, 630-631, 113 S.Ct. 1710, 1717-1718, 123 L.Ed.2d 353 (1993).

Petitioners also rely on a miscellany of decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts, see, *e.g., Sampeyreac v. United States,* 7 Pet. 222, 238, 8 L.Ed. 665 (1833); *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), or administrative agencies, *Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814 (1940), or that altered the prospective effect of injunctions entered by Article III courts, *Wheeling & Belmont Bridge Co.,* 18 How., at 421. These cases distinguish themselves; nothing in our holding today calls them into question. Petitioners rely on general statements from some ****1460** of these cases that legislative annulment of final judgments is not an exercise of judicial power. But even if it were our practice to decide cases by weight of prior dicta, we would find the many dicta that reject congressional ***233** power to revise the judgments of Article III courts to be the more instructive authority. See *supra,* at 1456-1457. [FN7]

> FN7. The dissent tries to turn the dicta of the territorial-court cases, *Sampeyreac* and *Freeborn,* into holdings. It says of *Sampeyreac* that "the relevant judicial power that the [challenged] statute arguably supplanted was this Court's Article III appellate jurisdiction." *Post,* at 1470. Even if it were true that the judicial power under discussion was that of this Court (which is doubtful), the point could still not possibly constitute a holding, since there was no "supplanted power" at issue in the case. One of the principal grounds of decision was that the finality of the territorial court's decree had *not* been retroactively abrogated. The decree had been entered under a previous statute which provided that a decree "shall be final and conclusive *between the parties.*" *Sampeyreac v. United States,* 7 Pet., at 239, 8 L.Ed. 665 (emphasis in original). The asserted basis for reopening was fraud, in that Sampeyreac did not actually exist. We reasoned that "as Sampeyreac was a fictitious person, he was no party to the decree, and the act [under which the decree had allegedly become final] in strictness does not apply to the case." *Ibid.*
>
> The dissent likewise says of *Freeborn* that "the 'judicial power' to which the opinion referred was this Court's Article III appellate jurisdiction." *Post,* at 1470. Once again, even if it was, the point remains dictum. No final judgment was at issue in *Freeborn.* The challenged statute reached only " 'cases of appeal or writ of error heretofore prosecuted *and now pending* in the supreme court of the United States,' " see *post,* at 1470, n. 7 (quoting 13 Stat. 441) (emphasis added). As we have explained, see *supra,* at 1456-1457, Congress may require (insofar as separation-of-powers limitations are concerned) that new statutes be applied in cases not yet final but still pending on appeal.

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Finally, petitioners liken § 27A(b) to Federal Rule of Civil Procedure 60(b), which authorizes courts to relieve parties from a final judgment for grounds such as excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief...." We see little resemblance. Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other " 'extraordinary circumstances,' " *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988), does not impose any legislative mandate to reopen upon the courts, but merely reflects and ***234** confirms the courts' own inherent and discretionary power, "firmly established in English practice long before the foundation of our Republic," to set aside a judgment whose enforcement would work inequity. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1944). Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process; but they are irrelevant to the claim that legislative instruction to reopen impinges upon the independent constitutional authority of the courts.

The dissent promises to provide "[a] few contemporary examples" of statutes retroactively requiring final judgments to be reopened, "to demonstrate that [such statutes] are ordinary products of the exercise of legislative power." *Post,* at 1471. That promise is not kept. The relevant retroactivity, of course, consists not of the requirement that there be set aside a judgment that has been rendered *prior to its being setting aside*--for example, a statute passed today which says that all default judgments rendered in the future may be reopened within 90 days after their entry. In that sense, *all* requirements to reopen are "retroactive," and the designation is superfluous. Nothing we say today precludes a law such as that. The finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involves a judgment that Congress subjected to a reopening requirement which did not exist when the judgment was pronounced. The dissent provides not a single clear prior instance of such congressional action.

The dissent cites, first, Rule 60(b), which it describes as a "familiar remedial measure." *Ibid.* As we have just discussed, Rule 60(b) ****1461** does not provide a new remedy at all, but ***235** is simply the recitation of pre-existing judicial power. The same is true of another of the dissent's examples, 28 U.S.C. § 2255, which provides federal prisoners a statutory motion to vacate a federal sentence. This procedure " 'restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.' " *United States v. Hayman,* 342 U.S. 205, 218, 72 S.Ct. 263, 271, 96 L.Ed. 232 (1952) (quoting the 1948 Reviser's Note to § 2255). It is meaningless to speak of these statutes as applying "retroactively," since they simply codified judicial practice that pre-existed. Next, the dissent cites the provision of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C.App. § 520(4), which authorizes courts, upon application, to reopen judgments against members of the Armed Forces entered while they were on active duty. It could not be clearer, however, that this provision was not retroactive. It says: "If any judgment *shall be rendered* in any action or proceeding governed by this section against any person in military service during the period of such service ... *such judgment* may ... be opened...." (Emphasis added.)

The dissent also cites, *post,* at 1472, a provision of the Handicapped Children's Protection Act of 1986, 82 Stat. 901, 20 U.S.C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for the award of attorney's fees under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U.S.C. § 1411 *et seq.* (1988 ed. and Supp. V). This changed the law regarding attorney's fees under the Education for All Handicapped Children Act, after our decision in *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), found such fees to be unavailable. The provision of the Statutes at Large adopting this amendment to the United States Code specified, in effect, that it would apply not only to proceedings brought after its enactment, but also to proceedings pending at the time of, or brought after, the decision in *Smith.* See 100 Stat. 798. The amendment says nothing about reopening final judgments, and the retroactivity provision may well mean nothing ***236** more than that it applies not merely to new suits

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commenced after the date of its enactment, but also to *previously* filed (but not yet terminated) suits of the specified sort. This interpretation would be consistent with the only case the dissent cites, which involved a court-entered consent decree not yet fully executed. *Counsel v. Dow,* 849 F.2d 731, 734, 738-739 (CA2 1988). Alternatively, the statute can perhaps be understood to create a new cause of action for attorney's fees attributable to already concluded litigation. That would create no separation-of-powers problem, and would be consistent with this Court's view that "[a]ttorney's fee determinations ... are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' " *Landgraf v. USI Film Products,* 511 U.S., at 277, 114 S.Ct., at 1503 (quoting *White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445, 451-452, 102 S.Ct. 1162, 1166-1167, 71 L.Ed.2d 325 (1982)). [FN8]

> FN8. Even the dissent's scouring the 50 States for support has proved unproductive. It cites statutes from five States, *post,* at 1472, nn. 13- 14. Four of those statutes involve a virtually identical provision, which permits the state-chartered entity that takes over an insolvent insurance company to apply to have any of the insurer's default judgments set aside. See Del.Code Ann., Tit. 18, § 4418 (1989); Fla.Stat. § 631.734 (1984); N.Y.Ins. Law § 7717 (McKinney Supp.1995); 40 Pa.Cons.Stat. § 991.1716 (Supp.1994). It is not at all clear, indeed it seems to us unlikely, that these statutes applied retroactively, to judgments that were final before enactment of the scheme that created the state-chartered entity. The last statute involves a discretionary procedure for allowing appeal by *pro se* litigants, Va.Code Ann. § 8.01-428(C) (Supp.1994). It is obvious that the provision did not apply retroactively, to judgments rendered before the procedures were established.

The dissent's perception that retroactive reopening provisions are to be found all about us is perhaps attributable to its inversion of the statutory presumption regarding retroactivity. Thus, it asserts that Rule 60(b) must be retroactive, since "[n]ot a single word in its text suggests that it does not apply to judgments entered prior to its effective date." ***237** *Post,* at 1471-1472. This reverses the traditional rule, confirmed only last Term, that statutes do *not* apply retroactively *unless* Congress expressly states that ****1462** they do. See *Landgraf, supra,* 511 U.S., at 277-280, 114 S.Ct., at 1502-1504. The dissent adds that "the traditional construction of remedial measures ... support[s] construing [Rule 60(b)] to apply to past as well as future judgments." *Post,* at 1472. But reliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity was rejected in the companion cases of *Landgraf,* see 511 U.S., at 284-286, and n. 37, 114 S.Ct., at 1507-1508, and n. 37 and *Rivers v. Roadway Express,* 511 U.S., at 309-313, 114 S.Ct., at 1517-1520. Cf. *Landgraf, supra,* 511 U.S., at 297, 114 S.Ct., at 1488-1489 (Blackmun, J., dissenting) ("This presumption [against retroactive legislation] need not be applied to remedial legislation...") (citing *Sampeyreac,* 7 Pet., at 238).

The dissent sets forth a number of hypothetical horribles flowing from our assertedly "rigid holding"--for example, the inability to set aside a civil judgment that has become final during a period when a natural disaster prevented the timely filing of a certiorari petition. *Post,* at 1474. That is horrible not because of our holding, but because the underlying statute *itself* enacts a "rigid" jurisdictional bar to entertaining untimely civil petitions. Congress could undoubtedly enact *prospective* legislation permitting, or indeed requiring, this Court to make equitable exceptions to an otherwise applicable rule of finality, just as district courts do pursuant to Rule 60(b). It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law. That is a routine result of constitutional rules. See, *e.g., Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (*Ex Post Facto* Clause precludes post-offense statutory extension of a criminal sentence); *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (Contract Clause prevents retroactive alteration of contract with state bondholders); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589-***238** 590, 601-602, 55 S.Ct. 854, 863-864, 868-869, 79 L.Ed. 1593 (1935) (Takings Clause invalidates a bankruptcy law that abrogates a vested property interest). See also *United States v. Security Industrial Bank,* 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982).

Finally, we may respond to the suggestion of the

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concurrence that this case should be decided more narrowly. The concurrence is willing to acknowledge only that "*sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment," *post,* at 1463. In the present context, what it considers critical is that § 27A(b) is "exclusively retroactive" and "appli[es] to a limited number of individuals." *Ibid.* If Congress had only "provid[ed] some of the assurances against 'singling out' that ordinary legislative activity normally provides--say, prospectivity and general applicability--we might have a different case." *Post,* at 1465.

This seems to us wrong in both fact and law. In point of fact, § 27A(b) does not "single out" any defendant for adverse treatment (or any plaintiff for favorable treatment). Rather, it identifies a class of actions (those filed pre-*Lampf,* timely under applicable state law, but dismissed as time barred post-*Lampf*) which embraces many plaintiffs and defendants, the precise number and identities of whom we even now do not know. The concurrence's contention that the number of covered defendants "is too small *(compared with the number of similar, uncovered firms)* to distinguish meaningfully the law before us from a similar law aimed at a single closed case," *post,* at 1465 (emphasis added), renders the concept of "singling out" meaningless.

More importantly, however, the concurrence's point seems to us wrong in law. To be sure, the class of actions identified by § 27A(b) could have been more expansive (*e.g.,* all actions that were *or could have been* filed pre-*Lampf*) and the provision could have been written to have prospective as well as retroactive effect (*e.g.,* "all post-*Lampf* dismissed actions, plus all future actions under Rule 10b-5, shall be timely if brought within 30 years of the injury"). But it escapes us ***239** how this could in any way cause the statute to be any less an infringement upon the judicial power. The nub of that infringement consists *not* of the Legislature's ****1463** acting in a particularized and hence (according to the concurrence) nonlegislative fashion; [FN9] but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized (*e.g.,* "we hereby set aside *all* hitherto entered judicial orders"), or that it is not accompanied by an "almost" violation of the Bill of Attainder Clause, or an "almost" violation of any other constitutional provision.

> FN9. The premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid--or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also *punishment,* see, *e.g., United States v. Lovett,* 328 U.S. 303, 315- 318, 66 S.Ct. 1073, 1078-1080, 90 L.Ed. 1252 (1946), and a case which says that Congress may legislate "a legitimate class of one," *Nixon v. Administrator of General Services,* 433 U.S. 425, 472, 97 S.Ct. 2777, 2805, 53 L.Ed.2d 867 (1977).

Ultimately, the concurrence agrees with our judgment only "[b]ecause the law before us embodies risks of the very sort that our Constitution's 'separation of powers' prohibition seeks to avoid." *Post,* at 1466. But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. It is interesting that the concurrence quotes twice, and cites without quotation a third time, the opinion of Justice Powell in ***240** *INS v. Chadha,* 462 U.S., at 959, 103 S.Ct. at 2788. But Justice Powell wrote only for himself in that case. He alone expressed dismay that "[t]he Court's decision ... apparently will invalidate every use of the legislative veto," and opined that "[t]he breadth of this holding gives one pause." *Ibid.* It did not give pause to the six-Justice majority, which put an end to the long-simmering interbranch dispute that would otherwise have been indefinitely prolonged. We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to congressional invalidation of executive action. The delphic

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alternative suggested by the concurrence (the setting aside of judgments is all right so long as Congress does not "impermissibly tr[y] to *apply,* as well as *make,* the law," *post,* at 1463-1464) simply prolongs doubt and multiplies confrontation. Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

* * *

We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice BREYER, concurring in the judgment.

I agree with the majority that § 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (1988 ed., Supp. V) (hereinafter § 27A(b)) is unconstitutional. In my view, the separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Article ***241** I to reopen an otherwise closed court judgment. And the statutory provision here at issue, § 27A(b), violates a basic "separation- of-powers" principle--one intended to protect individual liberty. Three features of this law--its exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments--taken together, show that Congress here impermissibly tried to *apply,* as well as *make,* ****1464** the law. Hence, § 27A(b) falls outside the scope of Article I. But, it is far less clear, and unnecessary for the purposes of this case to decide, that separation of powers "is violated" *whenever* an "individual final judgment is legislatively rescinded" or that it is "violated 40 times over when 40 final judgments are legislatively dissolved." See *ante,* at 1457. I therefore write separately.

The majority provides strong historical evidence that Congress lacks the power simply to reopen, and to revise, final judgments in individual cases. See *ante,* at 1453-1454. The Framers would have hesitated to lodge in the Legislature both that kind of power and the power to enact general laws, as part of their effort to avoid the "despotic government" that accompanies the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." The Federalist No. 47, p. 241 (J. Gideon ed. 1831) (J. Madison); *id.,* No. 48, at 249 (quoting T. Jefferson, Notes on the State of Virginia). For one thing, the authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms. See, *e.g.,* 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886) (describing one objective of the "separation of powers" as preventing "the same monarch or senate," having "enact[ed] tyrannical laws" from "execut[ing] them in a tyrannical manner"); W. Gwyn, The Meaning of the Separation of Powers 42-43, 104-106 (1965) (discussing historically relevant sources that explain one purpose of separation of powers as helping to assure an "impartial rule of ***242** law"). For another thing, as Justice Powell has pointed out, the Constitution's "separation-of-powers" principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS v. Chadha,* 462 U.S. 919, 962, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 (1983) (opinion concurring in judgment). The Framers "expressed" this principle, both in "specific provisions, such as the Bill of Attainder Clause," and in the Constitution's "general allocation of power." *Ibid.;* see *United States v. Brown,* 381 U.S. 437, 442, 85 S.Ct. 1707, 1711, 14 L.Ed.2d 484 (1965) (Bill of Attainder Clause intended to implement the separation of powers, acting as "a general safeguard against legislative exercise of the judicial function"); *Fletcher v. Peck,* 6 Cranch 87, 136, 3 L.Ed. 162 (1810) (Marshall, C.J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); cf. *Hurtado v. California,* 110 U.S. 516, 535-536, 4 S.Ct. 111, 120-121, 28 L.Ed. 232 (1884).

Despite these two important "separation-of-powers" concerns, *sometimes* Congress can enact legislation

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that focuses upon a small group, or even a single individual. See, *e.g., Nixon v. Administrator of General Services,* 433 U.S. 425, 468-484, 97 S.Ct. 2777, 2802-2813, 53 L.Ed.2d 867 (1977); *Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 846-856, 104 S.Ct. 3348, 3351-3357, 82 L.Ed.2d 632 (1984); *Brown, supra,* 381 U.S., at 453-456, 85 S.Ct., at 1717-1719. Congress also sometimes passes private legislation. See *Chadha, supra,* 462 U.S., at 966, n. 9, 103 S.Ct., at 2792, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated"). And, *sometimes* Congress can enact legislation that, as a practical matter, radically changes the effect of an individual,previously entered court decree. See *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 15 L.Ed. 435 (1856). Statutes that apply prospectively and (in part because of that prospectivity) to an open-ended class of persons, however, are more than simply ***243** an effort to apply, person by person, a previously enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals. Thus, it seems to me, if Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant "separation-of-powers" concerns, by ****1465** also providing some of the assurances against "singling out" that ordinary legislative activity normally provides--say, prospectivity and general applicability--we might have a different case. Cf. *Brown, supra,* 381 U.S., at 461, 85 S.Ct., at 1721 ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied"). Because such legislation, in light of those mitigating circumstances, might well present a different constitutional question, I do not subscribe to the Court's more absolute statement.

The statute before us, however, has no such mitigating features. It reopens previously closed judgments. It is entirely retroactive, applying only to those Rule 10b-5 actions actually filed, on or before (but on which final judgments were entered after) June 19, 1991. See 15 U.S.C. § 78j(b) and 17 CFR 240.10b-5 (1994). It lacks generality, for it applies only to a few individual instances. See Hearings on H.R. 3185 before the Subcommittee on Telecommunications and Finance of the House of Representatives Committee on Energy and Commerce, 102d Cong., 1st Sess., 3-4 (1991) (listing, by case name, only 15 cases that had been dismissed on the basis of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)). And, it is underinclusive, for it excludes from its coverage others who, relying upon pre-*Lampf* limitations law, may have failed to bring timely securities fraud actions against any other of the Nation's hundreds of thousands of businesses. I concede that its coverage extends beyond a single individual to many potential plaintiffs in these class actions. But because the legislation disfavors not plaintiffs but defendants, I should think ***244** that the latter number is the more relevant. And, that number is too small (compared with the number of similar, uncovered firms) to distinguish meaningfully the law before us from a similar law aimed at a single closed case. Nor does the existence of § 27A(a), which applies to Rule 10b-5 actions pending at the time of the legislation, change this conclusion. That provision seems aimed at too few additional individuals to mitigate the low level of generality of § 27A(b). See Hearings on H.R. 3185, *supra,* at 5-6 (listing 17 cases in which dismissal motions based on *Lampf* were pending).

The upshot is that, viewed in light of the relevant, liberty-protecting objectives of the "separation of powers," this case falls directly within the scope of language in this Court's cases suggesting a restriction on Congress' power to reopen closed court judgments. See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised [or] overturned ... by another Department of Government"); *Wheeling & Belmont Bridge Co., supra,* 18 How., at 431 ("[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress"); *Hayburn's Case,* 2 Dall. 409, 413 (1792) (letter from Justice Iredell and District Judge Sitgreaves to President Washington) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be

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liable to a revision, or even suspension, by the Legislature itself").

At the same time, because the law before us *both* reopens final judgments *and* lacks the liberty-protecting assurances that prospectivity and greater generality would have provided, we need not, and we should not, go further--to make of the reopening itself, an absolute, always determinative distinction, a "prophylactic device," or a foundation for the building of a new "high wal[l]" between the branches. ***245** *Ante,* at 1463. Indeed, the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens. See The Federalist No. 48 (J. Madison). That doctrine does not "divide the branches into watertight compartments," nor "establish and divide fields of black and white." *Springer v. Philippine Islands,* 277 U.S. 189, 209, 211, 48 S.Ct. 480, 484, 485, 72 L.Ed. 845 (1928) (Holmes, J., dissenting); ****1466** see also *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) (referring to the need for "workable government"); *id.,* at 596-597, 72 S.Ct., at 890-891 (Frankfurter, J., concurring); *Mistretta v. United States,* 488 U.S. 361, 381, 109 S.Ct. 647, 659, 102 L.Ed.2d 714 (1989) (the doctrine does not create a "hermetic division among the Branches" but "a carefully crafted system of checked and balanced power within each Branch"). And, important separation-of-powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree. See, *e.g., Crowell v. Benson,* 285 U.S. 22, 48-54, 52 S.Ct. 285, 291-294, 76 L.Ed. 598 (1932); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 551-555, 55 S.Ct. 837, 852-854, 79 L.Ed. 1570 (1935) (Cardozo, J., concurring). As the majority invokes the advice of an American poet, one might consider aswell that poet's caution, for he not only notes that "Something there is that doesn't love a wall," but also writes, "Before I built a wall I'd ask to know/ What I was walling in or walling out." R. Frost, Mending Wall, The New Oxford Book of American Verse 395-396 (R. Ellmann ed. 1976).

Finally, I note that the cases the dissent cites are distinguishable from the one before us. *Sampeyreac v. United States,* 7 Pet. 222, 8 L.Ed. 665 (1833), considered a law similar to § 27A(b) (it reopened a set of closed judgments in fraud cases), but the Court did not reach the here relevant issue. Rather, the Court rested its conclusion upon the fact that Sampeyreac was not "a real person," while conceding that, were he real, the case "might present a different question." *Id.,* 7 Pet., at 238-239. *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), which involved ***246** an Article I court, upheld a law that applied to all cases pending on appeal (in the Supreme Court) from the territory of Nevada, irrespective of the causes of action at issue or which party was seeking review. See *id.,* 2 Wall., at 162. That law had generality, a characteristic that helps to avoid the problem of legislatively singling out a few individuals for adverse treatment. See *Chadha,* 462 U.S., at 966, 103 S.Ct., at 2791 (Powell, J., concurring in judgment). Neither did *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), involve legislation that adversely treated a few individuals. Rather, it permitted the reopening of a case against the United States. See *id.,* at 391, 100 S.Ct., at 2728.

Because the law before us embodies risks of the very sort that our Constitution's "separation-of-powers" prohibition seeks to avoid, and because I can find no offsetting legislative safeguards that normally offer assurances that minimize those risks, I agree with the Court's conclusion and I join its judgment.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

On December 19, 1991, Congress enacted § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (1988 ed., Supp. V) (hereinafter 1991 amendment), to remedy a flaw in the limitations rule this Court announced on June 20, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In *Lampf* the Court replaced the array of state statutes of limitations that had governed shareholder actions under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 CFR 240.10b-5 (1994) (hereinafter 10b-5 actions), with a uniform federal limitations rule. Congress found only one flaw in the Court's new rule: its failure to exempt pending cases from its operation. Accordingly, without altering the

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prospective effect of the *Lampf* rule, the 1991 amendment remedied its flaw by providing that pre-*Lampf* law should determine the limitations period applicable to all cases that had ***247** been pending on June 20, 1991--both those that remained pending on December 19, 1991, when § 27A was enacted, and those that courts dismissed between June 20 and December 19, 1991. Today the Court holds that the 1991 amendment violates the Constitution's separation of powers because, by encompassing the dismissed claims, it requires courts to reopen final judgments in private civil actions.

Section 27A is a statutory amendment to a rule of law announced by this Court. The ****1467** fact that the new rule announced in *Lampf* was a product of judicial, rather than congressional, lawmaking should not affect the separation-of-powers analysis. We would have the same issue to decide had Congress enacted the *Lampf* rule but, as a result of inadvertence or perhaps a scrivener's error, failed to exempt pending cases, as is customary when limitations periods are shortened. [FN1] In my opinion, if Congress had retroactively restored rights its own legislation had inadvertently or unfairly impaired, the remedial amendment's failure to exclude dismissed cases from the benefited class would not make it invalid. The Court today faces a materially identical situation and, in my view, reaches the wrong result.

> FN1. Our decisions prior to *Lampf* consistently held that retroactive application of new, shortened limitations periods would violate "fundamental notions of justified reliance and due process." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 371, 111 S.Ct. 2773, 2786, 115 L.Ed.2d 321 (1991) (O'CONNOR, J., dissenting); see, *e.g., Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) ; *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987).

Throughout our history, Congress has passed laws that allow courts to reopen final judgments. Such laws characteristically apply to judgments entered before as well as after their enactment. When they apply retroactively, they may raise serious due process questions, [FN2] but the Court ***248** has never invalidated such a law on separation-of-powers grounds until today. Indeed, only last Term we recognized Congress' ample power to enact a law that "in effect 'restored' rights that [a party] reasonably and in good faith thought he possessed before the surprising announcement" of a Supreme Court decision. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 310, 114 S.Ct. 1510, 1518, 128 L.Ed.2d 274 (1994) (discussing *Frisbie v. Whitney,* 9 Wall. 187, 19 L.Ed. 668 (1870)). We conditioned our unambiguous restatement of the proposition that "Congress had the *power* to enact legislation that had the practical effect of restoring the statusquo retroactively," 511 U.S., at 310, 114 S.Ct., at 1518, only on Congress' clear expression of its intent to do so.

> FN2. Because the Court finds a separation-of-powers violation, it does not reach respondents' alternative theory that § 27A(b) denied them due process under the Fifth Amendment, a theory the Court of Appeals did not identify as an alternative ground for its holding. In my judgment, the statute easily survives a due process challenge. Section 27A(b) is rationally related to a legitimate public purpose. Cf., *e.g., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 636-641, 113 S.Ct. 2264, 2286-2289, 124 L.Ed.2d 539 (1993). Given the existence of statutes and rules, such as Rule 60(b), that allow courts to reopen apparently "final" judgments in various circumstances, see *infra,* at 1471-1472, respondents cannot assert an inviolable "vested right" in the District Court's post-*Lampf* dismissal of petitioners' claims. In addition, § 27A(b) did not upset any "settled expectations" of respondents. Cf. *Landgraf v. USI Film Products,* 511 U.S. 244, 266, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229. (1994). In *Landgraf,* we concluded that Congress did not intend § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1988 ed., Supp. V), to apply retroactively because retroactive application would have placed a new legal burden on past conduct. 511 U.S., at 280-286, 114 S.Ct., at 1505- 1508. Before 1991 no one could have relied either on the yet-to-be- announced rule in *Lampf* or on the Court's unpredictable decision to apply that rule retroactively. All of the reliance interests that ordinarily support a presumption against retroactivity militate in favor of allowing retroactive application of § 27A.

A large class of investors reasonably and in good faith thought they possessed rights of action before the surprising announcement of the *Lampf* rule on June 20, 1991. When it enacted the 1991 amendment, Congress clearly expressed its intent to restore the rights *Lampf* had denied the aggrieved

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class. Section 27A comported fully with *Rivers* and with other precedents in which we consistently have recognized Congress' power to enact remedial statutes that set aside classes of final judgments. The only remarkable feature of ***249** this enactment is the fact that it remedied a defect in a new judge-made rule rather than in a statute.

The familiar history the Court invokes, involving colonial legislatures' ad hoc decisions of individual cases, " 'unfettered by rules,' " *ante,* at 1454 (quoting Vermont State Papers 1779-1786, p. 540 (Slade ed. 1823)), provides no support for its holding. On the contrary, history and precedent demonstrate that Congress may enact laws that establish ****1468** both substantive rules and procedures for reopening final judgments. When it enacted the 1991 amendment to the *Lampf* rule, Congress did not encroach on the judicial power. It decided neither the merits of any 10b-5 claim nor even whether any such claim should proceed to decision on the merits. It did provide that the rule governing the timeliness of 10b-5 actions pending on June 19, 1991, should be the pre-*Lampf* statute of limitations, and it also established a procedure for Article III courts to apply in determining whether any dismissed case should be reinstated. Congress' decision to extend that rule and procedure to 10b-5 actions dismissed during the brief period between this Court's law- changing decision in *Lampf* and Congress' remedial action is not a sufficient reason to hold the statute unconstitutional.

I

Respondents conducted a public offering of common stock in 1983. Petitioners, suing on behalf of themselves and other purchasers of the stock, filed a 10b-5 action in 1987 in the United States District Court for the Eastern District of Kentucky, alleging violations of substantive federal rules that had been in place since 1934. Respondents moved to dismiss the complaint as untimely because petitioners had filed it more than three years after the events in dispute. At that time, settled law in Kentucky and elsewhere in the United States directed federal courts to determine statutes of limitations applicable to 10b-5 actions by reference to ***250** state law. [FN3] The relevant Kentucky statute provided a 3-year limitations period, [FN4] which petitioners contended ran from the time the alleged fraud was or should have been discovered. A Magistrate agreed with petitioners and recommended denial of respondents' motion to dismiss, but by 1991 the District Court had not yet ruled on that issue. The factual question whether petitioners should have discovered respondents' alleged 10b-5 violations more than three years before they filed suit remained open for decision by an Article III judge on June 20, 1991.

FN3. "Federal judges have 'borrowed' state statutes of limitations because they were directed to do so by the Congress of the United States under the Rules of Decision Act, 28 U.S.C. § 1652." *Lampf,* 501 U.S., at 367, n. 2, 111 S.Ct., at 2784, n. 2 (STEVENS, J., dissenting) (citations omitted); see, *e.g., Stull v. Bayard,* 561 F.2d 429, 431-432 (CA2 1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 783 (1978); *Roberts v. Magnetic Metals Co.,* 611 F.2d 450, 456 (CA3 1979); *Robuck v. Dean Witter & Co.,* 649 F.2d 641, 644 (CA9 1980) (borrowing state statutes of limitations for 10b-5 actions).

FN4. See Ky.Rev.Stat.Ann. § 292.480(3) (Michie 1988).

On that day, this Court's decision in *Lampf* changed the law. The Court concluded that every 10b-5 action is time barred unless brought within three years of the alleged violation and one year of its discovery. Moreover, it applied that novel rule to pending cases. As Justice O'CONNOR pointed out in her dissent, the Court held the plaintiffs' suit "time barred under a limitations period that did not exist before," a holding that "depart[ed] drastically from our established practice and inflict[ed] an injustice on the [plaintiffs]." *Lampf,* 501 U.S., at 369, 111 S.Ct., at 2785. [FN5] The inequitable consequences of *Lampf* reached beyond the parties to that case, ***251** injuring a large class of litigants that includes petitioners. Without resolving the factual issue that would have determined the timeliness of petitioners' complaint before *Lampf,* the District Court dismissed the instant action as untimely under the new limitations period dictated by this Court. Because *Lampf* had deprived them of any non-frivolous basis for an appeal, petitioners acquiesced in the dismissal, which therefore became final on September 12, 1991.

FN5. The *Lampf* opinion drew two other dissents. Justice KENNEDY, joined by Justice O'CONNOR, would have adopted a different substantive limitations rule. See 501 U.S., at 374,

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111 S.Ct., at 2788. Justice SOUTER and I would have adhered to "four decades of ... settled law" and maintained the existing regime until Congress enacted a new federal statute of limitations. *Id.*, at 366-367, 111 S.Ct., at 2784 (STEVENS, J., dissenting). No one dissented from the proposition that a uniform federal limitations period would be wise policy.

****1469** Congress responded to *Lampf* by passing § 27A, which became effective on December 19, 1991. The statute changed the substantive limitations law, restoring the pre-*Lampf* limitations rule for two categories of 10b-5 actions that had been pending on June 19, 1991. Subsection (a) of § 27A applies to cases that were still pending on December 19, 1991. The Courts of Appeals have uniformly upheld the constitutionality of that subsection, [FN6] and its validity is not challenged in this case. Subsection (b) applies to actions, like the instant case, that (1) were dismissed after June 19, 1991, and (2) would have been timely under the pre- *Lampf* regime. This subsection authorized the district courts to reinstate dismissed cases if the plaintiff so moved within 60 days after the effective date of § 27A. The amendment was not self-executing: Unless the plaintiff both filed a timely motion for reinstatement and then satisfied the court that the complaint had been timely filed under applicable pre-*Lampf* law, the dismissal would remain in effect.

FN6. See *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (CA1), cert. pending, No. 93-564; *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (CA2 1993); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (CA4 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (CA7 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (CA9 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (CA10 1992), cert. denied *sub nom. Dennler v. Trippet*, 507 U.S. 1029, 113 S.Ct. 1841, 123 L.Ed.2d 467 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (CA11 1992), cert. denied, 510 U.S. 828, 114 S.Ct. 95, 126 L.Ed.2d 62 (1993).

In this case petitioners made the required showing, but the District Court refused to reinstate their case. Instead, ***252** it held § 27A(b) unconstitutional. 789 F.Supp. 231 (ED Ky.1992). The Court of Appeals for the Sixth Circuit, contrary to an earlier decision of the Fifth Circuit, affirmed. 1 F.3d 1487 (1993).

II

Aside from § 27A(b), the Court claims to "know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." *Ante,* at 1458. In fact, Congress has done so on several occasions. Section 27A(b) is part of a remedial statute. As early as 1833, we recognized that a remedial statute authorizing the reopening of a final judgment after the time for appeal has expired is "entirely unexceptionable" even though it operates retroactively. "It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed." *Sampeyreac v. United States,* 7 Pet. 222, 239, 8 L.Ed. 665 (1833). We have upheld remedial statutes that carried no greater cause for separation-of-powers concerns than does § 27A(b); others have provoked no challenges. In contrast, the colonial directives on which the majority relies were nothing like remedial statutes.

The remedial 1830 law we construed in *Sampeyreac* strongly resembled § 27A(b): It authorized a class of litigants to reopen claims, brought under an 1824 statute, that courts had already finally adjudicated. The 1824 statute authorized proceedings to establish title to certain lands in the State of Missouri and the territory of Arkansas. It provided for an appeal to this Court within one year after the entry of the judgment or decree, "and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive." 7 Pet., at 238. In 1827 the Arkansas Territorial Court entered a decree in favor of one Sampeyreac, over the objection of the United States that the nominal plaintiff was a fictitious person. Because no appeal ***253** was taken from that decree, it became final in 1828. In 1830 Congress passed a special statute authorizing the Arkansas court to reopen any decree entered under the 1824 statute if, prior to July 1, 1831, the United States filed a bill of review alleging that the decree had been based on forged evidence of title. The United States filed such a bill and obtained a reversal of the 1827 decree from the Arkansas court.

The successors in interest of the fictitious Mr.

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Sampeyreac argued in this Court that **1470 the Arkansas court should not have entertained the Government's bill of review because the 1830 statute "was the exercise of a judicial power, and it is no answer to this objection, that the execution of its provisions is given to a court. The legislature of the union cannot use such a power." *Id.*, at 229. We categorically rejected that argument: "The law of 1830 is in no respect the exercise of judicial powers." *Id.*, at 239. Of course, as the majority notes, *ante,* at 1459, the particular decree at stake in *Sampeyreac* had issued not from an Article III court but from a territorial court. However, our opinion contains no suggestion that Congress' power to authorize the reopening of judgments entered by the Arkansas court was any broader than its power to authorize the reopening of judgments entered under the same statute by the United States District Court in Missouri. Moreover, the relevant judicial power that the 1830 statute arguably supplanted was this Court's Article III appellate jurisdiction-- which, prior to the 1830 enactment, provided the only avenue for review of the trial courts' judgments.

Similarly, in *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), the Court rejected a challenge to an Act of Congress that removed an accidental impediment to the exercise of our appellate jurisdiction. When Congress admitted Nevada into the Union as a State in March 1864, ch. 36, 13 Stat. 30, it neglected to provide for the disposition of pending appeals from final judgments previously entered by the Supreme Court of *254 the Nevada Territory. Accordingly, the *Freeborn* defendants in error moved to dismiss a writ of error to the territorial court on the ground that we had no power to decide the case. At the suggestion of plaintiffs in error, the Court deferred ruling on the motion until after February 27, 1865, when Congress passed a special statute that authorized the Court to decide this and similar cases. [FN7] Defendants in error renewed their motion, arguing that Congress could not reopen judgments that were already final and unreviewable because Congress was not competent to exercise judicial power.

> FN7. The Act provided, in part:
> "That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States, upon any record from the supreme court of the Territory of Nevada, may be heard and determined by the supreme court of the United States, and the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the district court of the United States for the district of Nevada, or to the supreme court of the State of Nevada, as the nature of said appeal or writ of error may require, and each of these courts shall be the successor of the supreme court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon.... *Provided,* That said appeals shall be prosecuted and said writs of errors sued out at any time before the first day of July, eighteen hundred and sixty-six." Ch. 64, § 8, 13 Stat. 441.

Defendants in error argued that, "[i]f it be possible for a right to attach itself to a judgment, it has done so here, and there could not be a plainer case of an attempt to destroy it by legislative action." 2 Wall., at 165. The Court, however, noted that the omission in the 1864 statute had left the case "in a very anomalous situation," *id.*, at 174, and that passage of the later statute "was absolutely necessary to remove an impediment in the way of any legal proceeding in the case." *Id.*, at 175. It concluded that such "acts are of a remedial character, and are peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Ibid.* As in *Sampeyreac,* although *Freeborn* involved *255 the review of a judgment entered by a territorial court, the "judicial power" to which the opinion referred was this Court's Article III appellate jurisdiction. If Congress may enact a law authorizing this Court to reopen decisions that we previously lacked power to review, Congress must have the power to let district courts reopen their own judgments.

Also apposite is *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), which involved the Sioux Nation's longstanding claim that the Government had in 1877 improperly abrogated the treaty by which the Sioux had held title to the Black Hills. The Sioux first brought their claim under a special 1920 jurisdictional statute. The Court of Claims dismissed the suit in 1942, holding that the 1920 Act did not **1471 give the court jurisdiction to consider the adequacy of the compensation the Government had paid in 1877. Congress passed a new jurisdictional statute in 1946, and in 1950 the Sioux brought a new action. In 1975 the Court of Claims, although acknowledging the merit of the Sioux's claim, held that the res judicata effect of the 1942 dismissal barred the suit.

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In response, Congress passed a statute in 1978 that authorized the Court of Claims to take new evidence and instructed it to considerthe Sioux's claims on the merits, disregarding res judicata. The Sioux finally prevailed. We held that the 1978 Act did not violate the separation of powers. 448 U.S., at 407, 100 S.Ct., at 2736.

The Court correctly notes, see *ante,* at 1459, and n. 5, that our opinion in *Sioux Nation* prominently discussed precedents establishing Congress' power to waive the res judicata effect of judgments against the United States. We never suggested, however, that those precedents sufficed to overcome the separation-of-powers objections raised against the 1978 Act. Instead, we made extensive comments about the propriety of Congress' action that were as necessary to our holding then as they are salient to the Court's analysis today. In passing the 1978 Act, we held, Congress

***256** "only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. "Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits." 448 U.S., at 407, 100 S.Ct., at 2737.

Congress observed the same boundaries in enacting § 27A(b).

Our opinions in *Sampeyreac, Freeborn,* and *Sioux Nation* correctly characterize statutes that specify new grounds for the reopening of final judgments as remedial. Moreover, these precedents correctly identify the unremarkable nature of the legislative power to enact remedial statutes. "[A]cts ... of a remedial character ... are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Freeborn,* 2 Wall., at 175. A few contemporary examples of such statutes will suffice to demonstrate that they are ordinary products of the exercise of legislative power.

The most familiar remedial measure that provides for reopening of final judgments is Rule 60(b) of the Federal Rules of Civil Procedure. That Rule both codified common-law grounds for relieving a party from a final judgment and added an encompassing reference to "any other reason justifying relief from the operation of the judgment." [FN8] ****1472** Not a ***257** single word in its text suggests that it does not apply to judgments entered prior to its effective date. On the contrary, the purpose of the Rule, its plain language, and the traditional construction of remedial measures all support construing it to apply to past as well as future judgments. Indeed, because the Rule explicitly abolished the common-law writs it replaced, an unintended gap in the law would have resulted if it did not apply retroactively. [FN9]

FN8. The full text of Rule60(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

This Court adopted the Federal Rules of Civil Procedure and submitted them to Congress as the Rules Enabling Act required. They became effective after Congress adjourned without altering

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them. See generally 308 U.S. 647 (letter of transmittal to Congress, Jan. 3, 1938).

FN9. In its criticism of this analysis of Rule 60(b), the majority overstates our holdings on retroactivity in *Landgraf,* 511 U.S., at 280, 114 S.Ct., at 1505, and *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Our opinion in *Landgraf* nowhere says "that statutes do *not* apply retroactively *unless* Congress expressly states that they do." *Ante,* at 1461-1462. To the contrary, it says that, "[w]hen ... the statute contains no such express command, the court must determine whether the new statute would have retroactive effect," an inquiry that requires "clear congressional *intent* favoring such a result." *Landgraf,* 511 U.S., at 280, 114 S.Ct., at 1505 (emphasis added); see also *id.,* at 273-275, 114 S.Ct., at 1501-1502; *Rivers,* 511 U.S., at 304-309, 114 S.Ct. at 1515-1517. In the case of Rule 60(b), the factors I have identified, taken together, support a finding ofclear congressional intent. Moreover, neither *Landgraf* nor *Rivers* "rejected" consideration of a statute's remedial purpose in analyzing Congress' intent to apply the statute retroactively. Compare *ante,* at 1462, with *Landgraf,* 511 U.S., at 281-286 and n. 37, 114 S.Ct., at 1505- 1508, and n. 37, and *Rivers,* 511 U.S., at 304-311, 114 S.Ct., at 1515- 1518.

***258** Other examples of remedial statutes that resemble § 27A include the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.App. § 520(4), which authorizes members of the Armed Forces to reopen judgments entered while they were on active duty; the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for recovery of attorney's fees under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1411 *et seq.* (1988 ed. and Supp. V); [FN10] and the federal habeas corpus statute, 28 U.S.C. § 2255, which authorizes federal courts to reopen judgments of conviction. The habeas statute, similarly to Rule 60(b), replaced a common-law writ, see App. to H.R.Rep. No. 308, 80th Cong., 2d Sess., A180 (1947), and thus necessarily applied retroactively. [FN11] State statutes that authorize the reopening of various types of default judgments [FN12] and judgments that became final before a party received ***259** notice of their entry, [FN13] as well as provisions for motions to reopen based on newly discovered evidence, [FN14] further demonstrate the widespread acceptance of remedial statutes that allow courts to set aside final judgments. As in the case of Rule 60(b), logic dictates that these statutes be construed to apply retroactively to judgments that were final at the time of their enactments. All of these remedial statutes announced generally applicable rules of law ****1473** as well as establishing procedures for reopening final judgments. [FN15]

FN10. When it enacted the Handicapped Children's Protection Act, Congress overruled our contrary decision in *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), by applying the Act retroactively to any action either pending on or brought after July 4, 1984, the day before we announced *Smith.* See 100 Stat. 798. Accordingly, a court has applied the Act retroactively to a case in which the parties had entered into a consent decree prior to its enactment. See *Counsel v. Dow,* 849 F.2d 731, 738-739 (CA2 1988).The Court's attempts to explain away the retroactivity provision, *ante,* at 1461-1462, simply do not comport with the plain language of the Act.

FN11. The Government also calls our attention to 28 U.S.C. § 1655, a statute that requires courts to reopen final *in rem* judgments upon entries of appearance by defendants who were not personally served. See Brief for United States 24-25, and n. 17. While that statute had only prospective effect, the Court offers no reason why Congress could not pass a similar statute that would apply retroactively to judgments entered under pre-existing procedures.

FN12. See, *e.g.,* Del.Code Ann., Tit. 18, § 4418 (1989); Fla.Stat. § 631.734 (1984); N.Y.Ins. Law § 7717 (McKinney Supp.1995); 40 Pa.Cons.Stat. § 991.1716 (Supp.1994).

FN13. For example, a Virginia statute provides that, when a *pro se* litigant fails to receive notice of the trial court's entry of an order, even after the time to appeal has expired, the trial judge may within 60 days vacate the order and grant the party leave to appeal. Va.Code Ann. § 8.01-428(C) (Supp.1994).

FN14. See *Herrera v. Collins,* 506 U.S. 390, 410-411, and nn. 8-11, 113 S.Ct. 853, 865-866, and nn. 8-11, 122 L.Ed.2d 203 (1993) (citing state statutes).

FN15. The Court offers no explanation of why the

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> Constitution should be construed to interpose an absolute bar against these statutes' retroactive application. Under the Court's reasoning, for example, an amendment that broadened the coverage of Rule 60(b) could not apply to any inequitable judgments entered prior to the amendment. The Court's rationale for this formalistic restriction remains elusive.

In contrast, in the examples of colonial legislatures' review of trial courts' judgments on which today's holding rests, the legislatures issued directives in individual cases without purporting either to set forth or to apply any legal standard. Cf. *ante,* at 1453-1456; see, *e.g., INS v. Chadha,* 462 U.S. 919, 961-962, 103 S.Ct. 2764, 2789-2790, 77 L.Ed.2d 317 (1983) (Powell, J., concurring in judgment). The principal compendium on which the Court relies, *ante,* at 1453, accurately describes these legislative directives:

> "In these records, which are of the first quarter of the 18th century, the provincial legislature will often be found acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trials, and other relief from judgments, on equitable ***260** grounds." Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv.L.Rev. 208, n. 1 (1902).

The Framers' disapproval of such a system of ad hoc legislative review of individual trial court judgments has no bearing on remedial measures such as Rule 60(b) or the 1991 amendment at issue today. The history on which the Court relies provides no support for its holding.

III

The lack of precedent for the Court's holding is not, of course, a sufficient reason to reject it. Correct application of separation-of-powers principles, however, confirms that the Court has reached the wrong result. As our most recent major pronouncement on the separation of powers noted, "we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' " *Morrison v. Olson,* 487 U.S. 654, 693-694, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) (quoting *United States v. Nixon,* 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974)). Rather, our jurisprudence reflects "Madison's flexible approach to separation of powers." *Mistretta v. United States,* 488 U.S. 361, 380, 109 S.Ct. 647, 659, 102 L.Ed.2d 714 (1989). In accepting Madison's conception rather than any "hermetic division among the Branches," *id.,* at 381, 109 S.Ct., at 660, "we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment," *id.,* at 382, 109 S.Ct., at 660. Today's holding does not comport with these ideals.

Section 27A shares several important characteristics with the remedial statutes discussed above. It does not decide the merits of any issue in any litigation but merely removes an impediment to judicial decision on the merits. The impediment it removes would have produced inequity because the statute's beneficiaries did not cause the impediment. It requires a party invoking its benefits to file a motion within a specified time and to convince a court that the statute entitles the party to relief. Most important, § 27A(b) specifies ***261** both a substantive rule to govern the reopening of a class of judgments--the pre-*Lampf* limitations rule--and a procedure for the courts to apply in determining whether a particular motion to reopen should be granted. These characteristics are quintessentially legislative. They reflect Congress' fealty to the separation of powers and its intention to avoid the sort of ad hoc excesses the Court rightly criticizes in colonial legislative practice. In my judgment, all of these elements distinguish § 27A from "judicial" action and confirm its constitutionality. A sensible analysis would at least consider them in the balance.

Instead, the Court myopically disposes of § 27A(b) by holding that Congress has no power to "requir[e] an Article III court to set aside a final judgment." *Ante,* at 1463. That holding must mean one of two things. ****1474** It could mean that Congress may not impose a mandatory duty on a court to set aside a judgment even if the court makes a particular finding, such as a finding of fraud or mistake, that Congress has not made. Such a rule, however, could not be correct. Although Rule 60(b), for example, merely authorizes federal courts to set aside judgments after making appropriate findings, Acts of Congress characteristically set standards that judges are obligated to enforce. Accordingly, Congress surely could add to Rule 60(b) certain instances in which courts *must* grant relief from final judgments

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if they make particular findings--for example, a finding that a member of the jury accepted a bribe from the prevailing party. The Court, therefore, must mean to hold that Congress may not *unconditionally* require an Article III court to set aside a final judgment. That rule is both unwise and beside the point of this case.

A simple hypothetical example will illustrate the practical failings of the Court's new rule. Suppose Congress, instead of endorsing the new limitations rule fashioned by the Court in *Lampf,* had decided to return to the pre- *Lampf* regime (or perhaps to enact a longer uniform statute). Subsection ***262** a) of § 27A would simply have provided that the law in effect prior to June 19, 1991, would govern the timeliness of all 10b-5 actions. In that event, subsection (b) would still have been necessary to remedy the injustice caused by this Court's failure to exempt pending cases from its new rule. In my judgment, the statutory correction of the inequitable flaw in *Lampf* would be appropriate remedial legislation whether or not Congress had endorsed that decision's substantive limitations rule. The Court, unfortunately, appears equally consistent: Even though the class of dismissed 10b-5 plaintiffs in my hypothetical would have been subject to the same substantive rule as all other 10b-5 plaintiffs, the Court's reasoning would still reject subsection (b) as an impermissible exercise of "judicial" power.

The majority's rigid holding unnecessarily hinders the Government from addressing difficult issues that inevitably arise in a complex society. This Court, for example, lacks power to enlarge the time for filing petitions for certiorari in a civil case after 90 days from the entry of final judgment, no matter how strong the equities. See 28 U.S.C. § 2101(c). If an Act of God, such as a flood or an earthquake, sufficiently disrupted communications in a particular area to preclude filing for several days, the majority's reasoning would appear to bar Congress from addressing the resulting inequity. If Congress passed remedial legislation that retroactively granted movants from the disaster area extra time to file petitions or motions for extensions of time to file, today's holding presumably would compel us to strike down the legislation as an attack on the finality of judgments. Such a ruling, like today's holding, would gravely undermine federal courts' traditional power "to set aside a judgment whose enforcement would work inequity." *Ante,* at 1460. [FN16]

FN16. The Court also appears to bar retroactive application of changes in the criminal law. Its reasoning suggests that, for example, should Congress one day choose to abolish the federal death penalty, the new statute could not constitutionally save a death row inmate from execution if his conviction had become final before the statute was passed.

***263** Even if the rule the Court announces today were sound, it would not control the case before us. In order to obtain the benefit of § 27A, petitioners had to file a timely motion and persuade the District Court they had timely filed their complaint under pre-*Lampf* law. In the judgment of the District Court, petitioners satisfied those conditions. Congress reasonably could have assumed, indeed must have expected, that some movants under § 27A(b) would fail to do so. The presence of an important condition that the District Court must find a movant to have satisfied before it may reopen a judgment distinguishes § 27A from the unconditional congressional directives the Court appears to forbid.

Moreover, unlike the colonial legislative commands on which the Court bases its holding, § 27A directed action not in "a civil case," *ante,* at 1455 (discussing *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798)), but in a ****1475** large category of civil cases. [FN17] The Court declares that a legislative direction to reopen a class of 40 cases is 40 times as bad as a direction to reopen a single final judgment because "*power* is the object of the separation-of-powers prohibition." See *ante,* at 1457. This self-evident observation might be salient if § 27A(b) unconditionally commanded courts to reopen judgments even absent findings that the complaints were timely under pre-*Lampf* law. But Congress did not decide--and could not know how any court would decide--the timeliness issue in any particular ***264** case in the affected category. Congress, therefore, had no way to identify which particular plaintiffs would benefit from § 27A. It merely enacted a law that applied a substantive rule to a class of litigants, specified a procedure for invoking the rule, and left particular outcomes to individualized judicial determinations--a classic exercise of legislative power.

FN17. At the time Congress was considering the

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bill that became § 27A, a House Subcommittee reported that *Lampf* had resulted in the dismissal of 15 cases, involving thousands of plaintiffs in every State (of whom over 32,000 had been identified) and claims totaling over $692.25 million. In addition, motions to dismiss based on *Lampf* were then pending in 17 cases involving thousands of plaintiffs in every State and claims totaling over $4.578 billion. Hearing on H.R. 3185, before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 1-4 (1991).

"All we seek," affirmed a sponsor of § 27A, "is to give the victims [of securities fraud] a fair day in court." [FN18] A statute, such as § 27A, that removes an unanticipated and unjust impediment to adjudication of a large class of claims on their merits poses no danger of "aggrandizement or encroachment." *Mistretta,* 488 U.S., at 382, 109 S.Ct. at 660. [FN19] This is particularly true for § 27A in light of Congress' historic primacy over statutes of limitations. [FN20] The statute contains several checks against the danger of congressional overreaching. The Court in *Lampf* undertook a legislative function. Essentially, it supplied a statute of limitations for 10b-5 actions. ***265** The Court, however, failed to adopt the transition rules that ordinarily attend alterations shortening the time to sue. Congress, in § 27A, has supplied those rules. The statute reflects the ability of two coequal branches to cooperate in providing for the impartial application of legal rules to particular disputes. The Court's mistrust of such cooperation ill serves the separation of powers. [FN21]

FN18. 137 Cong.Rec. S18624 (Nov. 27, 1991) (statement of Sen. Bryan).

FN19. Today's decision creates a new irony of judicial legislation. A challenge to the constitutionality of § 27A(a) could not turn on the sanctity of final judgments. Section 27A(a) benefits litigants who had filed appeals that *Lampf* rendered frivolous; petitioners and other law-abiding litigants whose claims *Lampf* rendered untimely had acquiesced in the dismissal of their actions. By striking down § 27A(b) on a ground that would leave § 27A(a) intact, the Court indulges litigants who protracted proceedings but shuts the courthouse door to litigants who proceeded with diligence and respect for the *Lampf* judgment.

FN20. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.... [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) (Jackson, J.) (footnote and citation omitted).

FN21. Although I agree with Justice BREYER's general approach to the separation-of-powers issue, I believe he gives insufficient weight to two important features of § 27A. First, he fails to recognize that the statute restored a pre-existing rule of law in order to remedy the manifest injustice produced by the Court's retroactive application of *Lampf.* The only " 'substantial deprivation' " Congress imposed on defendants was that properly filed lawsuits proceed to decisions on the merits. Cf. *ante,* at 1464 (BREYER, J., concurring in judgment) (quoting *INS v. Chadha,* 462 U.S. 919, 962, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 (1983) (Powell, J., concurring in judgment)). Second, he understates the class of defendants burdened by § 27A: He finds the statute underinclusive because it provided no remedy for potential plaintiffs who may have failed to file timely actions in reliance on pre-*Lampf* limitations law, but he denies the importance of § 27A(a), which provided a remedy for plaintiffs who appealed dismissals after *Lampf.* See *ante,* at 1464-1465 (BREYER, J., concurring in judgment). The coverage of § 27A is coextensive with the retroactive application of the general rule announced in *Lampf.* If Congress had enacted a statute providing that the *Lampf* rule should apply to all cases filed after the statute's effective date and that the pre-*Lampf* rule should apply to all cases filed before that date, Justice BREYER could not reasonably condemn the statute as special legislation. The only difference between such a statute and § 27A is that § 27A covered all cases pending on the date of *Lampf*--June 20, 1991--rather than on the effective date of the statute--December 19, 1991. In my opinion, § 27A has sufficient generality to avoid the characteristics of a bill of attainder.

****1476** IV

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The Court has drawn the wrong lesson from the Framers' disapproval of colonial legislatures' appellate review of judicial decisions. The Framers rejected that practice, not out of a mechanistic solicitude for "final judgments," but because they believed the impartial application of rules of law, rather ***266** than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment. Cf. *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872); *Hayburn's Case,* 2 Dall. 409 (1792). Section 27A(b) neither commands the reinstatement of any particular case nor directs any result on the merits. Congress recently granted a special benefit to a single litigant in a pending civil rights case, but the Court saw no need even to grant certiorari to review that disturbing legislative favor. [FN22] In an ironic counterpoint, the Court today places a higher priority on protecting the Republic from the restoration to a large class of litigants of the opportunity to have Article III courts resolve the merits of their claims.

> FN22. See *Atonio v. Wards Cove Packing Co.,* 513 U.S. 809, 115 S.Ct. 57, 130 L.Ed.2d 16 (1994); see also *Landgraf,* 511 U.S., at 258, 114 S.Ct., at 1493 ("The parties agree that § 402(b) [of the Civil Rights Act of 1991] was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company").

"We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson,* 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1931) (Holmes, J.). The three branches must cooperate in order to govern. We should regard favorably, rather than with suspicious hostility, legislation that enables the judiciary to overcome impediments to the performance of its mission of administering justice impartially, even when, as here, this Court has created the impediment. [FN23] Rigid rules often make good law, but judgments in areas such as the review of potential conflicts among the three coequal branches of the ***267** Federal Government partake of art as well as science. That is why we have so often reiterated the insight of Justice Jackson:

> FN23. Of course, neither the majority nor I would alter its analysis had Congress, rather than the Court, enacted the *Lampf* rule without any exemption for pending cases, then later tried to remedy such unfairness by enacting § 27A. Thus, the Court's attribution of § 27A to "the legislature's genuine conviction (supported by all the law professors in the land) that *[Lampf]* was wrong," *ante,* at 1457, is quite beside the point.

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (concurring opinion).

We have the authority to hold that Congress has usurped a judicial prerogative, but even if this case were doubtful I would heed Justice Iredell's admonition in *Calder v. Bull,* 3 Dall., at 399, that "the Court will never resort to that authority, but in a clear and urgent case." An appropriate regard for the interdependence of Congress and the judiciary amply supports the conclusion that § 27A(b) reflects constructive legislative cooperation ****1477** rather than a usurpation of judicial prerogatives.

Accordingly, I respectfully dissent.

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Supreme Court of the United States

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Petitioner
v.
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA.

No. 91-904.

Argued Dec. 1, 1992.
Decided June 14, 1993.

Employer filed action to set aside or modify arbitrator's decision as to employer's withdrawal liability to multiemployer pension plan under the Multiemployer Pension Plan Amendments Act (MPPAA). The United States District Court for the Central District of California granted plan's motion to confirm award, and employer appealed. The Court of Appeals for the Ninth Circuit, 936 F.2d 576, affirmed. The Supreme Court of the United States granted certiorari. The Supreme Court, Justice Souter, held that: (1) presumptions in the MPPAA favoring multiemployer plans did not violate due process rights of the employer by denying access to an impartial decision maker, and (2) MPPAA provisions did not violate the employer's Fifth Amendment rights as applied to employer's withdrawal liability.

Affirmed.

Justice O'Connor filed a concurring opinion.

Justice Scalia did not join Part III-B-1-b of the opinion of the Court.

Justice Thomas filed an opinion concurring in part and concurring in the judgment.

West Headnotes

[1] Constitutional Law ⚿251.5
92k251.5 Most Cited Cases

Due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party. U.S.C.A. Const.Amend. 5.

[2] Constitutional Law ⚿255(1)
92k255(1) Most Cited Cases

[2] Constitutional Law ⚿278(1)
92k278(1) Most Cited Cases

Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as matter of due process of law to an adjudicator who is not in situation which would offer possible temptation to the average man as judge, which might lead him not to hold balance nice, clear and true. U.S.C.A. Const.Amend. 5.

[3] Constitutional Law ⚿251.5
92k251.5 Most Cited Cases

Even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process. U.S.C.A. Const.Amend. 5.

[4] Constitutional Law ⚿251.5
92k251.5 Most Cited Cases

Requirement that justice must satisfy the appearance of justice, even to the point of requiring trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where private party is given statutory authority to adjudicate a dispute. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law ⚿318(1)
92k318(1) Most Cited Cases

Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct de novo review of all factual and legal issues. U.S.C.A. Const.Amend. 5.

[6] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[6] Pensions ⚿103
296k103 Most Cited Cases

Multiemployer pension plan trustees act only in an

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enforcement capacity, not in an adjudicatory capacity, and thus alleged bias or appearance of bias in trustees' initial determination of an employer's withdrawal liability did not alone violate due process right to impartial adjudicator; first adjudication was proceeding that occurred before arbitrator, not trustees' initial determination of withdrawal liability. Employee Retirement Income Security Act of 1974, §§ 4219(b)(1, 2), 4221(a)(1), as amended, 29 U.S.C.A. §§ 1399(b)(1, 2), 1401(a)(1).

[7] Pensions ⚿86
296k86 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, presumption favoring determination made by plan sponsor shifts burden of proof or persuasion to employer. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A), as amended, 29 U.S.C.A. § 1401(a)(3)(A).

[8] Evidence ⚿94
157k94 Most Cited Cases

Burden of showing something by a "preponderance of the evidence" simply requires trier of fact to believe that the existence of fact is more probable than its nonexistence before he may find in favor of party who has burden to persuade judge of fact's existence.

[9] Federal Courts ⚿853
170Bk853 Most Cited Cases

A finding is "clearly erroneous," when although there is evidence to support it, reviewing body on the entire evidence is left with the firm and definite conviction that a mistake has been committed.

[10] Federal Courts ⚿847
170Bk847 Most Cited Cases

[10] Federal Courts ⚿848
170Bk848 Most Cited Cases

A showing of "unreasonableness" would require even greater certainty of error on the part of a reviewing body than the "clearly erroneous" standard would require.

[11] Evidence ⚿598(1)
157k598(1) Most Cited Cases

A "preponderance of the evidence" standard is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance; before such burden can be satisfied, fact finder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with requisite degree of certainty.

[12] Federal Courts ⚿847
170Bk847 Most Cited Cases

[12] Federal Courts ⚿848
170Bk848 Most Cited Cases

[12] Federal Courts ⚿850.1
170Bk850.1 Most Cited Cases
(Formerly 170Bk850)

The terms "clearly erroneous" and "unreasonable" are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a fact finder in the first instance made a mistake in concluding that a fact has been proven under the applicable standard of proof, and thus are "standards of review" normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[13] Federal Courts ⚿853
170Bk853 Most Cited Cases

Review under the "clearly erroneous" standard is significantly deferential, requiring a "clear and firm conviction that a mistake has been committed."

[14] Federal Courts ⚿847
170Bk847 Most Cited Cases

[14] Federal Courts ⚿848
170Bk848 Most Cited Cases

Application of a "reasonableness" standard of review is more deferential than a "clearly erroneous" standard, requiring reviewer to sustain finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever required degree of proof.

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[15] Pensions ⚷103
296k103 Most Cited Cases

When unresolved dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act is referred to arbitration, arbitrator is reviewing body, as is clear from his obligation absent contrary showing to deem certain determinations by plan sponsor correct, but is also a reviewing body invested with further powers of a fact finder, as is clear from his power to take evidence in course of his review and from presumption of correctness that district court is bound to give his findings of fact. Employee Retirement Income Security Act of 1974, § 4221(b)(3), (c), as amended, 29 U.S.C.A. § 1401(b)(3), (c).

[16] Evidence ⚷90
157k90 Most Cited Cases

Although where the burden of proof lies on a given issue is rarely without consequence, and frequently may be dispositive to the outcome of the litigation or application, the locus of the burden of persuasion is normally not an issue of federal constitutional moment outside the criminal law area.

[17] Pensions ⚷103
296k103 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, it is entirely sensible to burden party which is more likely to have information relevant to the facts about its withdrawal from the plan with the obligation to demonstrate that facts treated by the plan as amounting to a withdrawal did not occur as alleged. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001- 4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14.

[18] Constitutional Law ⚷48(4.1)
92k48(4.1) Most Cited Cases

[18] Pensions ⚷103
296k103 Most Cited Cases

Where statutory language was ambiguous and legislative history contained very little relevant to issue of degree of certainty on part of arbitrator required for employer to overcome sponsor's factual conclusions as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act, statute would be construed so as to avoid serious doubt as to its constitutionality. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[19] Constitutional Law ⚷275(5)
92k275(5) Most Cited Cases

[19] Pensions ⚷23
296k23 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, employer had burden of persuasion in a dispute over a sponsor's factual determination as to the employer's withdrawal liability; because that burden did not foreclose any factual issue from independent consideration by the arbitrator, there was no constitutional infirmity in it. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[20] Pensions ⚷103
296k103 Most Cited Cases

Determining the date of an employer's "complete withdrawal" from a multiemployer pension plan is a mixed question of fact and law. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461.

[21] Constitutional Law ⚷275(5)
92k275(5) Most Cited Cases

[21] Pensions ⚷103
296k103 Most Cited Cases

Where dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act was referred to arbitration, arbitrator's determination of date of withdrawal did not involve misapplication of statutory presumption and did not deprive employer of right to procedural due process; because plan's letter to employer contained no statement of facts justifying trustees' demand and because parties entered into factual stipulation in

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district court prior to commencing arbitration, there were virtually no contested factual determination as to which arbitrator might have deferred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[22] Pensions ⚿103
296k103 Most Cited Cases

Multiemployer pension plan actuary's selection of assumptions and methods to calculate withdrawal liability under the Multiemployer Pension Plan Amendments Act were not vulnerable to suggestions of bias or its appearance; actuaries were trained professionals subject to regulatory standard, and technical nature of actuary's assumptions and methods and necessity for applying same assumptions and methods in more than one context limited any opportunity actuary might otherwise have to act unfairly toward withdrawing employer. Employee Retirement Income Security Act of 1974, §§ 302(c)(3), 3041, 3042, as amended, 29 U.S.C.A. §§ 1082(c)(3), 1241, 1242; 26 U.S.C.A. § 7701(a)(35).

[23] Pensions ⚿103
296k103 Most Cited Cases

Legislative history of ERISA provision suggested that actuarial assumptions in regard to withdrawal liability had to be independently determined by an actuary, and that it was inappropriate for employer to substitute his judgment for that of qualified actuary with respect to those assumptions. Employee Retirement Income Security Act of 1974, § 302, as amended, 29 U.S.C.A. § 1082.

[24] Pensions ⚿103
296k103 Most Cited Cases

In action in which employer challenged reasonableness of assumptions and methodology chosen by multiemployer pension plan actuary to calculate withdrawal liability, employer's burden of proof to show by preponderance of evidence that actuarial assumptions and methods were in the aggregate unreasonable was a burden to show that the combination of methods and assumptions used would not have been acceptable to a reasonable actuary. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B).

[25] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[25] Pensions ⚿23
296k23 Most Cited Cases

Under Multiemployer Pension Plan Amendments Act, requiring employer challenging methods and assumptions used by actuary in calculating employer's withdrawal liability to show that combination of methods and assumptions employed in calculation would not have been acceptable to reasonable actuary, did not violate due process. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B); U.S.C.A. Const.Amends. 5, 14.

[26] Pensions ⚿24.1
296k24.1 Most Cited Cases

Multiemployer pension plan has features of insurance scheme in which employers spread risk that their employees will meet plan's vesting requirements and obtain entitlement to benefits.

[27] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[27] Pensions ⚿23
296k23 Most Cited Cases

Multiemployer Pension Plan Amendments Act, as applied to an employer which withdrew from a multiemployer pension plan, did not violate employer's substantive due process rights as the imposition of withdrawal liability was rationally related to terms of the employer's participation in plan; employer had voluntarily decided to enter plan after trustee decisions affecting calculation of withdrawal liability had been made and thus could have assessed any implications for plan's future liability at that time and could have assessed implications for future liability of identity of plan trustees before it decided to enter plan whose trustees included representatives of contractors' associations of which employer was not member. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A.

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Const.Amends. 5, 14.

[28] Eminent Domain ⚷2(1.1)
148k2(1.1) Most Cited Cases

[28] Pensions ⚷23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act, a regulatory statute that was otherwise within Congress' powers, could not be defeated by private contractual provisions such as those protecting an employer from liability beyond what was specified in its collective bargaining and trust agreement, and thus application was not an unconstitutional taking. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[29] Eminent Domain ⚷2(1.1)
148k2(1.1) Most Cited Cases

[29] Pensions ⚷23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not deprive employer of its property without just compensation; government did not physically invade or permanently appropriate employer's assets for its own use, so as to warrant application of analysis as to whether portion of property taken was taken in its entirety. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[30] Eminent Domain ⚷2(1.1)
148k2(1.1) Most Cited Cases

[30] Pensions ⚷23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not take employer's property without just compensation on theory that property was taken for sole purpose of protecting Pension Benefit Guarantee Corporation (PBGC), a government body, from being forced to honor its pension insurance; any benefit to PBGC deriving from solvency of pension trust fund was merely incidental to primary congressional objective of protecting covered employees and beneficiaries of pension trusts. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[31] Constitutional Law ⚷23
92k23 Most Cited Cases

[31] Eminent Domain ⚷2(1.1)
148k2(1.1) Most Cited Cases

Mere diminution in value of property, however serious, is insufficient to demonstrate a taking for purposes of the Fifth Amendment, and thus fact that employer had to pay out estimated 46% of shareholder equity to satisfy its withdrawal liability obligation to multiemployer pension plan was insufficient to show that an unconstitutional taking had occurred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[32] Eminent Domain ⚷2(1.1)
148k2(1.1) Most Cited Cases

[32] Pensions ⚷23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not amount to a "taking" based on degree of interference with employer's reasonable investment backed expectations; at time employer began contributions to plan, pension plans had long been subject to federal regulation, plan was subject to ERISA, withdrawing employer faced contingent liability up to 30% of its net worth, and it had no reasonable basis to expect that legislative ceiling on contingent liability would never be lifted. Employee Retirement Income Security Act of 1974, §§ 4062(b), 4064, as amended, 29 U.S.C.A. §§ 1362(b), 1364; U.S.C.A. Const.Amend. 5.

****2268** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S.

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321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to provide that in certain circumstances an employer withdrawing from a multiemployer plan incurs as "withdrawal liability" a share of the plan's unfunded vested benefits, 29 U.S.C. §§ 1381, 1391. Withdrawal liability is assessed by means of a notification by the "plan sponsor" and a demand for payment. § 1399(b). An unresolved dispute is referred to arbitration, where (1) the sponsor's factual determinations are "presumed correct" unless a contesting party "shows by a preponderance of the evidence that the determination was unreasonable ****2269** or clearly erroneous," § 1401(a)(3)(A); and (2) the sponsor's actuary's calculation of a plan's unfunded vested benefits is presumed correct unless a contesting party "shows by a preponderance of the evidence" that, *inter alia,* "the actuarial assumptions and methods" used in a calculation "were, in the aggregate, unreasonable," § 1401(a)(3)(B). Petitioner Concrete Pipe and Products of California, Inc., is an employer charged with withdrawal liability by the trustees of respondent, a multiemployer pension plan (Plan). After losing in arbitration, Concrete Pipe filed an action to set aside or modify the arbitrator's decision and raised a constitutional challenge to the MPPAA, but the District Court granted the Plan's motion to confirm the award. The Court of Appeals affirmed.

Held:

1. The MPPAA does not unconstitutionally deny Concrete Pipe an impartial adjudicator by placing the determination of withdrawal liability in the plan sponsor, here the trustees, subject to § 1401's presumptions. Pp. 2276- 2286.

(a) Even assuming that the possibility of trustee bias toward imposing the greatest possible withdrawal liability would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability because of their fiduciary obligations to beneficiaries of the Plan, the Due Process Clause is not violated here because the first adjudication in this case was the arbitration proceeding, not the trustees' initial liability determination. The trustees' statutory notification ***603** and demand obligations are undertaken in an enforcement capacity. Pp. 2276-2278.

(b) Nor did the arbitrator's adjudication deny Concrete Pipe its right to procedural due process. While the § 1401(a)(3)(A) presumption shifts the burden of persuasion to the employer, the statute is incoherent with respect to the degree of certainty required to overturn a plan sponsor's factual determination. In light of the assumed bias, deference to a plan sponsor's determination would raise a substantial due process question. The uncertainty raised by this incoherent statute is resolved by applying the canon requiring that an ambiguous statute be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent. Thus, the presumption is construed to place the burden on the employer to disprove an alleged fact by a preponderance permitting independent review by the arbitrator of the trustees' factual determinations. The approach taken by the arbitrator and courts below in this case is not inconsistent with this Court's interpretation of the first presumption. Pp. 2278-2284.

(c) The § 1401(a)(3)(B) presumption also raises no procedural due process issue. The assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary, § 1393(c), who is a trained professional subject to regulatory standards. The technical nature of the assumptions and methods, and the necessity for applying the same ones in several contexts, limit an actuary's opportunity to act unfairly toward a withdrawing employer. Moreover, since § 1401(a)(3)(B) speaks not about the reasonableness of the trustees' conclusions of historical fact, but about the aggregate reasonableness of the actuary's assumptions and methods in calculating the dollar liability figure, an employer's burden to overcome the presumption is simply to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. Pp. 2284-2286.

2. The MPPAA, as applied, does not deny substantive due process in violation of the Fifth Amendment. The imposition of withdrawal liability

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is clearly rational here because Concrete Pipe's liability is based on **2270 a proportion of its contributions during its participation in the Plan. Pp. 2286-2289.

3. The MPPAA, as applied, did not take Concrete Pipe's property without just compensation. The application of a regulatory statute that is otherwise within Congress's powers may not be defeated by private contractual provisions, such as those protecting Concrete Pipe from liability beyond what was specified in its collective-bargaining and trust *604 agreements. See *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 223-224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166. Examining Concrete Pipe's relationship with the Plan in light of the three factors the Court has said have particular significance for takings claims confirms this. First, the Government did not physically invade or permanently appropriate Concrete Pipe's assets for its own use. Second, Concrete Pipe has failed to show that having to pay out an estimated 46% of shareholder equity is an economic impact out of proportion to its experience with the Plan, since diminution in a property's value, however serious, is insufficient to demonstrate a taking. See, *e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303. Third, the conditions on its contractual promises did not give Concrete Pipe a reasonable expectation that it would not be faced with liability for promised benefits. At the time it began making payments to the Plan, pension plans had long been subject to federal regulation. Indeed, withdrawing employers already faced contingent liability under ERISA, and Concrete Pipe's reliance on ERISA's original limitation of contingent withdrawal liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted, see *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752. Pp. 2289- 2292.

936 F.2d 576 (CA9 1991), affirmed.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as O'CONNOR, J., did not join the statement to which n. 28 is attached, SCALIA, J., did not join Part III-B-1-b, and THOMAS, J., did not join Part III-B-1. O'CONNOR, J., filed a concurring opinion, *post,* p. ----. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. ----.

Dennis R. Murphy, Sacramento, CA, for petitioner.

John S. Miller, Jr., Los Angeles, CA, for respondent.

Carol Connor Flowe, Washington, DC, for Pension Ben. Guar. Corp. as amicus curiae by special leave of the Court.

*605 Justice SOUTER delivered the opinion of the Court. [FN1]

> FN1. Justice SCALIA does not join Part III-B-1-b of this opinion.

Respondent Construction Laborers Pension Trust for Southern California (Plan) is a multiemployer pension trust fund established under a Trust Agreement executed in 1962. Petitioner Concrete Pipe and Products of California, Inc. (Concrete Pipe), is an employer and former contributor to the Plan that withdrew from it and was assessed "withdrawal liability" under provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301-1461 (1988 ed. and Supp. III), added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. 96-364, 94 Stat. 1208. Concrete Pipe contends that the MPPAA's assessment and arbitration provisions worked to deny it procedural due process. And, although we have upheld the MPPAA against constitutional challenge under the substantive component of the Due Process Clause and the Takings Clause, *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), Concrete Pipe contends that, as applied to it, the MPPAA violates these provisions as well. **2271 We see merit in none of Concrete Pipe's contentions.

I

A pension plan like the one in issue, to which more than one employer contributes, is characteristically maintained to fulfill the terms of collective-bargaining agreements. The contributions made by

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employers participating in such a multiemployer plan are pooled in a general fund available to pay any benefit obligation of the plan. To receive benefits, an ***606** employee participating in such a plan need not work for one employer for any particular continuous period. Because service credit is portable, employees of an employer participating in the plan may receive such credit for any work done for any participating employer. An employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for participating employers; benefits vest under the Plan in this case when an employee accumulates 10 essentially continuous years of credit. See Brief for Petitioner 28.

Multiemployer plans like the one before us have features that are beneficial in industries where

> "there [is] little if any likelihood that individual employers would or could establish single-employer plans for their employees ...[,] where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer." Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess., 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans).

Multiemployer plans provide the participating employers with such labor market benefits as the opportunity to offer a pension program (a significant part of the covered employees' compensation package) with cost and risk-sharing mechanisms advantageous to the employer. The plans, in consequence, help ensure that each participating employer will have access to a trained labor force whose members are able to move from one employer and one job to another without ***607** losing service credit toward pension benefits. See 29 CFR § 2530.210(c)(1) (1991); accord, *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,* 582 F.Supp. 301, 304 (DC1983).

Since the enactment of ERISA in 1974, the Plan has been subject to the provisions of the statute as a "defined benefit plan." Such a plan is one that does not qualify as an " 'individual account plan' or 'defined contribution plan,' " which provide, among other things, for an individual account for each covered employee and for benefits based solely upon the amount contributed to the covered employee's account. See 29 U.S.C. §§ 1002(35), 1002(34), 1002(7). Concrete Pipe has not challenged the determination that the Plan falls within the statutory definition of defined benefit plan, and no issue as to that is before the Court.

A

We have canvassed the history of ERISA and the MPPAA before. See *Pension Benefit Guaranty Corporation v. R.A. Gray & Co., supra; Connolly v. Pension Benefit Guaranty Corporation, supra.* ERISA was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in [them].... Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he will actually receive it." *Id.,* 475 U.S., at 214, 106 S.Ct., at 1020 (citations ****2272** and internal quotation marks omitted). As enacted in 1974, ERISA created the Pension Benefit Guarantee Corporation (PBGC) to administer and enforce a pension plan termination insurance program, to which contributors to both single-member and multiemployer plans were required to pay insurance premiums. 29 U.S.C. §§ 1302(a), 1306 (1988 ed. and Supp. III). Under the terms of the statute as originally enacted, the guarantee of basic ***608** benefits by multiemployer plans that terminated was not to be mandatory until 1978, and for terminations prior to that time, any guarantee of benefits upon plan termination was discretionary with PBGC. 29 U.S.C. §§ 1381(c)(2)-(4) (1976 ed.). If PBGC did choose to extend a guarantee when a multiemployer plan terminated with insufficient assets to pay promised benefits, an employer that had contributed to the plan in the five preceding years was liable to PBGC for the shortfall in proportion to its share of contributions during that 5-year period, up to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362(b), 1364 (1976 ed.). "In other words, any employer withdrawing from a

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multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits." *Gray,* 467 U.S., at 721, 104 S.Ct. at 2713.

"As the date for mandatory coverage of multiemployer plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship." *Ibid.* Indeed, the possibility of liability upon termination of a plan created an incentive for employers to withdraw from weak multiemployer plans. *Connolly,* 475 U.S., at 215, 106 S.Ct. at 1021. The consequent risk to the insurance system was unacceptable to Congress, which in 1978 postponed the mandatory guarantee pending preparation by the PBGC of a report "analyzing the problems of multiemployer plans and recommending possible solutions." *Ibid.* PBGC issued that report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978). "To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Connolly,* 475 U.S., at 216, 106 S.Ct. at 1021 (citation and internal quotation marks omitted).

***609** Congress ultimately agreed, see *id.,* at 217, 106 S.Ct. at 1022, and passed the MPPAA, which was signed into law by the President on September 26, 1980. Under certain provisions of the MPPAA (which when enacted had an effective date of April 29, 1980, 29 U.S.C. § 1461(e)(2)(A) (1976 ed., Supp. V)), if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" in the form of "a fixed and certain debt to the pension plan." *Gray, supra,* 467 U.S., at 725, 104 S.Ct. at 2715. An employer's withdrawal liability is its "proportionate share of the plan's 'unfunded vested benefits,' " that is, "the difference between the present value of vested benefits" (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, 29 U.S.C. § 1053) "and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391." *Gray, supra,* 467 U.S., at 725, 104 S.Ct. at 2715. [FN2]

FN2. In various places the statute uses the terms "participant" and "beneficiary," and these terms are defined at 29 U.S.C. §§ 1002(7), 1002(8). For simplicity, we will use the term "covered employee" to refer depending on context both to those earning service credits and to those entitled to benefits.

B

The MPPAA provides the procedure for calculating and assessing withdrawal liability. ****2273** The plan's actuary, who is subject to regulatory and professional standards, 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35), must determine the present value of the plan's liability for vested benefits. [FN3] In the absence of regulations promulgated by the PBGC, the actuary must employ "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. ***610** § 1393(a)(1). [FN4] The assumptions must cover such matters as mortality of covered employees, likelihood of benefits vesting, and, importantly, future interest rates. After settling the present value of vested benefits, the actuary calculates the unfunded portion by deducting the value of the plan's assets. § 1393(c).

FN3. Even if no employer withdraws, ERISA requires an assessment of the plan's liability at least annually. See 29 U.S.C. § 1082(c)(9) (1988 ed., Supp. III).

FN4. While the PBGC is also authorized to promulgate regulations governing such assumptions under 29 U.S.C. § 1393(a), it has not done so. See Brief for Pension Benefit Guaranty Corp. as *Amicus Curiae* 7, n. 7.

In order to determine a particular employer's withdrawal liability, the unfunded vested liability is allocated under one of several methods provided by law. § 1391. In this case, the Plan used the presumptive method of § 1391(b), which bases withdrawal liability on the proportion of total employer contributions to the plan made by the withdrawing employer during certain 5- year periods. See §§ 1391(b)(2)(E)(ii), (b)(3)(B), (b)(4)(D)(ii). In essence, the withdrawal liability

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imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation.

Withdrawal liability is assessed in a notification by the "plan sponsor" (here the trustees, see § 1301(a)(10)(A)) and a demand for payment. § 1399(b). The statute requires notification and demand to be made "[a]s soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). A "complete withdrawal"

"occurs when an employer--

"(1) Permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan." § 1383(a). [FN5]

FN5. There is an exception to this definition that applies to the building and construction industry, see § 1383(b), but neither party argues that it pertains in this case.

***611** "[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." § 1383(e).

The statute provides that if an employer objects after notice and demand for withdrawal liability, and the parties cannot resolve the dispute, § 1399(b)(2), it shall be referred to arbitration. See § 1401(a)(1). Two presumptions may attend the arbitration. First, "any determination made by a plan sponsor under [29 U.S.C. §§ 1381-1399 and 1405 (1988 ed. and Supp. III)] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Second, the sponsor's calculation of a plan's unfunded vested benefits.

"is presumed correct unless a party contesting the determination shows by a preponderance of evidence that--

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

"(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." § 1401(a)(3)(B).

****2274** The statute provides for judicial review of the arbitrator's decision by an action in the district court to enforce, vacate, or modify the award. See § 1401(b)(2). In any such action "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." § 1401(c)

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II

The parties to the Trust Agreement creating the Plan in 1962 are the Southern California District Council of Laborers (Laborers) and three associations of contractors, the ***612** Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc. App. 75, ¶ 6 (stipulation of facts filed in the District Court). Under § 302(c)(5)(B) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 186(c)(5)(B), when a union participates in management of a plan permitted by the LMRA, the plan must be administered jointly by representatives of labor and management. Accordingly, half of the Plan's trustees are selected by the Laborers, and half by these contractors' associations. Concrete Pipe has never been a member of any of the contractors' associations that are parties to the Trust Agreement.

In 1976, Concrete Pipe, which is a wholly owned subsidiary of Concrete Pipe and Products Co., Inc., purchased certain assets of another company, Cen-Vi-Ro, including a concrete pipe manufacturing plant near Shafter, California, which Concrete Pipe continued to operate much as Cen-Vi-Ro had done. Cen-Vi- Ro had collective-bargaining agreements with several unions including the Laborers, and Concrete Pipe abided by the agreement with the latter by contributing to the Plan at a specified rate for each hour worked by a covered employee. [FN6] In 1978, Concrete Pipe negotiated a new 3-year contract with the Laborers that called for continuing contributions to be made to the Plan based on hours worked by covered employees in the collective-bargaining unit. [FN7] The collective-bargaining agreement specified that it would remain in effect until June 30, 1981, and thereafter from year to year unless either Concrete Pipe or the Laborers gave notice of a desire to renegotiate or terminate it. " 'Such written notice [was to] be given at least sixty (60) ***613** days prior to June 30 ... [and if] no

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agreement [was] reached by June 30 ... the Employer or the [Laborers might] thereafter give written notice to the other that on a specified date [at least] fifteen (15) days [thereafter] the Agreement [should] be considered terminated.' " App. 76.

FN6. The average rate for covered employees at which Concrete Pipe contributed to the Plan in 1977 was $1.14 per hour, and Concrete Pipe's contributions for 1977 totaled $29,337.71.

FN7. The collective-bargaining agreement provided for contributions for each laborer at a rate of $1.20 per hour. In 1978 Concrete Pipe's total contribution to the Plan was $49,913.04, and in 1979 it was $20,826.60.

In August 1979, Concrete Pipe stopped production at the Shafter facility. Although the details do not matter here, by October 1979, work by employees covered by the agreement with the Laborers had virtually ceased, and Concrete Pipe eventually stopped making contributions to the Plan. In the spring of 1981, Concrete Pipe and the Laborers each sent the other a timely notice of a desire to renegotiate the collective-bargaining agreement. Concrete Pipe subsequently bargained to an impasse and, on November 30, 1981, sent the Laborers a letter withdrawing recognition of that union as an employee representative, and giving notice of intent to terminate the 1978 collective- bargaining agreement. At about the same time, however, in November 1981, Concrete Pipe reopened the Shafter plant to produce 7,000 tons of concrete pipe needed to fill two orders for which it had successfully bid. It hired employees in classifications covered by ****2275** its prior agreement with the Laborers, but did not contribute to the Plan for their work.

In January 1982, the Plan notified Concrete Pipe of withdrawal liability claimed to amount to $268,168.81. See *id.*, at 89-94. Although the demand letter did not specify the date on which the Plan contended that "complete withdrawal" from it had taken place, it referred to the failure of Concrete Pipe to make contributions to the Plan since February 1981, and stated that "[w]e are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ." *Id.*, at 90.

The Plan filed suit seeking the assessed withdrawal liability. Concrete Pipe countersued to bar collection, contending ***614** that "complete withdrawal" had occurred when operations at the Shafter plant ceased in August 1979, a date prior to the effective date of the MPPAA, and challenging the MPPAA on constitutional grounds. These cases were consolidated in the United States District Court for the Central District of California, which *sua sponte* ordered the parties to arbitrate the issue of whether withdrawal occurred prior to the effective date of the MPPAA. [FN8]

FN8. The District Court concluded that the effective date of the withdrawal liability provisions of the MPPAA was September 26, 1980, in reliance on the Ninth Circuit's decision in *Shelter Framing Corp. v. Pension Benefit Guaranty Corporation,* 705 F.2d 1502 (1983), which held the retroactivity provision of the MPPAA unconstitutional. App. 198. The decision in *Shelter Framing* was reversed by this Court in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). Subsequent to this Court's decision in *Gray,* Congress amended the effective date of the MPAA's withdrawal liability provisions. See 29 U.S.C. § 1461(e)(2)(A).

The arbitration took place in two phases. In the first, the arbitrator determined that Concrete Pipe had not withdrawn from the Plan prior to the effective date of the MPPAA. App. 216. In the second phase, explicitly applying the presumption of 29 U.S.C. § 1401(a)(3)(B), the arbitrator found that Concrete Pipe had failed to meet its burden of showing the actuarial assumptions and methods to be unreasonable in the aggregate. App. 400. For reasons not at issue here, the arbitrator did rule partially in Concrete Pipe's favor, and reduced the withdrawal liability from $268,168.61 to $190,465.57.

Concrete Pipe then filed a third action in the District Court, to set aside or modify the arbitrator's decision, and again raised its constitutional challenge. *Id.*, at 406. The District Court treated Concrete Pipe's subsequent motion for summary judgment as a petition to vacate the arbitrator's award, which it denied, and granted a motion by the Plan to confirm the award. *Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe* ****615*** *and Products,*

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CV-82-5184-HLH (CD Cal., July 5, 1989), App. 416-425. [FN9] On Concrete Pipe's appeal, the judgment of the District Court was affirmed. *Board of Trustees of Construction Laborers Pension Trust for Southern California v. Concrete Pipe and Products of California, Inc.*, 936 F.2d 576 (CA9 1991), App. 431-432, judgt. order reported at 935 F.3d 576. We granted certiorari limited to two questions presented, which are set out in the margin. 504 U.S. 940, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992). [FN10]

FN9. In its motion to confirm the award, the Plan also asked that it be modified. The District Court treated this as a motion to vacate the arbitration award and denied it as well. See App. 416. The Plan did not appeal.

FN10. Our grant of certiorari was limited to the questions: "Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California ... violate the due process rights of Concrete Pipe and Products by denying access to an impartial decisionmaker?" and "Do the provisions of the Multi-Employer Pension Plan Amendments Act ... violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied,* by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?" Pet. for Cert. i.

****2276** III

Concrete Pipe challenges the assessment of withdrawal liability on several grounds, the first being that by placing determination of withdrawal liability in the trustees, subject to the presumptions provided by § 1401, the MPPAA is unconstitutional because it denies Concrete Pipe an impartial adjudicator. This is not the first time this legal question has been before the Court. See *Pension Benefit Guaranty Corporation v. Yahn & McDonnell, Inc.*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987), aff'g by an equally divided Court *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (CA3 1986) .

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Concrete Pipe and its *amici* point to several potential sources of trustee bias toward imposing the greatest possible withdrawal liability. The one they emphasize most strongly has roots in the fact that "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)([A]), and thus owe an exclusive duty to the fund." *Id.*, at 139 (emphasis omitted). As we said in another case discussing employee benefit pension plans permitted under LMRA:

> "Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'
>
> . . . . .
>
> "In sum, the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party.... ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet. [Title 29 U.S.C. § 1104(a)(1)] requires a trustee to 'discharge his duties ... solely in the interest of the participants [*i.e.*, covered employees] and beneficiaries.' " *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332, 101 S.Ct. 2789, 2794-2795, 69 L.Ed.2d 672 (1981) (citations and footnote omitted).

The resulting tug away from the interest of the employer is fueled by the threat of personal liability for any breach of the trustees' fiduciary responsibilities, obligations, or duties, 29 U.S.C. § 1109, which may be enforced by civil actions brought by the Secretary of Labor or any covered employee or beneficiary of the plan, § 1132(a)(2).

***617** The trustees could act in a biased fashion for several reasons. The most obvious would be in attempting to maximize assets available for the beneficiaries of the trust by making findings to enhance withdrawal liability. The next would not be so selfless, for if existing underfunding was the consequence of prior decisions of the trustees, those decisions could, if not offset, leave the trustees open to personal liability. See Brief for American Trucking Associations, Inc., as *Amicus Curiae* 9. A risk of bias may also inhere in the mere fact that,

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fiduciary obligations aside, the trustees are appointed by the unions and by employers. Union trustees may be thought to have incentives, unrelated to the question of withdrawal, to impose greater rather than lesser withdrawal liability. Employer trustees may be responsive to concerns of those employers who continue to contribute, whose future burdens may be reduced by high withdrawal liability, and whose competitive position may be enhanced to boot. See Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 8, citing Note, Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980, 71 Geo.L.J. 161, 168 (1982).

**2277 [1][2][3] As against these supposed threats to the trustees' neutrality, due process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville,* 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see *Schweiker v. McClure,* 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio,* 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation " 'which would offer a possible *618 temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....' " *Ward, supra,* 409 U.S. at 60, 93 S.Ct. at 81 (quoting *Tumey, supra,* 273 U.S., at 532, 47 S.Ct., at 444). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. at 83.

[4] "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra,* 446 U.S., at 243, 100 S.Ct., at 1613 (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the possibility of bias, if only that stemming from the trustees' statutory role and fiduciary obligation, would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability.

2

[5] The assumption does not win the case for Concrete Pipe, however, for a further strand of governing law has to be applied. Not all determinations affecting liability are adjudicative, and the " 'rigid requirements' ... designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." 446 U.S., at 248, 100 S.Ct., at 1616. Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to "conduct a *de novo* review of all factual and legal issues." Cf. *id.,* at 245, 100 S.Ct., at 1614; see also *id.,* at 247-248, and n. 9, 100 S.Ct., at 1615 and n. 9; cf. *Withrow v. Larkin,* 421 U.S. 35, 58, 95 S.Ct. 1456, 1470, 43 L.Ed.2d 712 (1975) ("Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised").

[6] *619 The distinction between adjudication and enforcement disposes of the claim that the assumed bias or appearance of bias in the trustees' initial determination of withdrawal liability alone violates the Due Process Clause, much as it did the similar claim in *Marshall v. Jerrico.* Although we were faced there with a federal agency administrator who determined violations of a child labor law and assessed penalties under the statute, we concluded that the administrator could not be held to the high standards required of those "whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." 446 U.S., at 250, 100 S.Ct. at 1617. Of the administrator there we said, "He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual

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or legal questions. The function of assessing a violation **2278 is akin to that of a prosecutor or civil plaintiff." *Id.,* at 247, 100 S.Ct., at 1615.

This analysis applies with equal force to the trustees, who, we find, act only in an enforcement capacity. The statute requires the plan sponsor, here the trustees, to notify the employer of the amount of withdrawal liability and to demand payment, 29 U.S.C. § 1399(b)(1), actions that bear the hallmarks of an assessment, not an adjudication. The trustees are not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law. [FN11] In *Marshall,* we observed that an employer "except[ing] to a penalty ... is entitled to a *de novo* hearing before an administrative law judge," 446 U.S., at 247, 100 S.Ct., at 1615, and we concluded that this latter proceeding was the *620 "initial adjudication," *id.,* at 247, n. 9, 100 S.Ct., at 1615, n. 9. Likewise here, we conclude that the first adjudication is the proceeding that occurs before the arbitrator, not the trustees' initial determination of liability. [FN12]

FN11. While the employer "may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments," 29 U.S.C. § 1399(b)(2) , and while the plan sponsor must then respond, *ibid.,* this hardly amounts to "adjudication." The statute does not require the employer to exhaust the avenue of making a request of the plan sponsor prior to initiating arbitration proceedings. See § 1401(a)(1).

FN12. "[W]e need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," *Marshall,* 446 U.S., at 250, 100 S.Ct., at 1617 (footnote omitted), as that issue is not within the scope of the questions on which we granted certiorari in this case.

B

This does not end our inquiry, however, for Concrete Pipe goes on to argue that the statutory presumptions preserve the trustees' bias by limiting the arbitrator's autonomy to determine withdrawal liability, and thereby work to deny the employer a fair adjudication.

1

Under the first provision at issue here, "any determination made by the plan sponsor under [29 U.S.C. §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Concrete Pipe argues that this presumption denied it an impartial adjudicator on the issue of its withdrawal date, thus raising a constitutional question on which the Courts of Appeals have divided. [FN13]

FN13. The Courts of Appeals for the First, Second, Fourth, Ninth, and District of Columbia Circuits have found the provision at issue constitutional, while the Court of Appeals for the Third Circuit has struck it down. Compare *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund, Inc.,* 762 F.2d 1137, 1140-1143 (CA1 1985) (en banc); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396, 1403- 1404 (CA9 1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 481 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,* 235 U.S.App.D.C. 1, 10, 729 F.2d 1502, 1511 (1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.,* 725 F.2d 843, 855 (CA2), cert. denied *sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 856 (1984); and *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 639-641 (CA4 1983), cert. denied, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984), with *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, 138-142 (CA3 1986), aff'd by an equally divided Court *sub nom. Pension Benefit Guaranty Corporation v. Yahn & McDonnell, Inc.,* 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987).

*621 The parties apparently agree that this presumption applies only to factual determinations, see Reply Brief for Petitioner 17; Brief for Respondent 24 (deferring to brief for the PBGC as *amicus curiae*); Brief for Pension Benefit Guaranty Corporation as *Amicus Curiae* 10, and n. 11, and this position is consistent with a PBGC regulation requiring the arbitrator "[i]n reaching his **2279 decision [to] follow applicable law, as embodied in

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statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities," 29 CFR § 2641.4(a)(1) (1992). We will assume for purposes of this case that the regulation reflects a sound reading of the statute. [FN14]

> FN14. There is no utility in attempting to construe § 1401(a)(3)(A) finely to apply the "unreasonable" standard to certain determinations possible under § § 1381-1399 and 1405, and the "clearly erroneous" formulation to others. These distinctions are not relevant in light of the relationship in this context of both of these terms to the statutory phrase requiring a showing "by a preponderance," which we explain below.

a

[7] It is clear that the presumption favoring determinations of the plan sponsor shifts a burden of proof or persuasion to the employer. The hard question is what the employer must show under the statute to rebut the plan sponsor's factual determinations, that is, how and to what degree of probability the employer must persuade the arbitrator that the sponsor was wrong. The question is hard because the statutory text refers to three different concepts in identifying this burden: "preponderance," "clearly erroneous," and "unreasonable."

[8][9][10] ***622** The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' " *In re Winship,* 397 U.S. 358, 371-372, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring) (brackets in original) (citation omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] 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, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). A showing of "unreasonableness" would require even greater certainty of error on the part of a reviewing body. See, *e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

[11] In creating the presumption at issue, these terms are combined in a very strange way. As our descriptions indicate, the first, "preponderance," is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he proves a contested proposition by a preponderance of the evidence. The term thus belongs in the same category with "clear and convincing" and "beyond a reasonable doubt," which are also used to prescribe standards of proof (but when greater degrees of certainty are thought necessary). Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.

[12] The second and third terms differ from the first in an important way. They are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact ***623** had been proven under the applicable standard of proof. They are, in other words, standards of review, and they are normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity (unlike the trustees here). See, *e.g.,* Fed.Rule Civ.Proc. 52(a). As the terms readily indicate, a reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference. This makes sense because in many circumstances the costs of providing for duplicative ****2280** proceedings are thought to outweigh the benefits (the second would render the first ultimately useless), and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.

[13][14] Thus, review under the "clearly erroneous" standard is significantly deferential, requiring a "definite and firm conviction that a

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mistake has been committed." And application of a reasonableness standard is even more deferential than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever the required degree of proof.

[15] The strangeness in the statutory language creating the first presumption arises from the combination of terms from the first category (burdens of proof) with those from the second (standards of review). It is true, of course, that this apparent confusion of categories may have resulted from the hybrid nature of the arbitrator's proceeding in which it is supposed to be applied. The arbitrator here does not function simply as a reviewing body in the classic sense, for he is not only obliged to enquire into the soundness of the sponsor's determinations when they are challenged, but may receive new evidence in the course of his review and adopt his own conclusions of fact. He may conduct proceedings in the ***624** same manner and with the same powers as an arbitrator may do under Title 9 of the United State Code, see 29 U.S.C. § 1401(b)(3), being authorized, for example, to hear (indeed to subpoena) witnesses and to take evidence. See 9 U.S.C. § 7; 29 U.S.C. § 1401(b)(3) (making specific reference to subpoena power). He is, then, a reviewing body (as is clear from his obligation, absent a contrary showing, to deem certain determinations by the plan sponsor correct), but a reviewing body invested with the further powers of a finder of fact (as is clear from his power to take evidence in the course of his review and from the presumption of correctness that a district court is bound to give his "findings of fact," § 1401(c)). The arbitrator may thus provide a dual sort of trial and review, ultimately empowered to draw his own conclusions, and it would make sense to describe his different functions respectively by the language of trial and the language of review.

It does not, however, make sense to use the language of trial and the language of review as the statute does, for the statute does not refer to different arbitrator's functions in language appropriate to each; it refers, rather, to one single conclusion that must be drawn about a determination previously made by a plan sponsor. By its terms the statute purports to provide a standard for reviewing the sponsor's findings, and it defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched. They are also inconsistent with each other on any reading. As used here, as distinct from its more usual context, the statutory phrase authorizing the arbitrator to reject a factual conclusion upon proof by a "preponderance" implies review of the sponsor's determination on the basis of the record, supplemented by any new evidence, for simple error. If this statutory phrase were given effect, and the arbitrator concluded from a review of the record and of new evidence that a finding of fact was more probably wrong than not, it would be rejected, and a different ***625** finding might be substituted. On the other hand, requiring a showing that the sponsor's determination was "clearly erroneous" or "unreasonable" would grant the plan sponsor's factual findings a great deal of deference. But to say in this context that one must demonstrate that something is more probably clearly erroneous than not or more probably than not unreasonable is meaningless. One might as intelligibly say, in a trial court, that a criminal prosecutor is bound to prove each ****2281** element probably true beyond a reasonable doubt. The statute is thus incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor. [FN15]

FN15. Justice THOMAS reads the statute not to be about the standard of review of the plan sponsor's findings of fact at all. On his reading, "clearly erroneous" is not a term of art, but an attempt at independent literal description. Under his reading, if the arbitrator concludes a factual determination of a plan sponsor is probably wrong, it will nonetheless be permitted to stand, unless the error is "obvious, plain, gross, significant, or manifest." See *post,* at 2295 (citation omitted). Justice THOMAS does not adequately explain what purpose would be served by a statute that let some erroneous (and presumably material) factual determinations stand even when they were "clearly erroneous" in the legal sense or "unreasonable," merely because of the degree to which they happened to deviate from the true facts, even when the latter are supported by overwhelming evidence. He does refer to a possible congressional desire to avoid disputes over "insignificant errors," *post,* at 2296, but under his reading a factual error could be significant, in the sense that it was both material and undeniably incorrect, and yet still stand because it was not that far different from the truth. Justice THOMAS cites the presumption of innocence for the proposition that the presumption

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at issue here does not imply a standard of review. See *post,* at 2295. But just because some presumptions do not imply standards of review does not mean that this one does not. Here, by its terms, the statutory presumption says that factual findings of the plan sponsor will stand unless some showing is made, necessarily implying a standard of review of those findings.

[16][17] The proper response to this incomprehensibility is obviously important in deciding this case. If it permitted an employer to rebut the plan sponsor's factual conclusions by a ***626** preponderance, merely placing a burden of persuasion on the employer, and permitting adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations, the provision would be constitutionally unremarkable. For although we have observed that "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, ... [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne,* 424 U.S. 577, 585, 96 S.Ct. 1010, 1016, 47 L.Ed.2d 249 (1976) (footnote omitted). Concrete Pipe points to no special interest that would distinguish this from the normal case. It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law. W. Bailey, Onus Probandi 1 (1886) (citing Powell on Evidence 167-171) ("In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant").

On the other hand, if the employer were required to show the trustees' findings to be either "unreasonable or clearly erroneous," there would be a substantial question of procedural fairness under the Due Process Clause. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. Cf. *Withrow v. Larkin,* 421 U.S., at 58, 95 S.Ct., at 1470. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause. See *supra,* at 2276- 2277.

***627** b

Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative ****2282** purpose as revealed by the history of the statute, for such light as it may shed. [FN16] Unsurprisingly, we have found no direct discussion in the legislative history of the degree of certainty on the part of the arbitrator required for the employer to overcome the sponsor's factual conclusions. The Report of the House Committee on Education and Labor on the bill that became the MPPAA describes the presumption as applying to "a determination of withdrawal liability by a plan," and lumps it together with the statutory presumption, discussed below, that applies to the choice of actuarial assumptions and methods. See H.R.Rep. No. 96-869, pt. 1, p. 86 (1980); 29 U.S.C. § 1401(a)(3)(B). [FN17] The Report states that

FN16. The textual incomprehensibility concerns a very narrow matter, and we find nothing in the structure of the statutory scheme that provides elucidation.

FN17. The presumption at issue here was included in a new § 4221 added by the MPPAA to ERISA. In the text of the version of the bill to which the House Report refers the presumption was contained in § 4203, and the provision began: "For purposes of this part, a determination made with respect to a plan under section 4201 [relating to employer withdrawals] is presumed correct unless the party contesting the determination shows...." See H.R.Rep. No. 96-869, pt. 1, p. 17 (1980), 1980 U.S.C.C.A.N. p. 2918. As enacted, this text was replaced with "For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows...." Pub.L. 93-406, title IV, § 4221, as added, Pub.L. 96-364, title I § 104(2), Sept. 26, 1980, 94 Stat. 1239, 29 U.S.C. § 1401(a)(3)(A). The text of what was called § 4201 differs somewhat from the text of the sections to which the enacted bill refers, which are

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> now codified at 29 U.S.C. §§ 1381-1399 and 1405. Our concern with legislative history here goes only to the question of what degree of certainty of error Congress intended to require in this situation. While the change in referent that took place might have some implications for this question, we do not think anything relevant in the legislative history turns on the different scope of the earlier version of the bill.

***628** "[t]hese rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination. The committee believes it is extremely important that a withdrawn employer begin making the annual payments even though the period of years for which payments must continue will be based on the actual liability allocated to the employer." H.R.Rep. 96-869, pt. 1, *supra,* at 86, 1980 U.S.C.C.A.N. at 2954.

The only other comment that we have found in the legislative history occurs in a Report prepared by the Senate Committee on Labor and Human Resources, which first purports to speak about both statutory presumptions, but directs its brief discussion to problems unique to "technical actuarial matters." See *S. 1076:* The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 20-21 (Comm.Print 1980) (hereinafter Committee Print); see also *infra,* at 2286, and n. 20.

The legislative history thus sheds little light on the odd language chosen to describe the employer's burden. All it tells us is that the provision's purpose is to prevent the employer from "forcing the plan sponsor to prove every element involved in making an actuarial determination." Since this purpose would be served simply by placing the burden of proof as to historical fact on the employer, however light or heavy that burden may be, the legislative history does nothing to make sense of the drafter's failure to choose among the standards included in the text.

c

[18] The only way out of the muddle is by a different rule of construction. It is a hoary one that, in a case of statutory ambiguity, "where an otherwise acceptable construction of ***629** a statute would raise serious constitutional ****2283** 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, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson,* 285 U.S. 22, 62 [52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)]." *Machinists v. Street,* 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961). Cf. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 448-449, 7 L.Ed. 732 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.).

[19] Although we are faced here not with ambiguity within the usual degree, but with incoherence, we have a common obligation in each situation to resolve the uncertainty in favor of definite meaning, and the canon for resolving ambiguity applies with equal force when terminology renders a statute incoherent. In applying that canon here, we must give effect to the one conclusion clearly supported by the statutory language, that Congress intended to shift the burden of persuasion to the employer in a dispute over a sponsor's factual determination. This objective can be realized without raising serious constitutional concerns simply by construing the presumption to place the burden on the employer to disprove a challenged factual determination by a preponderance. In so construing the statute we make no pretense to have read the congressional mind to perfection. We would not, indeed, even have this problem if an argument could not obviously be made that Congress intended greater deference than the preponderance standard extends. But one could hardly call the intent clear after wondering why the preponderance ***630** standard was also included. In these circumstances it is enough that the choice to attain coherence by obviating constitutional problems is not "plainly

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contrary to the intent of Congress." *DeBartolo, supra,* 485 U.S., at 575, 108 S.Ct., at 1397.

Because the statute as we construe it does not foreclose any factual issue from independent consideration by the arbitrator (the presumption is, again, assumed by all to be inapplicable to issues of law), there is no constitutional infirmity in it. For the same reason, that an employer may avail itself of independent review by the concededly neutral arbitrator, we find no derivative constitutional defect infecting the further presumption that a district court must afford to an arbitrator's findings of fact. See 29 U.S.C. § 1401(c).

d

[20] Before applying the presumption to this case, one must recognize that in spite of Concrete Pipe's contention to the contrary, determining the date of "complete withdrawal" presents not a mere question of fact on which the arbitrator was required in the first instance to apply the § 1401(a)(3)(A) presumption, but a mixed question of fact and law. The relevant facts are about the closure of the Shafter plant (such as the intent of Concrete Pipe with respect to the plant, its expression of that intent, its activities while the plant was not operating, and the circumstances of the plant's reopening), while the question whether these facts amount to a "complete withdrawal" is one of law.

[21] As to the truly factual issues, the arbitrator's decision fails to reveal the force with which factual conclusions by the trustees here were presumed correct, and in such a case we would ordinarily reverse the judgment below for consideration of the extent to which the arbitrator's application of the presumption ****2284** was contrary to the construction we adopt today. But two reasons (urged upon us by neither party) persuade us not to take this course: the Plan's letter to Concrete Pipe contains no statement of facts justifying the trustees' ***631** demand, and the parties entered into a factual stipulation in the District Court prior to commencing the arbitration. Because of these two circumstances, there were virtually no contested factual determinations to which the arbitrator might have deferred. And, on the one question of fact that may have been disputed, the arbitrator found, apparently in the first instance, that Concrete Pipe's intent in closing the Shafter plant had been to cease operations permanently. App. 213-214. [FN18]

> FN18. Despite this favorable finding, Concrete Pipe still lost, of course. The arbitrator treated subjective intent as irrelevant. See App. 213-215. While the District Court and the Court of Appeals, which relied on the District Court's reasoning, did not go so far, see *id.,* at 419-420, any factual deference in their decisions would be to the arbitrator's finding, itself untainted by the force of any presumption. See 29 U.S.C. § 1401(c); Fed.Rule Civ.Proc. 52(a).

While we express no opinion on whether the facts in this case constitute a "complete withdrawal" within the meaning of the statute, a question not before us today, the approach taken by the arbitrator and the courts below is not inconsistent with our interpretation of the first presumption. The determination of the date of withdrawal by the arbitrator did not involve a misapplication of the statutory presumption, and it did not deprive Concrete Pipe of its right to procedural due process.

2

The second presumption at issue attends the calculation of the amount of withdrawal liability. The statute provides that in the absence of more particular PBGC regulations, the plan is required to use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). The presumption in question arises under § 1401(a)(3)(B), which provides that

***632** "the determination of a plan's unfunded vested benefits for a plan year, [is] presumed correct unless a party contesting the determination shows by a preponderance of evidence that--

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

"(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods."

Concrete Pipe's concern is with the presumptive force of the actuarial assumptions and methods covered by subsection (i).

[22] While this provision is like its counterpart

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creating the presumption as to factual determinations in placing the burden of proof on the employer, the issues implicated in applying it to the actuary's work are not the same. As the text plainly indicates, the assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary. For a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards. See 29 U.S.C. §§ 1241, 1242 ; 26 U.S.C. § 7701(a)(35). The technical nature of an actuary's assumptions and methods, and the necessity for applying the same assumptions and methods in more than one context, as a practical matter limit the opportunity an actuary might otherwise have to act unfairly toward the withdrawing employer. The statutory requirement (of "actuarial assumptions and methods--which, in the aggregate, are reasonable ...") is not unique to the withdrawal liability context, for the statute ****2285** employs identical language in 29 U.S.C. § 1082(c)(3) to describe the actuarial assumptions and methods to be used in determining whether a plan has satisfied the minimum funding requirements contained in the statute. The use of the same language to describe the actuarialassumptions ***633** and methods to be used in these different contexts tends to check the actuary's discretion in each of them.

> "Using different assumptions [for different purposes] could very well be attacked as presumptively unreasonable both in arbitration and on judicial review.
>
> "[This] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082." *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d, at 146-147 (Seitz, J., dissenting in part).

[23] This point is not significantly blunted by the fact that the assumptions used by the Plan in its other calculations may be "supplemented by several actuarial assumptions unique to withdrawal liability." Brief for Respondent 26. Concrete Pipe has not shown that any method or assumption unique to the calculation of withdrawal liability is so manipulable as to create a significant opportunity for bias to operate, and arguably the most important assumption (in fact, the only actuarial assumption or method that Concrete Pipe attacks in terms, see Reply Brief for Petitioner 18-20) is the critical interest rate assumption that must be used for other purposes as well. [FN19]

> FN19. It may be that the trustees could, in theory, replace the actuary's assumptions with their own, but that would involve a different case from this, and while we are aware of at least one case in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it disliked, see *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 93 (CA3 1990), we know of none in which a plan sponsor was found to have replaced an actuary's actuarial methods or assumptions with different ones of its own. Although we express no view on the question whether a plan sponsor must adopt the assumptions used by the actuary, we note that the legislative history of § 1082, which was enacted as part of ERISA in 1974, suggests that the acturarial assumptions must be "independently determined by an actuary," and that it is "inappropriate for an employer to substitute his judgment ... for that of a qualified actuary" with respect to these assumptions. S.Rep. No. 93-383, p. 70 (1973); see also H.R.Rep. No. 93-807, p. 95 (1974), 1974 U.S.C.C.A.N. 4639, 4954, 4761.

***634** The second major difference attending the two presumptions lies in the sense of reasonableness that must be disproven by an employer attacking the actuary's methods and assumptions, as against the reasonableness of the trustees' determinations of historical fact. Following the usual presumption of statutory interpretation, that the same term carries the same meaning whenever it appears in the same Act, see *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433, 52 S.Ct. 607, 608, 76 L.Ed. 1204 (1932), we might expect "reasonable" in § 1401(a)(3)(B) to function here just as it did in § 1401(a)(3)(A), to denote a certain range of probability that a factual determination is correct. For several reasons, however, we think it clear that this second presumption of reasonableness functions quite differently.

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[24] First, of course, the statute does not speak in terms of disproving the reasonableness of the calculation of the employer's share of the unfunded liability, which would be the finding of future fact most obviously analogous to the findings of historical fact to which the § 1401(a)(3)(A) presumption applies. Section 1401(a)(3)(B) speaks instead of the aggregate reasonableness of the assumptions **2286 and methods employed by the actuary in calculating the dollar liability figure. Because a "method" is not "accurate" or probably "true" within some range, "reasonable" must be understood here to refer to some different kind of judgment, one that it would make sense to apply to a review of methodology as *635 well as of assumptions. Since the methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.

[25] As thus understood, the presumption in question supports no due process objection. The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. To be sure, the burden may not be so "mere" when one considers that actuarial practice has been described as more in the nature of an "actuarial art" than a science, *Keith Fulton & Sons v. New England Teamsters,* 762 F.2d 1137, 1143 (CA1 1985) (en banc) (internal quotation marks omitted), and that the employer's burden covers "technical actuarial matters with respect to which there are often several equally 'correct' approaches," Committee Print 20-21. [FN20] But since imprecisioninheres *636 in the choice of actuarial methods and assumptions, the resulting difficulty is simply in the nature of the beast. Because it must fall on whichever party bears the burden of persuasion on such an issue, at least where the interests at stake are no more substantial than Concrete Pipe's are here, its allocation to one party or another does not raise an issue of due process. See *supra,* at 2281.

> FN20. Indeed, our view of the problem of imprecision in reviewing actuarial methods and assumptions seems to have been the very reason for including the presumption in the statute. The Senate Committee Report states that "[t]he [Senate] Committee [on Labor and Human Resources] includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer--tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Committee Print 20-21.

IV

Concrete Pipe argues next that, as applied, the MPPAA violates substantive due process and takes Concrete Pipe's property without just compensation, both in violation of the Fifth Amendment. As to these issues, our decisions in *Gray* and *Connolly* provide the principal guidance.

A

In *Gray* we upheld the MPPAA against substantive due process challenge. Unlike the employer in *Gray,* Concrete Pipe here has no complaint that the MPPAA has been retroactively applied by predicating liability on a withdrawal decision made before passage of the statute. To be sure, since there would be no withdrawal liability without prewithdrawal contributions to the Plan, some of which were made before the statutory enactment, some of the conduct upon which Concrete Pipe's liability rests ante**2287 dates the statute. But this fact presents a far weaker premise for claiming a substantive due process violation even than the *Gray* employer raised, and rejection of Concrete Pipe's contention is compelled by our decisions not only in *Gray,* but in *Usery v. Turner Elkhorn Mining Co.,*

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428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), upon which the *Gray* Court relied.

***637** " 'It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726 [83 S.Ct. 1028, 10 L.Ed.2d 93] (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-488 [75 S.Ct. 461, 464, 99 L.Ed. 563] (1955).

. . . . .

" '[I]t may be that the liability imposed by the Act ... was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming v. Rhodes,* 331 U.S. 100 [67 S.Ct. 1140, 91 L.Ed. 1368] (1947); *Carpenter v. Wabash R. Co.,* 309 U.S. 23 [60 S.Ct. 416, 84 L.Ed. 558] (1940); *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240 [55 S.Ct. 407, 79 L.Ed. 885] (1935); *Home Bldg. & Loan Assn. v. Blaisdell,* 290 U.S. 398 [54 S.Ct. 231, 78 L.Ed. 413] (1934); *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467 [31 S.Ct. 265, 55 L.Ed. 297] (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter v. United States,* 334 U.S. 742 [68 S.Ct. 1294, 92 L.Ed. 1694] (1948); *Welch v. Henry,* 305 U.S. 134 [59 S.Ct. 121, 83 L.Ed. 87] (1938); *Funkhouser v. Preston Co.,* 290 U.S. 163 [54 S.Ct. 134, 78 L.Ed. 243] (1933).' " *Gray,* 467 U.S., at 729-730, 104 S.Ct., at 2718, quoting *Turner Elkhorn, supra,* 428 U.S., at 15-16, 96 S.Ct., at 2892 (footnotes omitted).

To avoid this reasoning, Concrete Pipe relies not merely on a claim of retroactivity, but on one of irrationality. Since the company contributed to the plan for only 3 1/2 years, it argues, none of its employees had earned vested benefits through employment by Concrete Pipe at the time of its withdrawal. See Brief for Petitioner 28. Concrete Pipe argues that, consequently, no rational relationship exists between its payment of past contributions and the imposition of liability for a share of the unfunded vested benefits.

But this argument simply ignores the nature of multiemployer plans, which, as we have said above, operate by ***638** pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone. Thus, Concrete Pipe's presupposition that none of its employees had vested benefits at the time of its withdrawal may be wrong. An employee whose benefits had vested before coming to work for Concrete Pipe may have earned additional vested benefits by the subsequent covered service. Another may have had sufficient prior service credit to obtain vesting of benefits during employment at Concrete Pipe. A third may have attained vesting while working for other employers but based in part on service credits earned at Concrete Pipe.

But even if Concrete Pipe is correct and none of its employees had earned enough service credits for entitlement to vested benefits by the time of Concrete Pipe's withdrawal, as a Concrete Pipe employee each had earned service credits that could be built upon in future employment with any other participating employer. In determining whether the imposition of withdrawal liability is rational, then, the relevant question is not whether a withdrawing employer's employees have vested benefits, but whether an employer has contributed to the plan's probable liability by providing employees with service credits. When the withdrawing employer's ****2288** liability to the plan is based on the proportion of the plan's contributions (and coincident service credits) provided by the employer during the employer's participation in the plan, the imposition of withdrawal liability is clearly rational.

[26][27] It is true that, depending on the future employment of Concrete Pipe's former employees, the withdrawal liability assessed against Concrete Pipe may amount to more (or less) than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe. But this possibility was exactly what Concrete Pipe accepted when it joined the Plan. A multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements ***639** and obtain an entitlement to benefits. A rational employer hopes that its employees will vest at a rate above the average for all employees of contributing

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employers, and that, in this way, it will pay less than it would have by creating a single-employer plan. But the rational employer also appreciates the foreseeable risk that circumstances may produce the opposite result. [FN21] Since the MPPAA spreads the unfunded vested liability among employers in approximately the same manner that the cost would have been spread if all of the employers participating at the time of withdrawal had seen the venture through, the withdrawal liability is consistent with the risks assumed on joining a plan (however inconsistent that liability may be with the employer's hopes). In any event, under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means. See *Turner Elkhorn,* 428 U.S., at 19, 96 S.Ct., at 2894.

FN21. An employer's calculation whether to join a plan will include these factors as well as a determination of the other benefits it can hope to receive from its participation in the plan. See *supra,* at 2271.

Concrete Pipe's substantive due process claim is not enhanced by its argument that the MPPAA imposes obligations upon it contrary to limitations on liability variously contained in the 1962 Trust Agreement, [FN22] in a collective-***640** bargaining agreement between the Laborers and multiemployer associations (the "1977-1980 Laborer's Craft Master Labor Agreement") [FN23] and in an appendix to the "Southern California Master Labor Agreements in 1977-1980." [FN24] Even assuming that ****2289** all these provisions apply to Concrete Pipe, [FN25] its argument runs against the holding in *Gray* that federal economic legislation, which is not subject to constraintscoextensive ***641** with those imposed upon the States by the Contract Clause of Art. I, § 10, of the Federal Constitution, *Gray,* 467 U.S., at 733, 104 S.Ct., at 2719; *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 17, n. 13, 97 S.Ct. 1505, 1515, n. 13, 52 L.Ed.2d 92 (1977), is subject to due process review only for rationality, which, as we have said, is satisfied in theapplication of the MPPAA to Concrete Pipe.

FN22. The 1962 Trust Agreement states:
" 'Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.
" 'Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.' " App. 80-81, ¶ 32.

FN23. Article X, § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement provides:
" 'The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by Law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.' " *Id.,* at 82, ¶ 34.

FN24. Appendix K to the Southern California Master Labor Agreements in 1977-1980 states:
" 'IMPORTANT.

PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYERS'S SOLE OBLIGATION IS TO MAKE THE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.' " *Id.,* at 81-82, ¶ 33.

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FN25. The Plan contends that the record does not reflect that the appendix mentioned in the text was incorporated by reference into Concrete Pipe's own collective-bargaining agreement. See Brief for Respondent 10, n. 7.

Nor does the possibility that trustee decisions made "before [Concrete Pipe] entered [the Plan]" may have led to the unfunded liability alter the constitutional calculus. See Brief for Petitioner 31. Concrete Pipe's decision to enter the Plan after any such decisions were made was voluntary, and Concrete Pipe could at that time have assessed any implications for the Plan's future liability. Similarly, Concrete Pipe cannot rely on any argument based on the fact that, because it was not a member of any of the contractors' associations represented among the Plan's trustees, it had no control over decisions of the trustees after it entered the Plan that may have increased the unfunded liability. Again, Concrete Pipe could have assessed the implications for future liability of the identity of the trustees of the Plan before it decided to enter. [FN26] The imposition of withdrawal liability here is rationally related to the terms of Concrete Pipe's participation in the Plan it joined and that suffices for substantive due process scrutiny of this economic legislation.

FN26. Even if Concrete Pipe were represented, its representative, like all the trustees, would be bound to act consistently with the fiduciary duty owed by trustees to covered employees and beneficiaries of the plan. See 29 U.S.C. § 1104(a)(1).

B

[28] Given that Concrete Pipe's due process arguments are unavailing, "it would be surprising indeed to discover" the challenged statute nonetheless violating the Takings Clause. *Connolly,* 475 U.S., at 223, 106 S.Ct., at 1025. Nor is there any violation. Following the analysis in *Connolly,* we begin with the contractual provisions relied upon from the Trust Agreement and ***642** the collective-bargaining agreements, which we find no more helpful to Concrete Pipe than those adduced in the facial challenge brought in *Connolly,* as described in that opinion:

"By the express terms of the Trust Agreement and the Plan, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan." *Id.,* at 218, 106 S.Ct., at 1022 (citations and footnotes omitted).

Indeed, one provision of the Trust Agreement on which Concrete Pipe primarily relies is substantially identical to the one at issue in *Connolly.* Compare n. 22, *supra,* with *Connolly, supra,* at 218, n. 2, 106 S.Ct., at 1022, n. 2.

We said in *Connolly* that

****2290** "[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. 'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.'

"Ifthe regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U.S., at 223-224, 106 S.Ct., at 1025 (citations omitted).

***643** Nothing has changed since these words were first written. [FN27]

FN27. To the extent that Concrete Pipe's argument could be characterized as a challenge to the determination that, notwithstanding the contractual language, it is a "defined benefits plan" under the statute, this is a question on which Concrete Pipe did not seek review. See *supra,* at 2271.

Following *Connolly,* the next step in our analysis is to subject the operative facts, including the facts of the contractual relationship, to the standards derived from our prior Takings Clause cases. See *id.,* at 224- 225, 106 S.Ct., at 1026. They have identified three factors with particular significance for assessing the results of the required "ad hoc, factual inquir [y] into the circumstances of each particular case." *Id.,* at 224, 106 S.Ct., at 1026. The first is the nature of the governmental action. Again, our

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analysis in *Connolly* applies with equal force to the facts before us today.

> "[T]he Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.,* at 225, 106 S.Ct., at 1026.

[29] We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2890-2892, 120 L.Ed.2d 798 (1992). While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," Brief for Petitioner ***644** 37, we rejected this analysis years ago in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' ") (citation omitted).

****2291** [30] There is no more merit in Concrete Pipe's contention that its property is impermissibly taken "for the sole purpose of protecting the PBGC [a government body] from being forced to honor its pension insurance." Brief for Petitioner 38; see also Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 12. That the solvency of a pension trust fund may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of plan failure, is merely incidental to the primary congressional objective of protecting covered employees and beneficiaries of pension trusts like the Plan. "[H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly, supra,* 475 U.S., at 224, 106 S.Ct. at 1025-1026.

Nor is Concrete Pipe's argument about the character of the governmental action strengthened by the fact that Concrete Pipe lacked control over investment and benefit decisions that may have increased the size of the unfunded vested liability. The response to the same argument raised ***645** under the substantive Due Process Clause is appropriate here: although Concrete Pipe is not itself a member of any of the management associations that are represented among the trustees of the fund, Concrete Pipe voluntarily chose to participate in the Plan, notwithstanding this fact. See *supra,* at 2289, and n. 26.

[31] As to the second factor bearing on the taking determination, the severity of the economic impact of the Plan, Concrete Pipe has not shown its withdrawal liability here to be "out of proportion to its experience with the plan," 475 U.S., at 226, 106 S.Ct., at 1026, notwithstanding the claim that it will be required to pay out 46% of shareholder equity. As a threshold matter, the Plan contests this figure, arguing that Concrete Pipe, a wholly owned subsidiary of Concrete Pipe & Products Co., Inc., was simply "formed to facilitate the purchase ... of certain assets of Cen-Vi-Ro," Brief for Respondent 2, and that the relevant issue turns on the diminution of net worth of the parent company, not Concrete Pipe. See Tr. of Oral Arg. 29. But this dispute need not be resolved, for even assuming that Concrete Pipe has used the appropriate measure in determining the portion of net worth required to be paid out, our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.

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See, *e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915) (92.5% diminution).

[32] The final factor is the degree of interference with Concrete Pipe's "reasonable investment-backed expectations." 475 U.S., at 226, 106 S.Ct., at 1027. Again, *Connolly* controls. At the time Concrete Pipe purchased Cen-Vi-Ro and began its contributions to the Plan, pension plans had long been subject to federal regulation, and " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' *FHA v. The Darlington, Inc.,* 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). See ***646** also *Usery v. Turner Elkhorn Mining Co.,* 428 U.S., at 15-16, 96 S.Ct., at 2892 and cases cited therein." *Id.,* 475 U.S., at 227, 106 S.Ct., at 1027. Indeed, at that time the Plan was already subject to ERISA, and a withdrawing employer faced contingent liability up to 30% of its net worth. See 29 U.S.C. § 1364 (1976 ed.); see also 29 U.S.C. § 1362(b) (1976 ed.); *Connolly, supra,* at 226-227, 106 S.Ct., at 1027; *Gray,* 467 U.S., at 721, 104 S.Ct., at 2713. Thus while Concrete Pipe argues that requiring it to pay a share of promised benefits "ignores express and bargained-for conditions on [its contractual] promises," *Connolly,* 475 U.S., at 235, 106 S.Ct., at 1031 (O'CONNOR, J., concurring), it could have had no reasonable expectation that it would not be faced with liability ****2292** for promised benefits. *Id.,* at 227, 106 S.Ct., at 1027 (opinion of the Court). Because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts," *Turner Elkhorn,* 428 U.S., at 16, 96 S.Ct., at 2983, Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, [FN28] there being no reasonable basis to expect that the legislative ceiling would never be lifted. [FN29]

FN28. See Brief for Petitioner 36-37 ("The ERISA contingent liabilities were substantially different in scope from the liabilities of MPPAA so that [Concrete Pipe] had no reasonable notice that 46% of its net worth would be seized").

Justice O'CONNOR does not join the statement to which this footnote is attached.

FN29. Nor do the contractual provisions on which Concrete Pipe would rely provide the support it seeks. Indeed, one such provision, Article X, § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement, provides that liability will be limited to contributions specific in collective-bargaining agreements "if permitted by law under ERISA." App. 82, ¶ 34.

"The employe[r] in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA." *Connolly, supra,* 475 U.S., at 227, 106 S.Ct., at 1027. In light of the relationship between Concrete Pipe and the Plan, we find no basis to conclude that Concrete Pipe is ***647** being forced to bear a burden "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

V

Having concluded that the statutory presumptions work no deprivation of procedural due process, and that the statute, as applied to Concrete Pipe, violates no substantive constraint of the Fifth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice O'CONNOR, concurring.

I join all of the Court's opinion, except for the statement that petitioner cannot "rel[y] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante,* at 2292. The Court's reasoning is generally consistent with my own views about retroactive withdrawal liability, which I explained in *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 228-236, 106 S.Ct. 1018, 1027-1032, 89 L.Ed.2d 166 (1986) (concurring opinion), and which I need not restate at length here. In essence, my position is that the "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Id.,* at 229, 106 S.Ct., at 1027.

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The Court does not hold otherwise. Rather, it reasons that, although "the withdrawal liability assessed against Concrete Pipe may amount to more ... than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe," this possibility "was exactly what Concrete Pipe accepted when it joined the Plan." *Ante,* at 2288. I agree that a withdrawing employer can be held responsible for its statutory "share" of unfunded vested benefits if the employer should have anticipated the prospect of withdrawal liability when it joined the plan. In such a ***648** case, the "basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility" would be the very act of joining the plan.

I am not sure that petitioner did in fact "accept" the prospect of withdrawal liability when it joined the Construction Laborers ****2293** Pension Trust (Plan) in 1976. As of that date, Congress had not yet promulgated the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA); the kind of "withdrawal liability" imposed on petitioner did not yet exist. Although the Employee Retirement Income Security Act of 1974 (ERISA) was in effect, and did create a contingent liability for the employer that withdrew from a multiemployer defined benefit plan, such liability was limited to 30% of the employer's net worth. See 29 U.S.C. §§ 1364, 1362(b)(2) (1976 ed.). Petitioner's withdrawal liability under the MPPAA amounts to *46%* of its net worth. See *ante,* at 2291. In addition, the Plan apparently is a hybrid "Taft-Hartley" plan, which provides for fixed employee benefits *and* fixed employer contributions. It remains an open question whether hybrid Taft- Hartley plans are indeed "defined benefit" rather than "defined contribution" plans, and therefore subject to withdrawal liability. See *Connolly, supra,* at 230, 232-235, 106 S.Ct., at 1028-1029, 1029-1035 (O'CONNOR, J., concurring). We do not decide that question today. See *ante,* at 2271, 2290, n. 27.

But petitioner has not argued that its withdrawal liability, even if otherwise permissible, cannot exceed the 30% cap that was in effect in 1976. Nor has petitioner claimed that the Plan is a defined contribution plan. In short, petitioner has failed to adduce the two features of this case that might have demonstrated why it did not "accept" the prospect of full withdrawal liability when it joined the Plan. I therefore agree with the Court's result as well as most of its reasoning.

I cannot, however, agree that petitioner is precluded from "rely[ing] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante,* at 2292. The Court seizes ***649** upon a passing reference in petitioner's brief, see *ante,* at 2292, n. 28, to justify issuing this unnecessary statement about a difficult issue that the parties essentially have ignored. I would not decide without adversary briefing and argument whether ERISA's 30% cap might prevent retroactive withdrawal liability above 30% of the employer's net worth for an employer that joined a multiemployer plan after the passage of ERISA but before the passage of the MPPAA. I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." *Ante,* at 2291. Surely the employer that joined a multiemployer plan before *ERISA* had been promulgated--before Congress had made employers liable for unfunded benefits--might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here--again, petitioner joined the Plan *after* the passage of ERISA--and the Court does not address it. It remains to be resolved in a future case.

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

I join all of the Court's opinion except Part III-B-1--the portion of the opinion in which the Court grapples with the trustee presumption in 29 U.S.C. § 1401(a)(3)(A). The Court finds the presumption "incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor." *Ante,* at 2281. And because, in the Court's view, "there would be a substantial question of procedural fairness under the Due Process Clause" if employers had to show that sponsors' findings were unreasonable or clearly erroneous, *ante,* at 2281, the Court proceeds to interpret the statute as if it required an unconstrained evidentiary hearing into "any factual issue" concerning the employer's withdrawal liability, *ante,* at 2283.

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***650** Until today, § 1401(a)(3)(A) provided:

"For purposes of any [arbitration] proceeding under this section, any determination made by a plan sponsor under sections **2294 1381 through 1399 of this title and section 1405 of this title *is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.*" (Emphasis added.)

Now the statute provides, in effect, that "any factual determination made by a plan sponsor shall be rejected by the arbitrator if the party contesting the determination shows by a preponderance of the evidence that the determination was erroneous." There is no meaningful presumption of correctness and no examination for reasonableness or clear error. I decline to participate in this redrafting of a federal law.

As I see it, there are three missteps in the analysis. First, the Court believes the statutory text is "incomprehensib[le]," *ante,* at 2281, because it refers to three different, and mutually inconsistent, "degree[s] of certainty," *ante,* at 2279, or of "probability," *ante,* at 2281. This is incorrect--in large part because the Court overlooks the grammatical structure of the statute. Section 1401(a)(3)(A) sets up no parallelism between the phrase "by a preponderance of the evidence," which establishes the standard of proof for the arbitration proceeding, and the critical terms "unreasonable" and "clearly erroneous." "*[B]y* a preponderance of the evidence" (emphasis added) is an adverbial phrase that modifies the "show[ing]" required of the employer. "Unreasonable" and "clearly erroneous," on the other hand, are predicate adjectives used to describe what it is the employer must show.

The incoherence identified by the Court follows from the assumption that Congress has "confus[ed]" burdens of proof with standards of review. *Ante,* at 2280. The Court believes that the terms "clearly erroneous" and "unreasonable" must signify standards of review. *Ante,* at 2279-2280. Standards of proof and standards of review are entirely unrelated ***651** concepts (as the Court intimates, see *ante,* at 2279-2281). The Court's reading leads to the conclusion that § 1401(a)(3)(A) is "meaningless," *ante,* at 2280, because the statute (as so interpreted) "defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched," *ante,* at 2280. [FN*]

FN* Regrettably, the Court compounds and further muddles the textual difficulty by suggesting that in some sense, "preponderance of the evidence," "unreasonable," and "clearly erroneous" are comparable--that they all refer to relative "degree[s] of certainty." *Ante,* at 2279. There is, in fact, no basis for comparing any particular standard of proof with any particular standard of review. An appellate tribunal could be required to determine whether it was "clearly erroneous" to find a disputed fact "by a preponderance of the evidence," or it could ask whether any "reasonable" factfinder could have found "probable cause" to believe, or "clear and convincing evidence" supporting, the fact in question. See, *e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) ("If the defendant in a ... civil case moves for summary judgment or for a directed verdict ..., [the inquiry is] whether *reasonable jurors* could find *by a preponderance of the evidence* that the plaintiff is entitled to a verdict") (emphasis added); *Jackson v. Virginia,* 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction ... is whether [a] *rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*") (emphasis added). Any combination of evidentiary and review standards is possible.

The Court's preoccupation with standards of review is understandable, at least with respect to "clearly erroneous," a term with an established legal usage. See *Anderson v. Bessemer City,* 470 U.S. 564, 573-575, 105 S.Ct. 1504, 1511- 1512, 84 L.Ed.2d 518 (1985); Fed.Rule Civ.Proc. 52(a). But such a reading is not compelled. As used in this statutory provision, "unreasonable" and "clearly erroneous" cannot signify standards applicable to the review of prior findings, since the arbitrator himself is undeniably a factfinder, not an appellate tribunal. See § 1401(c) (establishing a presumption of correctness for "the findings of fact made by the arbitrator"). That the arbitrator is to undertake his examination "by a preponderance of the evidence" explicitly establishes his role as factfinder; **2295 appellate review ***652* does not occur "by" a taking of "evidence." The Court sees the arbitrator as a "hybrid," who acts as both a trier of fact and a reviewer of facts found. *Ante,* at 2279-2280. But the presumption of correctness that applies to the

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plan sponsor's determinations does not make the arbitrator a "reviewing body," *ante,* at 2280, any more than the presumption of innocence in a criminal trial renders the jury a reviewer, rather than a trier, of fact.

The way out of the conundrum is apparent. The terms "unreasonable" and "clearly erroneous" must refer to what are, in effect, *elements* of the employer's claim in the arbitration proceeding. To prevail in its action before the arbitrator, in other words, the employer must show by a preponderance of the evidence, first, that the plan sponsor has made a determination under one of the relevant provisions and, second, that that determination was either unreasonable or clearly erroneous. This construction requires us to put aside the technical definition of "clearly erroneous" and focus on the literal meaning of the phrase. "Clear" error can simply mean an obvious, plain, gross, significant, or manifest error or miscalculation. See Black's Law Dictionary 250 (6th ed. 1990). That may not be the most natural reading (for a court, that is) of this legal term of art, but if we do not drop the assumption that "clearly erroneous" must be a reference to the *Bessemer City* standard of review, we cannot avoid the incoherence that has trapped the majority. The term "unreasonable," of course, is even more readily construed to refer to something other than a standard of review, since it can hardly be thought to have a sharply defined meaning that is limited to the context of appellate review. There is, for example, nothing unusual about requiring a party to show as an element of a substantive claim that something--an interstate carrier's filed rate, for example, see *Reiter v. Cooper,* 507 U.S. 258, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993)--is "unreasonable." Section 1401(a)(3)(A) is thus susceptible of a reading that gives it a coherent meaning.

***653** This interpretation also conforms neatly with the very similar language and structure of the actuarial presumption in § 1401(a)(3)(B), which the Court today finds unproblematic. See *ante,* at 2284-2286. That presumption provides that the actuary's determination of unfunded vested benefits will be presumed correct unless the employer shows "by a preponderance of the evidence" that the actuarial assumptions and methods were "unreasonable" or that the actuary made a "significant error." The Court offers no persuasive explanation as to why this presumption does not suffer from the same incoherence. In addition, my reading of the term "clearly erroneous" in § 1401(a)(3)(A) renders it virtually indistinguishable from the term "significant error" in § 1401(a)(3)(B).

The second false step in the Court's analysis is the use of the rule of construction applied in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397- 1398, 99 L.Ed.2d 645 (1988). *Ante,* at 2282-2283. This rule, which requires a court to adopt a reasonable alternative interpretation of a statute when necessary to avoid serious constitutional problems, does not provide authority to construe the statute in a way that "is plainly contrary to the intent of Congress." *DeBartolo, supra,* at 575, 108 S.Ct., at 1397. The rule "cannot be stretched beyond the point at which [the alternative] construction remains '*fairly* possible.' " *Public Citizen v. Department of Justice,* 491 U.S. 440, 481, 109 S.Ct. 2558, 2580, 105 L.Ed.2d 377 (1989) (KENNEDY, J., concurring in judgment) (emphasis in original) (quoting *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)). "And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it." *Public Citizen, supra,* 491 U.S., at 481, 109 ****2296** S.Ct., at 2580. Here it is plain, in my view, that Congress intended to shield the plan sponsor's factual determinations behind a presumption of correctness and intended that withdrawing employers would have to show something more than simple error. The ***654** Court's construction is plainly contrary to this intent and is not "fairly possible" under the terms of the statute. Rather than a reasonable alternative reading, therefore, the interpretation adopted by the Court today is effectively a declaration that the statute as written is unconstitutional.

Which leads to my final, and perhaps most fundamental, disagreement with the Court. Before a court can appropriately invoke the *Crowell/ DeBartolo* rule of construction, it must have a significantly higher degree of confidence that the statutory provision would be unconstitutional should the problematic interpretation be adopted. The potential due process problem troubling the Court is the supposed lack of a neutral or "impartial"

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arbitration hearing. *Ante,* at 2281. This potential is based on an "assumption" about a "risk" or "possibility" of trustee bias, *ante,* at 2276, 2277--bias that, if it existed, might be "preserve[d]" during the arbitration proceeding by the presumption of correctness. *Ante,* at 2278. Petitioner has not established that the trustees were biased in fact. And whatever structural bias may flow from the trustees' fiduciary obligations or from the fact that the trustees are appointed by interested parties, see *ante,* at 2276-2277, will likely be nullified by the elaborately detailed criteria that channel and cabin their exercise of discretion. See 29 U.S.C. §§ 1381 -1399 (1988 ed. and Supp. III). Such bias may be checked, in particular, by the requirement of consistency that governs the trustees' choice of a method for calculating liability. See *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.,* 762 F.2d 1137, 1142 (CA1 1985) (en banc). And the very fiduciary duty the trustees owe to the fund should simultaneously prevent them from imposing excessive withdrawal liability that will discourage other employers from joining the fund in the future. *Id.,* at 1142-1143. The Court does not consider these countervailing forces.

But even if there is a real risk that structural bias may distort the trustees' factual determinations, I am inclined ***655** to believe that the arbitration proceeding--presumption and all--provides adequate process for the employer. Cf. *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976) (adequacy of specific procedures involves consideration of private and public interests and risk of erroneous deprivation). This conclusion rests principally on the nature of the particular statutory determinations to which the presumption applies (those described in §§ 1381-1399 and 1405). Many of these determinations, such as the mathematical computations the trustees must perform under §§ 1386, 1388, and 1391, involve little or no discretion. As a result, the employer will have correspondingly little difficulty proving the existence of any significant error made by the trustees (either inadvertently or because of bias). The same can be said of withdrawal-date determinations under §§ 1381 and 1383, especially where all the information relevant to the determination is better known to the employer than to the trustees.

To me, the public interest is plain on the face of the statute: Congress did not want withdrawing employers to avoid their obligations by engaging in a lengthy arbitration over relatively insignificant errors. At the same time, the employer's interest in correcting miscalculations that are significant is adequately protected by the opportunity for arbitration afforded by § 1401.

For these reasons, I concur only in the Court's judgment that the application of § 1401(a)(3)(A) "did not deprive Concrete Pipe of its right to procedural due process." *Ante,* at 2283-2284.

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Tab 4

Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION
v.
R.A. GRAY & COMPANY.
OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND
v.
R.A. GRAY & COMPANY.

Nos. 83-245, 83-291.

Argued April 16, 1984.
Decided June 18, 1984.

The United States District Court for the District of Oregon, 549 F.Supp. 531, held that the Multiemployer Pension Plan Amendments Act was constitutional. The Court of Appeals, 705 F.2d 1502, reversed, and probable jurisdiction was noted, 104 S.Ct. 271. The Supreme Court, Justice Brennan, held that in view of congressional purpose in utilizing retroactive application of the statutes, i.e., to prevent employers from taking advantage of lengthy legislative process and withdrawing while Congress debated revisions, application of the withdrawal liability provisions to employers withdrawing from pension plans during the five-month period prior to the statute's enactment did not violate due process clause of the Fifth Amendment, such purpose being a rational legislative purpose.

Judgment of Court of Appeals reversed, and cases remanded.

West Headnotes

[1] Pensions ⚿66.1
296k66.1 Most Cited Cases
(Formerly 296k66, 255k78.1(1), 255k78.1(9))

Among principal purposes of Employee Retirement Income Security Act was to insure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of pension plans before sufficient funds have been accumulated in the plans, so as to guarantee that worker who has been promised defined pension benefit upon retirement and has fulfilled whatever conditions are required to obtain vested benefit will actually receive it. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

[2] Pensions ⚿23
296k23 Most Cited Cases
(Formerly 232Ak131.1)

In legislating to protect pension plans from adverse consequences when individual employers terminate their participation in, or withdraw from, multiemployer plans, Congress provided retroactive effective date for withdrawal liability so as to prevent employers from avoiding adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered by Congress, and effective date was later advanced from February 27, 1979 to April 29, 1980 because, while legislation was being considered, such original purpose of retroactive effective date had been achieved. Employee Retirement Income Security Act of 1974, §§ 4001-4082, 4062(b)(2), 4082(a, b), (c)(1-4), as amended, 29 U.S.C.A. §§ 1301-1381, 1362(b)(2), 1381(a, b), (c)(1-4).

[3] Labor Relations ⚿436
232Ak436 Most Cited Cases

By accepting certain findings of pension plan, employer waived right to arbitration. Employee Retirement Income Security Act of 1974, § 4221(a), as amended, 29 U.S.C.A. § 1401(a).

[4] Constitutional Law ⚿48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))

Legislative acts adjusting burdens and benefits of economic life come to court with presumption of constitutionality, and burden is on one complaining of due process violation to establish that legislature acted in arbitrary and irrational way, and the strong deference accorded legislation in field of national economic policy is no less applicable when the legislation is applied retroactively. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381; Federal Coal Mine Health

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and Safety Act of 1969, §§ 2 et seq., 402 et seq., as amended, 30 U.S.C.A. §§ 801 et seq., 901 et seq.

[5] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

Although retroactive aspects of legislation, as well as prospective aspects, must meet test of due process, and justifications for the latter may not suffice for the former, such burden is met simply by showing that retroactive application of the legislation is itself justified by rational legislative purpose. U.S.C.A. Const.Amends. 5, 6, 14; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

[6] Constitutional Law ⚖275(5)
92k275(5) Most Cited Cases

[6] Pensions ⚖23
296k23 Most Cited Cases
(Formerly 232Ak83.1, 232Ak83)

In view of congressional purpose in utilizing retroactive application of the statutes, i.e., to prevent employers from taking advantage of lengthy legislative process and withdrawing while Congress debated revisions, application of withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during five-month period prior to the statute's enactment did not violate due process clause of the Fifth Amendment, such purpose being a rational legislative purpose. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, 4001(a)(3), 4203(b), 4211, 4219(b)(2), 4402(e), as amended, 29 U.S.C.A. §§ 1001-1381, 1301(a)(3), 1383(b), 1391, 1399(b)(2), 1461(e); 28 U.S.C.A. § 1252.

[7] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

Enactment of retroactive statutes confined to short and limited periods required by practicalities of producing national legislation is customary congressional practice, which courts are loathe to reject when conducting limited judicial review accorded economic legislation under the Fifth Amendment's due process clause. U.S.C.A. Const.Amend. 5.

[8] Constitutional Law ⚖113
92k113 Most Cited Cases

Contract clause does not apply, either by its own terms or by convincing historical evidence, to actions of the national government. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[9] Constitutional Law ⚖252.5
92k252.5 Most Cited Cases

Principles embodied in the Fifth Amendment's due process clause have not been held coextensive with prohibitions existing against state impairments of preexisting contracts, and the standards imposed on economic legislation by the due process clauses are less searching. U.S.C.A. Const. Art. 1, § 10, cl. 1; Amends. 5, 14.

[10] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

Although retrospective civil legislation may offend due process if it is particularly harsh and oppressive, such standard does not differ from prohibition against arbitrary and irrational legislation. U.S.C.A. Const.Amends. 5, 14.

[11] Pensions ⚖103
296k103 Most Cited Cases
(Formerly 232Ak131.6)

Multiemployer Pension Plan Amendments Act of 1980 merely requires withdrawing employer to compensate pension plan for benefits that have already vested with employees at time of employer's withdrawal. Employment Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Employee Retirement Income Security Act (ERISA), enacted in 1974, created a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly

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owned Government corporation, collects insurance premiums from covered private retirement pension plans and provides benefits to participants if their plan terminates with insufficient assets to support its guaranteed benefits. For multiemployer pension plans, the PBGC's payment of guaranteed benefits was not to become mandatory until January 1, 1978. During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of such plans. If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to PBGC in amounts proportional to their share of the plan's contributions during that period. As the mandatory coverage date approached, Congress became concerned that a significant number of multiemployer pension plans were experiencing extreme financial hardship that would result in termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. Ultimately, after deferring the mandatory coverage until August 1, 1980, and extensively debating the issue of withdrawal liability in 1979 and 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), requiring an employer withdrawing from a multiemployer ****2712** pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." These withdrawal liability provisions were made to take effect approximately five months before the statute was enacted into law. When appellee building and construction firm, within this 5- month period, withdrew from a multiemployer pension plan that it had been contributing to under collective-bargaining agreements with a labor union, the pension plan notified appellee that it had incurred a withdrawal liability and demanded ***718** payment. Appellee then filed suit in Federal District Court, seeking declaratory and injunctive relief against the pension plan and the PBGC and claiming, inter alia, that the retroactive application of the MPPAA violated the Due Process Clause of the Fifth Amendment. The District Court rejected this claim and granted summary judgment in favor of the pension plan and the PBGC. The Court of Appeals reversed, holding that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA and because the equities generally favored appellee over the pension plan.

Held: Application of the withdrawal liability provisions of the MPPAA during the 5-month period prior to the statute's enactment does not violate the Due Process Clause of the Fifth Amendment. Pp. 2717-2720.

(a) The burden of showing that retroactive legislation complies with due process is met by showing that retroactive application of the legislation is justified by a rational legislative purpose. Here, it was rational for Congress toconclude that the MPPAA's purposes could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems that Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer pension plans, and Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of the lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Pp. 2717-2719.

(b) It is doubtful that retroactive application of the MPPAA would be invalid under the Due Process Clause even if it was suddenly enacted without any period of deliberate consideration. But even assuming that advance notice of retroactive legislation is constitutionally compelled, employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA impose contingent liability, but the various legislative proposals debated by Congress before the MPPAA was enacted uniformly included retroactive effective dates. P. 2719.

(c) The principles embodied in the Fifth Amendment's Due Process Clause have never been held coextensive with prohibitions existing against state impairments of pre-existing contracts. Rather, the limitations imposed on States by the Contract Clause have been contrasted with the less searching standards imposed on economic legislation by the Due Process Clauses. Pp. 2719- 2720.

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***719** (d) Unlike the statute invalidated in Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, which required employers to finance pensions for former employees who had already been fully compensated while employed, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal. P. 2720.

705 F.2d 1502, reversed and remanded.

Baruch A. Fellner argued the cause for appellants in both cases. With him on the briefs for appellant in No. 83-245 were *Henry Rose, Mitchell L. Strickler, J. Stephen Caflisch, Peter H. Gould, David F. Power, Nathan Lewin,* and *Seth P. Waxman. William B. Crow, James N. Westwood, William H. Walters,* and *David S. Paull* filed briefs for appellant in No. 83-291.

***2713** *Thomas M. Triplett* argued the cause and filed a brief for appellee. < < dagger > > > > >

< <dagger> > *Gerald M. Feder* filed a brief for the National Coordinating Committee for Multiemployer Plans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for G & R Roofing Co. by *Michael E. Merrill, Stephen J. Schultz,* and *Mark T. Bennett;* for the National Association of Wholesaler-Distributors by *Harold T. Half-penny;* for the National Association of Manufacturers by *Chester W. Nosal, John R. Keys, Jr., Jan S. Amundson,* and *Quentin Riegel;* for the National-American Wholesale Grocers' Association by *William H. Borghesani, Jr.,* and *Peter A. Susser;* for the National Steel Service Center, Inc., by *Ralph T. DeStefano* and *Richard R. Riese;* for Republic Industries, Inc., by *Philip B. Kurland, Christopher G. Walsh, Jr., Lester M. Bridgeman,* and *Louis T. Urbanczyk;* for Sibley, Lindsay & Curr Co. by *William L. Dorr;* and for Transport Motor Express, Inc., et al. by *Harris Weinstein.*

Jack L. Whitacre and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

***2713** Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether application of the withdrawal liability provisions of the Multiemployer ***720** Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a 5-month period prior to the statute's enactment violates the Due Process Clause of the Fifth Amendment. We hold that it does not.

I

A

[1] In 1974, after careful study of private retirement pension plans, Congress enacted the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U.S.C. § 1001 et seq. Among the principal purposes of this "comprehensive and reticulated statute" was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-362, 374-375, 100 S.Ct. 1723, 1726, 1732-1733, 64 L.Ed.2d 354 (1980). See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510-511, 101 S.Ct. 1895, 1899-1900, 68 L.Ed.2d 402 (1981). Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it." Nachman, supra, 446 U.S., at 375, 100 S.Ct., at 1733; Alessi, supra, 451 U.S., at 510, 101 S.Ct., at 1899.

Toward this end, Title IV of ERISA, 29 U.S.C. § 1301 et seq., created a plan termination insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation within the Department of Labor, § 1302. The PBGC collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits. See §§ 1322, 1361. For pension plans maintained by single employers, the PBGC's obligation to pay benefits took effect immediately upon enactment of ERISA in 1974. §§ 1381(a)-(b). For multiemployer pension plans, however, the payment of guaranteed benefits by the PBGC was

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not to become mandatory until January 1, 1978. § 1381(c)(1).

*721 During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of multiemployer pension plans. §§ 1381(c)(2)-(4). If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their share of the plan's contributions during that period. § 1364. In other words, any employer withdrawing from a multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits. In addition, any individual employer's liability was not to exceed 30% of the employer's net worth. § 1362(b)(2).

As the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. To avoid this potential collapse of the plan termination insurance program, Congress deferred mandatory insurance coverage for multiemployer plans for 18 months--until July 1, 1979--extending the PGBC's discretionary authority to insure plans terminating during the interim. Pub.L. 95-214, 91 **2714 Stat. 1501. [FN1] The PBGC was also directed to prepare a comprehensive report analyzing the problems faced by multiemployer plans and recommending appropriate legislative action. See S.Rep. No. 95-570, pp. 1-4 (1977), U.S.Code Cong. & Admin.News 1977, p. 4128; H.R.Rep. No. 95-706, p. 1 *722 (1977). In this way, Congress created "time to legislate, if necessary, before the mandatory coverage comes into effect." 123 Cong.Rec. 36800 (1977) (statement of Sen. Williams); id., at 36800- 36802.

FN1. The effective date for mandatory insurance coverage of multiemployer plans was subsequently deferred to May 1, 1980, Pub.L. 96- 24, 93 Stat. 70, to July 1, 1980, Pub.L. 96-239, 94 Stat. 341, and finally to August 1, 1980, Pub.L. 96-293, 94 Stat. 610. On each occasion, Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans. Ultimately, mandatory insurance coverage was superseded by the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364, 94 Stat. 1208.

The PBGC issued its report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978). Among its principal findings was that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans. As the report summarized:

"The basic problem with the withdrawal rules is that they are designed primarily to protect PBGC. They do not provide an efficient mechanism for reducing the burden of withdrawal on the plan and remaining employers. They may even encourage withdrawals in some instances (e.g., where termination may be imminent). Changes in the withdrawal rules should be considered:

"(1) to provide relief to plans without increasing the burden on the insurance system,

"(2) to provide a disincentive to voluntary employer withdrawals,

"(3) to reduce or remove disincentives to plan entry, and

"(4) to work with, instead of against, the termination liability provisions." Id., at 96-97. [FN2]

FN2. Congressional testimony by the Executive Director of the PBGC further explained the problems caused by employers withdrawing from multiemployer plans:

"A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage--or force--further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to

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continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind).

[2] *723 To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation. Id., at 97-114. [FN3] These tentative proposals were included in policy recommendations submitted to Congress on February 27, 1979, and were incorporated in proposed legislation that the Executive **2715 Branch formally sent to Congress three months later, S.1076, 96th Cong., 1st Sess. (1979). Most significantly for present purposes, the bill included an effective date for withdrawal liability of February 27, 1979--the date on which the PBGC had initially submitted its recommendations to Congress. Id., § 108. This date was chosen to prevent employers from avoiding the adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered by Congress. As one Senator noted, the retroactive effective date was designed "to prevent ... the withdrawal of these opportunistic employers without imposition of liability" and was to *724 serve "as a deterrent to hasty employer withdrawal." 126 Cong.Rec. 20234 (1980) (remarks of Sen. Matsunaga).

FN3. Again, the PBGC's Executive Director provided a more elaborate explanation:
"To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal....
"We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." Id., at 23 (statement of Matthew M. Lind).

Congress debated the issue of withdrawal liability for the remainder of 1979 and much of 1980. By April 1980, two Committees in the House and one in the Senate had approved substantially similar versions of the bill, each containing the February 27, 1979, effective date for withdrawal liability. The Senate Finance Committee had not yet completed its work on the bill, however, and sought more time for consideration of the legislation. See supra, at 3, and n. 1. At the same time, the Senate advanced the effective date for imposing withdrawal liability to April 29, 1980. As Senator Javits later explained:

"The committees decided in part to move up the date from February 27, 1979, the date contained in earlier versions of the bill, because the original purpose of a retroactive effective date--namely, to avoid encouragement of employer withdrawals while the bill was being considered--has been achieved. It should also be noted that the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date. I realize that permitting these employers to avoid liability only increases the burdens of those employers remaining with the plans in question, but it appears necessary to accept the April 29 date in order to enact the bill before the August 1 deadline for action." 126 Cong.Rec. 20179 (1980) (statement of Sen. Javits).

See also id., at 9236-9237 (statement of Sen. Bentsen).

The House unanimously passed its version of the bill, including the February 27, 1979, effective date, in May 1980. Id., at 12233. The Senate version, adopting an effective date of April 29, 1980, was endorsed by a vote of 85-1. Id., at 20247. The Conference Committee accepted the Senate's effective date, and the legislation was signed into law by *725 the President on September 26, 1980. Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), Pub.L. 96-364, 94 Stat. 1208. As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391. Pursuant to 29 U.S.C. § 1461(e), these withdrawal liability provisions took effect on April 29, 1980, approximately five months before the statute was enacted into law.

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B

Appellee R.A. Gray & Co. (Gray) is a building and construction firm doing business in Oregon. Under a series of collective-bargaining agreements with the Oregon State Council of Carpenters (Council), Gray contributed to the Oregon- Washington Carpenters-Employers Pension Trust Fund (Pension Plan), a multiemployer pension plan under 29 U.S.C. § 1301(a)(3). During February 1980, Gray advised the Council that it would be terminating their collective-bargaining agreement when it expired on June 1, 1980. Gray continued to engage in the building and construction industry, however, and therefore was deemed to have completely **2716 withdrawn from the Pension Plan pursuant to § 1383(b).

[3] The Pension Plan subsequently notified Gray that, by completely withdrawing from the plan on June 1, 1980, it had incurred a withdrawal liability of $201,359. The notice set forth a schedule of quarterly payments and demanded payment in accordance with that schedule. After some preliminary correspondence between Gray and the plan's trustees, the Pension Plan informed Gray that it was delinquent in its payments. Gray thereafter filed suit in the United States District Court for the District of Oregon, seeking *726 declaratory and injunctive relief against the Pension Plan and the PBGC. [FN4]

FN4. Gray also moved for a preliminary injunction to restrain the Pension Plan from taking any further steps to collect the withdrawal liability it assessed. The District Court denied that motion. App. 50-57. At the same time, Gray requested that the Pension Plan review its determination of withdrawal liability. See 29 U.S.C. § 1399(b)(2). In response, the Pension Plan issued a "Decision on Review," concluding that it had "accurately determined: (1) the method for allocating the unfunded vested benefits to Gray, (2) the amount of the Plan's unfunded vested benefits, (3) the schedule of payments offered to Gray, and (4) the date of Gray's complete withdrawal." 549 F.Supp. 531, 534 (Ore.1982). Although Gray could have initiated arbitration with the Pension Plan on these issues, 29 U.S.C. § 1401(a), it accepted these findings and waived its right to arbitration, 549 F.Supp., at 534.

Gray's complaint raised several constitutional claims, including a challenge to the retroactive application of the MPPAA under the Due Process Clause of the Fifth Amendment. [FN5] In particular, Gray noted that its June 1, 1980, withdrawal from the Pension Plan occurred during the 5-month period preceding enactment of the MPPAA, and therefore was directly affected by the retroactivity provision included in the Act. Moreover, Gray contended, retroactive application of withdrawal liability could not be sustained under the Due Process Clause because it was arbitrary and irrational, and because it impaired the collective-bargaining agreements that Gray had signed with the Council.

FN5. Gray also contended, inter alia, that the different treatment afforded employers participating in multiemployer pension plans as opposed to employers participating in single-employer pension plans violates the equal protection component of the Fifth Amendment, that retroactive application of the MPPAA violates the Ex Post Facto Clause included in Art. I, § 9, of the Constitution, and that the Act's arbitration provisions violated Gray's rights to procedural due process and trial by jury. The District Court rejected the first two claims, see 549 F.Supp., at 538-539, and refused to reach the last claim because Gray had waived its right to arbitration, id., at 539; n. 4, supra. These issues were not reached by the Court of Appeals, Shelter Framing Corp. v. Pension Benefit Guaranty Corp., 705 F.2d 1502, 1515 (CA9 1983), and are not now pressed before this Court.

*727 The District Court rejected Gray's due process claim, and granted summary judgment in favor of the Pension Plan and the PBGC. 549 F.Supp. 531 (1982). Specifically, the court analyzed the constitutionality of retroactively imposing withdrawal liability on employers by applying a four-part test established by the Court of Appeals for the Seventh Circuit in Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947 (1979), aff'd on statutory grounds, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). As that test requires, the court examined (1) the reliance interest of the affected parties, (2) whether the interest impaired is in an area previously subjected to regulatory control, (3) the equities of imposing the legislative burdens, and (4) the statutory provisions that limit and moderate the impact of the burdens imposed. [FN6] **2717 Under these criteria, the court concluded that Gray had not satisfied the heavy burden faced by parties attempting to demonstrate that Congress has acted arbitrarily and irrationally when enacting

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socioeconomic legislation.

FN6. The court in Nachman developed this four-part test for reviewing the constitutionality of retroactive legislation under the Fifth Amendment's Due Process Clause primarily by relying upon this Court's decisions in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), and Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). For reasons explained below, however, we do not believe that these cases control judicial review of retroactive federal legislation affecting economic benefits and burdens. See infra, at 2719-2720. We therefore reject the constitutional underpinnings of the analysis employed by the Court of Appeals in Nachman, although we have no occasion to consider whether the factors mentioned by that court might in some circumstances be relevant in determining whether retroactive legislation is rational. Cf. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 367-368, and n. 12, 100 S.Ct. 1723, 1729-1730, and n. 12, 64 L.Ed.2d 354 (1980) (explicitly limiting our review to the statutory question presented).

The Court of Appeals for the Ninth Circuit reversed, although it too believed that the four-factor Nachman test was the appropriate standard to use when analyzing the constitutionality of retroactive legislation enacted by Congress. Shelter Framing Corp. v. Pension Benefit Guaranty Corp., *728 705 F.2d 1502 (1983). In particular, the court concluded that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA, id., at 1511- 1512, and because the equities in this action generally favored Gray over the Pension Plan, id., at 1512-1514.

Both the Pension Plan and the PBGC invoked the appellate jurisdiction of this Court under 28 U.S.C. § 1252. We noted probable jurisdiction, 464 U.S. 912, 104 S.Ct. 271, 78 L.Ed.2d 253 (1983), [FN7] and now reverse.

FN7. At least three Courts of Appeals, as well as numerous District Courts, have concluded that retroactive application of the MPPAA's withdrawal liability provisions satisfies constitutional standards. See, e.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (CA2 1984); Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247 (CA7 1983), cert. pending, 465 U.S. 1098, 104 S.Ct. 1588, 80 L.Ed.2d 121; Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (CA4 1983) , cert. pending, No. 83-541.

The prospective application of the MPPAA's withdrawal liability provisions has also been the subject of extensive nationwide litigation. All of the Courts of Appeals addressing the various constitutional challenges raised in those cases, however, have upheld the statute. See, e.g., The Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 235 U.S.App.D.C. 1, 729 F.2d 1502 (1984); Peick v. Pension Benefit Guaranty Corp., supra; Republic Industries, Inc. v. Teamsters Joint Council, supra. Because these issues were not addressed by the Court of Appeals, cf. n. 5, supra, and are not actively pursued by the parties before this Court, we assume for purposes of our decision in these cases that the prospective effects of the Act satisfy constitutional standards.

II

[4] The starting point for analysis is our decision in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In Turner Elkhorn, we considered a constitutional challenge to the retroactive effects of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972. Under Title IV of that Act, coal mine operators were required to compensate former employees disabled pneumoconiosis *729 even though those employees had terminated their work in the industry before the statute was enacted. We nonetheless had little difficulty in upholding the statute against constitutional attack under the Due Process Clause. As we initially noted:

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955) ." 428 U.S., at 15, 96 S.Ct., at 2892.

We further explained that the strong deference accorded legislation in the field of national economic

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policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational **2718 means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches:

"[I]nsofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect--although, as we have noted, the Act imposed no liability on operators until [after its enactment]. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases areclear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See Fleming v. Rhodes, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947); Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); Louisville *730 & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948); Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Funkhouser v. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243 (1933)." Id., at 15-16, 96 S.Ct., at 2892-2893 (footnotes omitted).

[5] To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow ... that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Id., at 16- 17, 96 S.Ct., at 2892-2893. But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

For example, in Turner Elkhorn we found that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor--the operators and the coal consumers." Id., at 18, 96 S.Ct., at 2893. Similarly, in these cases, a rational legislative purpose supporting the retroactive application of the MPPAA's withdrawal liability provisions is easily identified. Indeed, Congress was quite explicit when explaining the reason for the statute's retroactivity.

[6][7] In particular, we believe it was eminently rational for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing *731 employers was being considered. See 126 Cong.Rec. 20179 (1980) (statement of Sen. Javits); id., at 20244 (remarks of Sen. Matsunaga). See also supra, at 2715. Withdrawals occurring during the legislative process not only would have required that remaining employers increase their contributions to existing pension plans, butalso could have ultimately affected the stability of the plans themselves. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Indeed, as the amendments progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period **2719 that Congress believed would be necessary to accomplish its purposes. As we recently noted when upholding the retroactive application of an income tax statute in United States v. Darusmont, 449 U.S. 292, 296-297, 101 S.Ct. 549, 551-552, 66 L.Ed.2d 513 (1981) (per curiam), the enactment of retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice." We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation under the Fifth Amendment's Due Process Clause.

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III

Gray and its supporting amici offer several reasons for subjecting the retroactive application of the MPPAA to some form of heightened judicial scrutiny. We are not persuaded, however, by any of their arguments.

First, Gray contends that retroactive legislation does not satisfy due process requirements unless persons affected by the legislation had "notice" of changing legal circumstances and "an opportunity to conform their conduct to the requirements of [the] new legislation." Brief for Appellee 20. We have doubts, however, that retroactive application of the *732 MPPAA would be invalid under the Due Process Clause for lack of notice even if it was suddenly enacted by Congress without any period of deliberate consideration, as often occurs with floor amendments or "riders" added at the last minute to pending legislation. But even assuming that advance notice of legislative action with retrospective effects is constitutionally compelled, cf. Darusmont, supra, at 299, 101 S.Ct., at 553 (similarly assuming that notice is a relevant consideration), we believe that employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA itself impose contingent liability on withdrawing employers, but the various legislative proposals debated by Congress before enactment of the MPPAA uniformly included retroactive effective dates among their provisions. See supra, at 2714-2715. [FN8]

FN8. See, e.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d, at 852 ("Notice was everywhere.... [Employers] withdrew from their funds not only when pervasive regulation, including withdrawal liability under ERISA, existed in the pension field, but also when the advent of the MPPAA was imminent"); Peick v. Pension Benefit Guaranty Corp., 724 F.2d, at 1269 ("[T]he intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process.... [E]mployers who withdrew during [[[[the retrospective] period cannot argue that they are now being required to pay wholly unanticipated liabilities" (footnote omitted).

[8][9][10] Second, it is suggested that we apply constitutional principles that have been developed under the Contract Clause, Art. I, § 10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ..."), when reviewing this federal legislation. [FN9] See, e.g., Energy Resources *733 Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. See, e.g., Philadelphia, B. & W.R. Co. v. Schubert, 224 U.S. 603, **2720 32 S.Ct. 589, 56 L.Ed. 911 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. See United States Trust Co. v. New Jersey, 431 U.S. 1, 17, n. 13, 97 S.Ct. 1505, 1515, n. 13, 52 L.Ed.2d 92 (1977). And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,' " ibid. (quoting Welch v. Henry, 305 U.S. 134, 147, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938), and citing Turner Elkhorn, 428 U.S., at 14-20, 96 S.Ct., at 2891-2894), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in Turner Elkhorn.

FN9. It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause:
"MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded." 5 J. Elliott, Debates on the Federal Constitution 546 (2 ed. 1876). See 2 M. Ferrand, Records of the Federal Convention of 1787, p. 619 (1911).

[11] Finally, Gray urges that we resuscitate the Court's 1935 decision in Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, which invalidated provisions of the Railroad Retirement Act of 1934 that required

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employers to finance pensions for former railroad employees. Assuming, as we did in Turner Elkhorn, supra, 428 U.S., at 19, 96 S.Ct., at 2894, that this aspect of Alton "retains vitality" despite the changes in judicial review of economic legislation that have occurred in the ensuing years, we again find it distinguishable from the present litigation. Unlike the statute in Alton, which created pensions for employees who had been fully compensated while working for ***734** the railroads, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal.

IV

We conclude that Congress' decision to apply the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act to employers withdrawing from pension plans during the 5-month period preceding enactment of the Act is supported by a rational legislative purpose, and therefore withstands attack under the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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Tab 5

Supreme Court of the United States

DUKE POWER COMPANY, Appellant,
v.
CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.
UNITED STATES NUCLEAR REGULATORY COMMISSION et al., Appellants,
v.
CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.

Nos. 77-262, 77-375.

Argued March 20, 1978.
Decided June 26, 1978.

Direct appeal was taken from a decision of the United States District Court for the Western District of North Carolina, 431 F.Supp. 203, declaring that the Price-Anderson Act, which imposed a $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, was constitutionally invalid. The Supreme Court, Mr. Chief Justice Burger, held that: (1) citizens living near the site of proposed nuclear power plants had standing to maintain the declaratory judgment action; (2) the constitutional challenges to the Act were ripe for adjudication; (3) the Act did not violate the due process clause of the Fifth Amendment, and (4) the Act did not violate the equal protection component of the Fifth Amendment.

Reversed.

Mr. Justice Stewart filed an opinion concurring in result.

Mr. Justice Rehnquist filed an opinion concurring in judgment, with whom Mr. Justice Stevens joined.

Mr. Justice Stevens filed an opinion concurring in the judgment.

West Headnotes

[1] Federal Courts ⚿242.1
170Bk242.1 Most Cited Cases
(Formerly 170Bk242)

For purposes of determining whether general federal question jurisdiction exists, it is not necessary to decide whether alleged cause of action against federal agency based directly on Constitution is in fact cause of action on which plaintiffs could actually recover; instead, test is whether cause of action alleged is so patently without merit as to justify court's dismissal for want of jurisdiction. 28 U.S.C.A. § 1331(a).

[2] Federal Courts ⚿243
170Bk243 Most Cited Cases

District court had jurisdiction over complaint seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants under general federal question jurisdictional statute rather than under statute granting jurisdiction over cases arising under acts regulating commerce or protecting against restraints and monopolies, where complaint, fairly read, raised two basic challenges to act, both of which were derived from Fifth Amendment; whether direct cause of action against Nuclear Regulatory Commission under Constitution was one generally to be recognized need not be decided since claimed cause of action to vindicate plaintiffs' constitutional rights was sufficiently substantial and colorable to sustain jurisdiction. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.; 28 U.S.C.A. §§ 1331(a), 1337; U.S.C.A.Const. Amend. 5.

[3] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
(Formerly 170Ak103)

Essence of standing inquiry is whether parties seeking to invoke court's jurisdiction have alleged such personal stake in outcome of controversy as to assure that concrete adverseness which sharpens presentation of issues upon which court so largely depends for illumination of difficult constitutional questions; "personal stake" requires not only distinct and palpable injury to plaintiff, but also fairly traceable causal connection between claimed injury and challenged conduct.

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[4] Federal Courts 478
170Bk478 Most Cited Cases

In action brought against Nuclear Regulatory Commission challenging constitutional validity of statute imposing $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding that several of immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of disputed plants and emission of nonnatural radiation into environment, were adequate to satisfy "injury in fact" standard required as predicate for standing was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[5] Federal Courts 478
170Bk478 Most Cited Cases

In action brought against Nuclear Regulatory Commission by citizens groups and individuals living near sites of proposed nuclear power plants, seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding of "substantial likelihood" that neither of disputed nuclear plants would be completed or operated absent challenged statute, and that relief requested would redress injury claimed, so as to satisfy constitutional standing requirement, was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[6] Federal Civil Procedure 103.3
170Ak103.3 Most Cited Cases
(Formerly 170Ak103)

Outside context of taxpayer suits, litigant need not demonstrate more than injury in fact and substantial likelihood that judicial relief requested will prevent or redress claimed injury to satisfy "case and controversy" standing requirement; where party champions his own rights, and where injury alleged is concrete and particularized one which will be prevented or redressed by relief requested, basic practical and prudential concerns underlying standing doctrine are generally satisfied when constitutional requisites are met. U.S.C.A.Const. art. 3, § 1 et seq.

[7] Constitutional Law 42.3(2)
92k42.3(2) Most Cited Cases

Citizens groups and individuals who lived within close proximity to planned nuclear power plants had standing to maintain action against public utility and Nuclear Regulatory Commission seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants where immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of plants, was adequate to satisfy "injury in fact" standard and where there was substantial likelihood that plants would be neither completed nor operated absent challenged statute. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.

[8] Federal Courts 13.25
170Bk13.25 Most Cited Cases
(Formerly 170Bk13)

Constitutional challenges to statute imposing $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants were ripe for adjudication where all parties would be adversely affected by decision to defer definitive resolution of constitutional validity vel non of act, and where alleged injury could be redressed by relief requested. Atomic Energy Act of 1954, § 170 et seq. as amended 42 U.S.C.A. § 2210 et seq.

[9] Constitutional Law 48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants was classic example of economic regulation, and came to court with presumption of constitutionality; burden was on parties complaining that statute violated due process to establish that legislature acted in arbitrary or irrational way. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[10] Constitutional Law 299.1
92k299.1 Most Cited Cases

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(Formerly 92k299(1), 92k299)

[10] Electricity ⚿1
145k1 Most Cited Cases

[10] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Price-Anderson Act statutory limit on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants bears rational relationship to Congress' concern for stimulating involvement of private enterprise in production of electric energy through use of atomic power and thus the Act does not violate the due process clause. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210; U.S.C.A.Const. Amend. 5.

[11] Constitutional Law ⚿299.1
92k299.1 Most Cited Cases
(Formerly 92k299(1), 92k299)

[11] Electricity ⚿1
145k1 Most Cited Cases

[11] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Assuming arguendo that $560 million fund provided by Price-Anderson Act limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants would not insure full recovery in all conceivable circumstances, it does not follow that liability limitation is therefore irrational and violative of due process in view of extremely remote possibility of accident in which liability would exceed statutory limit, and of Congress' commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequence of" a disaster of such proportions. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[12] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

District court's finding that statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants encouraged irresponsibility in matters of safety and environmental protection could not withstand careful scrutiny, since nothing in liability limitation provision undermined or altered rigor and integrity of process involved in review of applications for license to construct or operate nuclear power plant, and since in event of nuclear accident utility itself would probably suffer largest damages. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[13] Constitutional Law ⚿92
92k92 Most Cited Cases

Person has no property right or vested interest in any rule of common law; Constitution does not forbid creation of new rights or abolition of old ones recognized by common law to attain permissible legislative objective, despite fact that otherwise settled expectations may be upset thereby.

[14] Constitutional Law ⚿92
92k92 Most Cited Cases

Parties who lived within close proximity to planned nuclear power plants, and who sought declaration of constitutional invalidity of statutory limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants did not, prior to enactment of such statute, have any right cognizable under due process clause to be free of nuclear power or to take advantage of state of uncertainty which inhibited private development of nuclear power; parties' only relevant right prior to enactment of statute was to utilize their existing common-law and state law remedies to vindicate any particular harm visited on them from whatever resources. U.S.C.A.Const. Amend. 5; Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[15] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants to $560 million provides fair and reasonable substitute for state tort law remedies it replaces, in view of uncertainty of recovery of damages of such magnitude from utility or

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component manufacturer whose resources might well be exhausted at early stage, and in view of congressional assurance of $560 million fund for recovery accompanied by statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident; statutorily mandated waiver of defenses establishes right of injured parties to compensation without proof of fault and eliminates burden of delay and uncertainty which would follow from need to litigate question of liability after accident. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[16] Constitutional Law ⚷243.1
92k243.1 Most Cited Cases
(Formerly 92k243(1))

[16] Electricity ⚷13
145k13 Most Cited Cases

[16] United States ⚷53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

General rationality of Price-Anderson Act imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, particularly with reference to important congressional purpose of encouraging private participation and exploitation of nuclear energy, is ample justification for difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes; liability limitation does not violate equal protection. Atomic Energy Act of 1954, § 170(b, e) as amended 42 U.S.C.A. § 2210(b, e); U.S.C.A.Const. Amend. 5.

[17] Eminent Domain ⚷266
148k266 Most Cited Cases

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants does not withdraw Tucker Act remedy for any "taking" which would result from such accident. 28 U.S.C.A. § 1491; Atomic Energy Act of 1954, § 170(b, e) as amended 42 U.S.C.A. § 2210(b, e); U.S.C.A.Const. Amend. 5.

****2623** Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***59** The Price-Anderson Act (Act), having the dual purpose of protecting the public and encouraging the development of the nuclear energy industry, imposes a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, requires those indemnified by the $560 million fund established under the Act to waive all legal defenses in the event of a substantial nuclear accident, and further provides that in the event of a nuclear accident involving damages in excess of the amount of aggregate liability Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." Appellant Duke Power Co. (Duke), an investor-owned public utility which is constructing nuclear power plants in North and South Carolina, and appellant Nuclear Regulatory Commission (NRC), were sued by appellees (an environmental organization, a labor union, and a number of individuals who live near the plants in question) who sought a declaration that the Act is unconstitutional. After finding, *inter alia,* that the "immediate" adverse effects upon appellees resulting from the operation of the plants included thermal pollution of lakes in the vicinity, and emission of non-natural radiation into appellees' environment, and also that there was a "substantial likelihood" that Duke would not be able to complete construction and maintain operation of the plants "but for" the protection provided by the Act, the District Court held that appellees had standing to challenge the Act's constitutionality and that their claim could be properly adjudicated. The court then went on to hold that the Act violated the Due Process Clause of the Fifth Amendment because the amount of recovery is not rationally related to the potential losses, the Act tends to encourage irresponsibility in matters of safety and environmental protection, and there is no *quid pro quo* for the liability limitation; and, the Act also offended the equal ***60** protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power. *Held:*

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1. The District Court had jurisdiction over appellees' complaint against the NRC under 28 U.S.C. § 1331(a) (1976 ed.) rather than § 1337, the jurisdictional base pleaded. The complaint, fairly read, raised two basic challenges to the Act, both of which are derived from the Fifth Amendment. Appellees' cause of action against the NRC directly under the Constitution is sufficiently substantial to sustain jurisdiction; the further question of whether such a cause of **2624 action is to be generally recognized need not be decided on this record. Pp. 2628-2630.

2. Appellees have standing to challenge the Act's constitutionality. That several of the "immediate" adverse effects of construction of the plants were found to harm appellees is sufficient to satisfy the "injury in fact" prong of the constitutional requirement for standing. And the finding as to the "but for" causal connection between the Act and the construction of the plants satisfies the second prong of the constitutional test for standing, that the exercise of the court's remedial powers would redress the claimed injuries. Pp. 2630-2635.

3. The constitutional challenges to the Act are ripe for adjudication, since all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Act. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 138, 95 S.Ct. 335, 355, 42 L.Ed.2d 320 (1974) , the fact that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested satisfies this requirement. P. 2635.

4. The Act does not violate the Due Process Clause of the Fifth Amendment. Pp. 2635-2641.

(a) The record supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating private industry's involvement in the production of nuclear electric energy. P. 2636.

(b) Assuming, *arguendo,* that the $560 million fund would not insure full recovery in all conceivable circumstances, it does not follow that the liability limitation is therefore irrational and violative of due process. When appraised in light of the extremely remote possibility of an accident in which liability would exceed the statutory limit and Congress' commitment to "take whatever action is deemed necessary and appropriate *61 to protect the public from the consequences of" a disaster of such proportions, the congressional decision to fix a $560 million ceiling is within permissible limits and not violative of due process. Pp. 2636-2638.

(c) The District Court's finding that the Act tends to encourage irresponsibility in matters of safety and environmental protection cannot withstand careful scrutiny, since nothing in the liability-limitation provision undermines or alters the rigor and integrity of the process involved in the review of applications for a license to construct or operate a nuclear power plant, and since, in the event of a nuclear accident the utility itself would probably suffer the largest damage. P. 2638.

(d) The Act provides a reasonably just substitute for the common-law or state tort law remedies it replaces, and nothing more is required by the Due Process Clause. The congressional *assurance* of a $560 million fund for recovery, accompanied by the statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, is a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer whose resources might well be exhausted at an early stage. And, at the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty that would follow from the need to litigate the question of liability after an accident. Pp. 2638-2641.

(e) There is no equal protection violation, since the general rationality of the Act's liability limitation, particularly with reference to the congressional purpose of encouraging private participation in the exploitation of nuclear energy, is ample justification for the difference in treatment between those injured in nuclear accidents **2625 and those whose injuries are derived from other causes. P. 2641.

5. The Act does not withdraw the Tucker Act

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remedy, 28 U.S.C.A § 1491, and thus appellees' challenge under the Just Compensation Clause must fail. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day. P. 2641 n. 39.

431 F.Supp. 203, reversed and remanded.

***62** Steve C. Griffith, Jr., Charlotte, N. C., for appellant in No. 77- 262.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for appellants in No. 77- 375.

William B. Schultz, Washington, D. C., for appellees.

Mr. Chief Justice BURGER delivered the opinion of the Court.

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on ***63** liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government.

I
A

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a Government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H.R.Rep. No. 2181, 83d Cong., 2d Sess., 1-11 (1954). The Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281 (1970 ed. and Supp V), implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC). [FN1] See *Power Reactor Development Co. v. Electrical Workers,* 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), rev'g and remanding, 108 U.S.App.D.C. 97, 280 F.2d 645 (1960).

FN1. Under the terms of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* (1970 ed., Supp. V), the Nuclear Regulatory Commission (NRC) has now replaced the AEC as the licensing and regulatory authority.

Private industry responded to the Atomic Energy Act of 1954 with the development of an experimental power plant constructed under the auspices of a consortium of interested companies. It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. See Green, Nuclear Power: ***64** Risk, Liability, and Indemnity, 71 Mich.L.Rev. 479-481 (1973) (Green). Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems--the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle. Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. See Hearings before the Joint Committee on Atomic Energy on Government Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess., 122-124 (1956). Thus, while repeatedly stressing that the risk of a ****2626** major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation. *Id.,* at 9, 109-110, 115, 120, 136-137, 148, 181, 195, and 240.

Congress responded in 1957 by passing the Price-Anderson Act, 71 Stat. 576, 42 U.S.C. § 2210 (1970 ed. and Supp. V). The Act had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry." 42 U.S.C. § 2012(i). In its original form, the Act limited the aggregate liability for a

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single nuclear incident [FN2] to $500 million plus the amount of liability insurance ***65** available on the private market--some $60 million in 1957. The nuclear industry was required to purchase the maximum available amount of privately underwritten public liability insurance, and the Act provided that if damages from a nuclear disaster exceeded the amount of that private insurance coverage, the Federal Government would indemnify the licensee and other "persons indemnified" [FN3] in an amount not to exceed $500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totaled $560 million.

FN2. A "nuclear incident" is defined as "any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material . . . ." 42 U.S.C. § 2014(q).

FN3. "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States . . . the person with whom an indemnity agreement is executed and any other person who may be liable for public liability . . . ." 42 U.S.C. § 2014(t).

Since its enactment, the Act has been twice amended, the first occasion being on the eve of its expiration in 1966. [FN4] These amendments extended the basic liability-limitation provisions for another 10 years, and added a provision which had the effect of requiring those indemnified under the Act to waive all legal defenses in the event of a substantial nuclear accident. [FN5] This provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions--strict liability--was needed. A waiver of defenses was thought to be the preferable approach since it entailed less ***66** interference with state tort law than would the enactment of a federal statute prescribing strict liability. [FN6] See S.Rep. No. 1605, 89th Cong., 2d Sess., 6-10 (1966); U.S.Code Cong. & Admin.Code 1966, p. 3201.

FN4. By the terms of the Act as originally passed, it was only applicable to licenses issued between August 30, 1954, and August 1, 1967. § 4, 71 Stat. 576, as amended, 42 U.S.C. § 2210(c).

FN5. The waiver provision is incorporated in the indemnity agreement. The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of risk all are waived in the event of an extraordinary nuclear occurrence, as are, to a limited degree, defenses based on certain short state statutes of limitations. 80 Stat. 891, 42 U.S.C. § 2210(n)(1). See also 10 C.F.R. §§ 140.81 to 140.85, 140.91 to 140.92 (1977).

FN6. The Act was also amended in 1966 to provide for the transfer of all claims arising out of a nuclear incident to a single federal district court. 42 U.S.C. § 2210(n)(2). If the court finds that liability may exceed the liability limitation of the Act, immediate payments to injured parties are limited to 15% of the liability limitation until the court approves a plan of distribution to insure equitable treatment of all parties. § 2210(*o*) (1970 ed. and Supp. V).

In 1975, Congress again extended the Act's coverage until 1987, and continued the $560 million limitation on liability. However a new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between $2 and $5 million toward the cost ***2627** of compensating victims. [FN7] 42 U.S.C. § 2210(b) (1970 ed., Supp. V). Since the liability ceiling remained at the same level, the effect of the "deferred premium" provision was to reduce the Federal Government's contribution to the liability pool. [FN8] In its amendments to the Act in 1975, Congress also explicitly provided that "in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a ***67** disaster of such magnitude . .. ." 42 U.S.C. § 2210(e) (1970 ed., Supp. V).

FN7. The NRC, which was empowered by the 1975 amendments to choose a figure in the $2-$5 million range, has set the assessment at $5 million. 42 Fed.Reg. 46 (1977).

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FN8. As the number of reactors increases, the $5 million deferred premium in itself will yield a fund exceeding the present liability ceiling. For example, it is predicted that by 1985 there will be a maximum of 138 reactors operating, see Executive Office of the President, The National Energy Plan 71 (1977), which would produce $690 million in addition to whatever insurance is available from the private insurance market. Under the Act, the liability ceiling automatically increases to a level equal to the amount of primary and secondary (deferred premium) insurance coverage when the amount of such coverage exceeds the $560 million figure. 42 U.S.C. § 2210(e) (1970 ed., Supp. V).

Under the Price-Anderson Act as it presently stands, liability in the event of a nuclear incident causing damages of $560 million or more would be spread as follows: $315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; $140 million would come from private insurance (the maximum now available); the remainder of $105 million would be borne by the Federal Government. [FN9]

FN9. Appellees' expert witness on insurance testified in the District Court that homeowners were unable to purchase insurance against nuclear catastrophes because "the nuclear industry has essentially absorbed the entire capacity of the private insurance markets in their need for property and liability insurance." App. 293-294.

B

Appellant in No. 77-262, Duke Power Co., is an investor-owned public utility which is constructing one nuclear power plant in North Carolina and one in South Carolina. Duke Power, along with the NRC, was sued by appellees, two organizations--Carolina Environmental Study Group and the Catawba Central Labor Union--and 40 individuals who live within close proximity to the planned facilities. The action was commenced in 1973, and sought, among other relief, a declaration that the Price-Anderson Act is unconstitutional. [FN10]

FN10. The complaint also sought review of the AEC's decision to grant a construction permit for one of the plants. During the pendency of this action, however, the United States Court of Appeals for the District of Columbia Circuit decided that the AEC had properly issued the permits. *Carolina Environmental Study Group v. United States,* 166 U.S.App.D.C. 416, 510 F.2d 796 (1975). Accordingly, the District Court dismissed all counts of the complaint except those relating to the Price-Anderson Act's constitutionality.

After the parties had engaged in extensive discovery, the District Court held an evidentiary hearing on the questions of whether the issues were ripe for adjudication and whether ***68** appellees had standing to challenge the constitutionality of the Act. That court determined that appellees had standing and that their claim could properly be adjudicated. The District Court went on to hold that the Price-Anderson Act was unconstitutional in two respects: (a) it violated the Due Process Clause of the Fifth Amendment because it allowed injuries to occur without assuring adequate compensation to the victims; (b) the Act offended the equal protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power.

****2628** We noted probable jurisdiction [FN11] in these appeals, 434 U.S. 937, 98 S.Ct. 426, 54 L.Ed.2d 297 (1977), and we now reverse.

FN11. Our jurisdiction was invoked under 28 U.S.C. § 1252 (1976 ed.), which provides for a direct appeal to this Court from any decision invalidating an Act of Congress in any suit to which the United States, its agencies, officers, or employees are parties.

II

As a threshold matter, we must address the question of whether the District Court had subject-matter jurisdiction over appellees' claims, despite the fact that none of the parties raised this issue and the District Court did not consider it. See *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976). Appellees' complaint alleges jurisdiction under 28 U.S.C. § 1337 (1976 ed.), which provides for original jurisdiction in the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Our reading of the pleadings, [FN12] however, indicates that ***69** appellees' claims do not "arise under" the Price-Anderson Act as that statutory language has been interpreted in prior decisions.

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See *Peyton v. Railway Express Agency,* 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

FN12. The complaint provides in relevant part: "19. Since the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2 1/2 % of such losses, the operation of the $500 million limitation would, in the event of a nuclear disaster, deprive the persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." App. 32.

Specifically, as we read the complaint, appellees are making two basic challenges to the Act--both of which find their moorings in the Fifth Amendment. First, appellees contend that the Due Process Clause protects them against arbitrary governmental action adversely affecting their property rights and that the Price-Anderson Act--which both creates the source of the underlying injury and limits the recovery therefor--constitutes such arbitrary action. And second, they are contending that in the event of a nuclear accident their property would be "taken" without any assurance of just compensation. The Price-Anderson Act is the instrument of the taking since on this record, without it, there would be no power plants and no possibility of an accident. Implicit in the complaint is also the assumption that there exists a cause of action directly under the Constitution to vindicate appellees' federal rights through a suit against the NRC, the executive agency charged with enforcement and administration of the allegedly unconstitutional statute. [FN13] Appellees' right to relief ***70** thus depends not on the interpretation or construction of the Price-Anderson Act itself, but instead "upon the construction or application of the Constitution," *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 199, 41 S.Ct. 243, 245, 65 L.Ed. 577 (1921). Hence, if there exists jurisdiction to hear appellees' claims at all, it must be derived from 28 U.S.C. § 1331(a) (1976 ed.), the general federal-****2629** question statute, rather than from § 1337--the jurisdictional base pleaded. [FN14]

FN13. Mr. Justice REHNQUIST would read the complaint, insofar as it alleges a denial of due process, as stating a claim only against Duke Power under North Carolina law. Under such a construction of the complaint, the question of the constitutionality of the Price-Anderson Act would emerge only in anticipation of a defense to appellees' state-law claims and thus would not support federal jurisdiction under the "well-pleaded" complaint rule regardless of the jurisdictional statute relied upon. See *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). We conclude that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment. See n. 12, *supra.* On this view, the "well-pleaded" complaint rule poses no bar to the assertion of jurisdiction. Appellees' claim under the Due Process Clause is an essential ingredient of a well-pleaded complaint asserting a right under the Constitution and is not simply a claim made in anticipation of a defense to be raised in an action having its origin in state law. See also n. 26, *infra.*

FN14. Previously § 1331(a) required a minimum amount in controversy in all suits, but a 1976 amendment eliminated the jurisdictional amount requirement in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub.L. 94-574, § 2, 90 Stat. 2721. Thus this action, at least as against the NRC, would seem clearly permitted by § 1331(a) without specification of an amount in controversy. See *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 608 n.6, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978). Appellees' failure to assert § 1331(a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction. See 436 U.S., at 608 n.6, 98 S.Ct., at 2005 n.6.

[1][2] For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). Instead, the test is whether " 'the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.' " *Hagans v. Lavine,* 415 U.S. 528, 542-543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974) quoting *Bell v. Hood, supra,* at 683, 66 S.Ct., at 776. (Emphasis added.) See also *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666, 94 S.Ct. 772, 778,

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39 L.Ed.2d 73 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this ***71** Court, or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and *Hagans v. Lavine, supra,* as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood, supra,* 327 U.S., at 684, 66 S.Ct., at 777, we conclude that appellees' allegations are sufficient to sustain jurisdiction under § 1331(a). [FN15]

FN15. Mr. Justice REHNQUIST suggests that appellees' "taking" claim will not support jurisdiction under § 1331(a), but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491 (1976 ed.). We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which were brought under § 1331 as well as the Declaratory Judgment Act. See App. in *Regional Rail Reorganization Act Cases,* O.T.1974, Nos. 74-165, 74-166, 74-167, 74-168, p. 161, 95 S.Ct. at p. 367. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

The further question of whether appellees' cause of action under the Constitution is one generally to be recognized need not be decided here. The question does not directly implicate our jurisdiction, see *Bell v. Hood, supra,* was not raised in the court below, was not briefed, and was not addressed during oral argument. As we noted last Term in a similar context, questions of this sort should not be resolved on such an inadequate record; leaving them unresolved is no bar to full consideration of the merits. See *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 278-279, 97 S.Ct. 568, 571-572, 50 L.Ed.2d 471 (1977). It is enough for present purposes that the claimed cause of action to vindicate appellees' ***72** constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a). [FN16]

FN16. We need not resolve the question of whether Duke Power is a proper party since jurisdiction over appellees' claims against the NRC is established, and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or our authority to award the requested relief.

****2630** III

The District Judge held four days of hearings on the questions of standing and ripeness; his factual findings form the basis for our analysis of these issues.

A

[3] The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). See also *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976); *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Application of these constitutional standards to the factual findings of the District Court persuades us that the Art. III requisites for standing are satisfied by appellees.

We turn first to consider the kinds of injuries the

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District Court found theappellees suffered. It discerned two categories of effects which resulted from the operation of nuclear ***73** power plants in potentially dangerous proximity to appellees' living and working environment. The immediate effects included: (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a "sharp increase" in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to produce steam and to cool the reactor; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) "objectively reasonable" present fear and apprehension regarding the "effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants"; and (f) the continual threat of "an accident resulting in uncontrolled release of large or even small quantities of radioactive material" with no assurance of adequate compensation for the resultant damage. 431 F.Supp. 203, 209. Into a second category of potential effects were placed the damages "which may result from a CORE MELT OR OTHER MAJOR ACCIDENT IN THE OPERATION OF A REACTOR . . . ." *Id.*, at 209. [FN17]

FN17. For a detailed explanation of the nature and consequences of a core melt, see 431 F.Supp., at 206-207.

[4] For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. Compare *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), with *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). See also *Conservation Society of Southern Vermont v. AEC*, Civ. Action No. 19-72 (DC Apr. 17, 1975). It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type ***74** of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. See *United States v. SCRAP, supra.* Cf. *Sierra Club v. Morton*, ****2631** 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972). [FN18] And the emission of non- natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants. [FN19]

FN18. "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." *Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366.

FN19. It is argued that the District Court's findings on the question of injury in fact upon which we rely are clearly erroneous and should not be accepted as a predicate for standing. "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." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Application of this standard to the factual findings of the District Court does not persuade us that they should not be accepted.

The more difficult step in the standing inquiry is establishing that these injuries "fairly can be traced to the challenged action of the defendant," *Simon v. Eastern Ky. Welfare Rights Org., supra*, 426 U.S., at 41, 96 S.Ct., at 1926, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries. 426 U.S., at 43, 96 S.Ct., at 1926. The District Court discerned a "but for" causal connection between the Price- Anderson Act, which appellees challenged as unconstitutional, "and the construction of the nuclear plants which the [appellees] view as a threat to them." 431 F.Supp., at 219. Particularizing that causal link to the facts of the instant case, the District Court concluded that "there is a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the McGuire and Catawba Nuclear Plants ***75** but for the protection provided by the Price-Anderson Act." *Id.*, at 220.

These findings, which, if accepted, would likely satisfy the second prong of the constitutional test for

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standing as elaborated in *Simon*, [FN20] are challenged on two grounds. First, it is argued that the evidence presented at the hearing, contrary to the conclusion reached by the District Court, indicated that the McGuire and Catawba nuclear plants would be completed and operated without the Price-Anderson Act's limitation on liability. And second, it is contended that the Price-Anderson Act is not, in some essential sense, the "but for" cause of the disputed nuclear power plants and resultant adverse effects since if the Act had not been passed Congress may well have chosen to pursue the nuclear program as a Government monopoly as it had from 1946 until 1954. We reject both of these arguments.

> FN20. Our recent cases have required no more than a showing that there is a "substantial likelihood" that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977), quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) ("MHDC has shown an injury to itself that is 'likely to be redressed by a favorable decision' "). See also *Warth v. Seldin*, 422 U.S. 490, 504, 506-507, 95 S.Ct. 2197, 2207, 2209-2210, 45 L.Ed.2d 343 (1975).

The District Court's finding of a "substantial likelihood" that the McGuire and Catawba nuclear plants would be neither completed nor operated absent the Price-Anderson Act rested in major part on the testimony of corporate officials before the Joint Committee on Atomic Energy (JCAE) in 1956-1957 when the Price- Anderson Act was first considered and again in 1975 when a second renewal was discussed. During the 1956-1957 hearings, industry spokesmen for the utilities and the producers of the various component parts of the power plants expressed a categorical unwillingness to participate in the development of nuclear **2632 power absent guarantees of a limitation on their liability. 431 F.Supp., at 215. See also *76 Green, 486, 490-491. [FN21] By 1975, the tenor of the testimony had changed only slightly. While large utilities and producers were somewhat more equivocal about whether a failure to renew Price-Anderson would entail their leaving the industry, the smaller producers of component parts and architects and engineers--all of whom are essential to the building of the reactors and generating plants--considered renewal of the Act as the critical variable in determining their continued involvement with nuclear power. 431 F.Supp., at 216-217. Duke Power itself, in its letter to the Committee urging extension of the Act, cited recent experiences with suppliers and contractors who were requiring the inclusion of cancellation clauses in their contracts to take effect if the liability-limitation provisions were eliminated. *Id.*, at 217. And the Report of the JCAE, in discussing the need for renewal of the Act, stated:

> FN21. Nor was the situation different in 1965-1966, when the first 10-year renewal of Price-Anderson was considered. See H.R.Rep.No.883, 89th Cong., 1st Sess., 9 (1965). See generally Green 493.

> "Nuclear power plants now in the planning and design phases would not receive construction permits until about 1977-1978. Thus there is uncertainty as to whether these plants would receive protection in the form of Government indemnity. Reactor manufacturers and architect-engineers are already requiring escape clauses in their contracts to permit cancellation in the event some form of protection from unlimited potential liability is not provided. Action is required soon to prevent disruption in utility plans for nuclear power." H.R.Rep.No.94-648, p. 7 (1975).

[5] Nor was the testimony at the hearing in this case, evaluation of which is the primary responsibility of the trial judge, at odds with the impression drawn from the legislative history. The testimony of Executive Vice President Lee of Duke Power *77 simply echoed the views presented by Duke and others to Congress in 1975, that is, although some of the utilities themselves might be confident enough with respect to safety factors to proceed with nuclear power absent a liability limitation, the suppliers of critical parts and the utility shareholders could reasonably be expected to take a more cautious view. [FN22] Appellees presented expert testimony essentially to the same effect. Considering the documentary evidence and the testimony in the record, we cannot say we are left with "the definite and firm conviction that" the finding by the trial court of a substantial likelihood that the McGuire and Catawba nuclear power plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous; and,

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hence, we are bound to accept it. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 526, 541 (1948).

> FN22. "From what I know about nuclear power, it would be my recommendation that Duke proceed even in the absence of Price-Anderson. However, from the point of view of how others perceive nuclear power, there is some question about whether it would be a practical undertaking in the absence of the Act. . . . I have already been advised by several firms that the existence of Price-Anderson is required for them to be a supplier to our nuclear program . . .. If Price-Anderson did not exist, I would therefore have to evaluate the extent to which its absence caused disappearance of suppliers from the marketplace in arriving at my recommendation." App. 368-369.

The second attack on the District Court's finding of a causal link warrants only brief attention. Essentially the argument is, as we understand it, that Price-Anderson is not a "but for" cause of the injuries appellees claim, since if Price-Anderson had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to appellees from such Government-operated plants as from privately operated ones. Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact **2633 operate the nuclear-powered generating plants injuringappellees, *78 and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

B

It is further contended that in addition to proof of injury and of a causal link between such injury and the challenged conduct, appellees must demonstrate a connection between the injuries they claim and the constitutional rights being asserted. This nexus requirement is said to find its origin in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), where the general question of taxpayer standing was considered:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.*, at 102, 88 S.Ct., at 1954.

See also *United States v. Richardson*, 418 U.S. 166, 174-175, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974). Since the environmental and health injuries claimed by appellees are not directly related to the constitutional attack on the Price-Anderson Act, such injuries, the argument continues, cannot supply a predicate for standing. [FN23] We decline to accept this argument.

> FN23. The only injury that would possess the required subject-matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act.

[6] The major difficulty with the argument is that it implicitly assumes that the nexus requirement formulated in the context of taxpayer suits has general applicability in suits of all other types brought in the federal courts. No cases have been cited *79 outside the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none. [FN24] Instead, in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225, 94 S.Ct. 2925, 2934, 41 L.Ed.2d 706 n. 15 (1974), we explicitly rejected such a broad compass for the *Flast* nexus requirement:

> FN24. In *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), a nontaxpayer suit, reference was made to *Flast* ' s nexus requirement in the course of denying appellant's standing to challenge the nonenforcement of Texas' desertion and nonsupport statute. Upon careful reading, however, it is clear that standing was denied not because of the absence of a subject-matter nexus between the injury asserted and the constitutional claim, but instead because of the unlikelihood that the relief requested would redress appellant's claimed injury. *Id.*, at 618, 93 S.Ct., at 1149. This case thus provides no qualitative support for the broader application of *Flast* 's principles which appellants

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appear to advocate. Cf. Scott, Standing in the Supreme Court--A Functional Analysis, 86 Harv.L.Rev. 645, 660-662 (1973).

"Looking 'to the substantive issues' which *Flast* stated to be both 'appropriate and necessary' in relation to taxpayer standing was for the express purpose of determining 'whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated.' 392 U.S. at 102 [88 S.Ct. 1942]. This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. . . ."

We continue to be of the same view and cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the ****2634** "case or controversy" requirement of Art. III. [FN25]

FN25. Both at the time of its formulation, see *Flast v. Cohen*, 392 U.S., at 120, 130-131, 88 S.Ct., at 1962, 1968-1969 (Harlan J., dissenting), and more recently, see *United States v. Richardson*, 418 U.S. 166, 181, 196 n. 18, 94 S.Ct. 2940, 2948, 2956, 41 L.Ed.2d 678 (1974). (POWELL, J., concurring), there have been questions as to whether the nexus requirement, even in the context of taxpayers' suits, is constitutionally mandated or is instead simply a prudential limitation.

***80** Our prior cases have, however, acknowledged "other limits on the class of persons who may invoke the courts' decisional and remedial powers," *Warth v. Seldin*, 422 U.S., at 499, 95 S.Ct., at 2205, which derive from general prudential concerns "about the proper--and properly limited--role of the courts in a democratic society." *Id.*, at 498, 95 S.Ct., at 2205. See also *Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S., at 221-227, 94 S.Ct., at 2932-2935. Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure. See *United States v. Richardson, supra.* We have also narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra*, at 499, 95 S.Ct., at 2205. See also *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). This limitation on third-party standing arguably suggests a connection between the claimed injury and the right asserted bearing some resemblance to the nexus requirement now urged upon us.

There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated--the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. See *Singleton v. Wulff*, 428 U.S. 106, 113-114, 96 S.Ct. 2868, 2873-2874, 49 L.Ed.2d 826 (1976). We do not, however, find these reasons a satisfactory predicate for applying this limitation or a similar nexus requirement to all cases as a matter of course. Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be ***81** prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. See, *e. g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

[7] We conclude that appellees have standing to challenge the constitutionality of the Price-Anderson Act. [FN26]

FN26. Mr. Justice REHNQUIST undertakes to sever the action of the NRC in executing indemnity agreements under the Act from the Act's alleged constitutional infirmities--particularly the liability limitation provisions. Careful examination of the statutory mechanism indicates that such a separation simply cannot be sustained. The execution of the indemnification agreements by the NRC triggers the statutory ceiling on liability which, in terms, applies only to "persons indemnified." See 42 U.S.C. § 2210(e) (1970 ed., Supp. V). Thus, absent the execution of such agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play.

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> This fact, coupled with the District Court's finding that "but for" the liability-limitation provisions there is a substantial likelihood that the contemplated plants would not be built or operated, is sufficient to establish the justiciability of appellees' claim against the Commission. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S., at 44-46, 96 S.Ct., at 1927-1928.

C

The question of the ripeness of the constitutional challenges raised by appellees need not long detain us. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' " ***2635** *Regional Rail Reorganization Act Cases*, 419 U.S., at 138, 95 S.Ct., at 356, our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement.

[8] The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this ***82** subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. However, delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees--relief that would be forthcoming if they were to prevail in their various challenges to the Act. Similarly, delayed resolution would frustrate one of the key purposes of the Price-Anderson Act--the elimination of doubts concerning the scope of private liability in the event of major nuclear accident. In short, all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Price-Anderson Act. Since we are persuaded that "we will be in no better position later than we are now" to decide this question, *id.*, at 143- 145, 95 S.Ct., at 359, we hold that it is presently ripe for adjudication.

IV

The District Court held that the Price-Anderson Act contravened the Due Process Clause because "[t]he amount of recovery is not rationally related to the potential losses"; because "[t]he Act tends to encourage irresponsibility in matters of safety and environmental protection . . ."; and finally because "[t]here is no *quid pro quo* " for the liability limitations. 431 F.Supp., at 222-223. An equal protection violation was also found because the Act "places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe." *Id.*, at 225. Application of the relevant constitutional principles forces the conclusion that these holdings of the District Court cannot be sustained.

A

Our due process analysis properly begins with a discussion of the appropriate standard of review. Appellants, portraying the liability-limitation provision as a legislative balancing of economic interests, urge that the Price-Anderson Act be ***83** accorded the traditional presumption of constitutionality generally accorded economic regulations and that it be upheld absent proof of arbitrariness or irrationality on the part of Congress. See *Ferguson v. Skrupa*, 372 U.S. 726, 731-732, 83 S.Ct. 1028, 1031-1032, 10 L.Ed.2d 93 (1963); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). Appellees, however, urge a more elevated standard of review on the ground that the interests jeopardized by the Price- Anderson Act "are far more important than those in the economic due process and business-oriented cases" where the traditional rationality standard has been invoked. Brief for Appellees 36. An intermediate standard like that applied in cases such as *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (equal protection challenge to statute requiring that males be older than females in order to purchase beer) or *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (Contract Clause challenge to repeal of statutory covenant providing security for bondholders) is thus recommended for our use here.

[9] As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear

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incident. See, *e. g.,* S.Rep. No. 296, 85th Cong., 1st Sess., 15 (1957); **2636 U.S.Code, Cong. & Admin.Code 1957, p. 1803. The liability-limitation provision thus emerges as a classic example of an economic regulation--a legislative effort to structure and accommodate "the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co., supra,* 428 U.S., at 15, 96 S.Ct., at 2892. "It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Ibid.* That the accommodation struck may haveprofound and far-reaching consequences, contrary to appellees' suggestion, provides all the ***84** more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational. [FN27]

FN27. Appellees, in apparent reliance on our recent decision in *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), argue that because the Price-Anderson Act encroaches on substantial state government interests, an augmented standard of review under the Due Process Clause is warranted. Nothing in *National League of Cities* or in our prior due process cases provides any support for this claim.

B

[10] When examined in light of this standard of review, the Price-Anderson Act, in our view, passes constitutional muster. The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power; nor do we understand appellees or the District Court to be of a different view. Rather their challenge is to the alleged arbitrariness of the *particular figure* of $560 million, which is the statutory ceiling on liability. The District Court aptly summarized its position:

"The amount of recovery is not rationally related to the potential losses. Abundant evidence in the record shows that although major catastrophe in any particular place is not certain and may not be extremely likely, nevertheless, in the territory where these plants are located, damage to life and property for this and future generations could well be many, many times the limit which the law places on liability." 431 F.Supp., at 222.

[11] Assuming, *arguendo,* that the $560 million fund would not insure full recovery in all conceivable circumstances [FN28]--and ***85** the hard truth is that no one can ever know--it does not by any means follow that the liability limitation is therefore irrational and violative of due process. The legislative history clearly indicates that the $560 million figure was not arrived at on the supposition that it alone would necessarily be sufficient to guarantee full compensation in the event of a nuclear incident. Instead, it was conceived of as a "starting point" or a working hypothesis. [FN29] The reasonableness ****2637** of the statute's assumed ceiling on liability was predicated on two corollary considerations--expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of $560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice.

FN28. As the various studies considered by the District Court indicate, there is considerable uncertainty as to the amount of damages which would result from a catastrophic nuclear accident. See 431 F.Supp., at 210-214. The Reactor Safety Study published by the NRC in 1975 suggested that there was a 1 in 20,000 chance (per reactor year) of an accident causing property damage approaching $100 million and having only minor health effects. By contrast, when the odds were reduced to the range of 1 in 1 billion (per reactor year), the level of damages approached $14 billion; and 3,300 early fatalities and 45,000 early illnesses were predicted. NRC, Reactor Safety Study, An Assessment of Accident Risks in U. S. Commercial Nuclear Power Plants 83-85 (Wash.-1400, Oct. 1975). For a thorough criticism of the Reactor Safety Study, see EPA, Reactor Safety Study (Wash.-1400): A Review of the Final Report (June 1976).

FN29. "What we were thinking about was the magnitude of protection and we set up an arbitrary figure because it seemed to be practical at that time and because we didn't think an accident would happen . . . but yet we recognize that it could happen. *We wanted to have a base to work from.*" Hearings before the Joint Committee on Atomic Energy on Possible Modification or Extension of the Price-Anderson Insurance And Indemnity Act

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of 1957 In Order for Proper Planning of Nuclear Power Plants to Continue Without Delay, 93d Cong., 2d Sess., 68 (1974) (remarks of Rep. Holifield) (emphasis added).

"[T]his limitation does not, as a practical matter, detract from the public protection afforded by this legislation. In the first place, the likelihood of an accident occurring ***86** which would result in claims exceeding the sum of the financial protection required and the governmental indemnity is exceedingly remote, albeit theoretically possible. Perhaps more important, in the event of a national disaster of this magnitude, it is obvious that Congress would have to review the problem and take appropriate action. The history of other natural or man-made disasters, such as the Texas City incident, bears this out. The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than as an ultimate bar to further relief of the public." H.R.Rep. No. 883, 89th Cong., 1st Sess. 6-7 (1965).

See also S.Rep. No. 296, *supra*, at 21; H.R.Rep. No. 94-648, pp. 12, 15 (1975).

Given our conclusion that, in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power, candor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action. When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation [FN30] and Congress' now statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, 42 U.S.C § 2210(e) (1970 ed., Supp. V), [FN31] we hold the ***87** congressional decision to fix a $560 million ceiling at this stage in the private development and production of electric energy by nuclear power, to be within permissible limits and not violate of due process.

FN30. Congress' conclusion that "the probabilities of a nuclear incident are much lower and the likely consequences much less severe than has been thought previously," was a key factor in the decision not to increase the $560 million liability ceiling in 1975. S.Rep. No. 94-454, p. 12 (1975), U.S.Code, Cong. & Admin.News 1975, pp. 2251, 2262.

FN31. In the past Congress has provided emergency assistance for victims of catastrophic accidents even in the absence of a prior statutory commitment to do so. For example in 1955, Congress passed the Texas City Explosion Relief Act, 69 Stat. 707, to provide relief for victims of the explosion of ammonium nitrate fertilizer in 1947. Congress took this action despite the decision in *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), holding the United States free from any liability under the Federal Tort Claims Act for the damages incurred and injuries suffered. More recently Congress enacted legislation to provide relief for victims of the flood resulting from the collapse of the Teton Dam in Idaho. Pub.L. 94-400, 90 Stat. 1211. Under the Act, the Secretary of the Interior was authorized to provide full compensation for any deaths, personal injuries, or property damage caused by the failure of the dam. *Ibid.*
The Price-Anderson Act is, of course, a significant improvement on these prior relief efforts because it provides an advance guarantee of recovery up to $560 million plus an express commitment by Congress to take whatever further steps are necessary to aid the victims of a nuclear incident.

[12] This District Court's further conclusion that the Price-Anderson Act "tends to encourage irresponsibility . . . on the part of builders and owners" of the nuclear power plants, 431 F.Supp., at 222, simply cannot withstand careful scrutiny. We recently outlined the multitude of detailed ****2638** steps involved in the review of any application for a license to construct or to operate a nuclear power plant, *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 526-527, and n.5, 98 S.Ct. 1197, 1203-1204, and n.5, 55 L.Ed.2d 460 (1978); nothing in the liability limitation provision undermines or alters in any respect the rigor and integrity of that process. Moreover, in the event of a nuclear accident the utility itself would suffer perhaps the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by

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the District Court.

[13][14] The remaining due process objection to the liability- limitation provision is that it fails to provide those injured by a ***88** nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. [FN32] However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. *Cf. New York Central R. Co. v. White,* 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). [FN33]

FN32. Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). See also *Arizona Employers' Liability Cases,* 250 U.S. 400, 419-422, 39 S.Ct. 553, 555-556, 63 L.Ed. 1058 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, *e. g., Silver v. Silver, supra* (automobile guest statute); *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578, 3 S.Ct. 379, 27 L.Ed. 1038 (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan American Airways,* 58 F.Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). Cf. *Thomason v. Sanchez,* 539 F.2d 955 (C.A.3 1976) (Federal Driver's Act).

FN33. We reject at the outset appellees' contention that the Price- Anderson Act differs from other statutes limiting liability because the Act itself is the "but for" cause of the tort for which liability is limited. Put otherwise, the argument is that no *quid pro quo* can be provided by the Act since without it there would be no nuclear power plants and no possibility of accidents or injuries. As we understand the argument, it proceeds from the premise that prior to the enactment of the Price-Anderson Act, appellees had some right, cognizable under the Due Process Clause, to be free of nuclear power or to take advantage of the state of uncertainty which inhibited the private development of nuclear power. This premise we cannot accept. Appellees' only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right at least with regard to nuclear accidents was replaced by the compensation mechanism of the statute, and it is only the terms of that substitution which are pertinent to the *quid pro quo* inquiry which appellees insist the Due Process Clause requires.

***89** The legislative history of the liability-limitation provisions and the accompanying compensation mechanism reflects Congress' determination that reliance on state tort law remedies and state-court procedures was an unsatisfactory approach to assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy. The remarks of Chairman Anders of the NRC before the Joint Committee on Atomic Energy during the 1975 hearings on the need for renewal of the Price-Anderson Act are illustrative of this concern and of the expectation that ****2639** the Act would provide a more efficient and certain vehicle for assuring compensation in the unlikely event of a nuclear incident:

> "The primary defect of this alternative [nonrenewal of the Act], however, is its failure to afford the public either a secure source of funds or a firm basis for legal liability with respect to new plants. While in theory no legal limit would be placed on liability, as a practical matter the public would be less assured of obtaining compensation than under Price-Anderson. Establishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability, let alone the multiple other protections now embodied in Price-Anderson. The present assurance of prompt and equitable compensation under a pre-structured and nationally applicable protective system would give way to

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uncertainties, variations and potentially lengthy delays in recovery. It should be emphasized, moreover, that it is collecting a judgment, not filing a ***90** lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." Hearings on H.R. 8631 before Joint Committee on Atomic Energy, 94th Cong., 1st Sess., 69 (1975).

Appellees, like the District Court, differ with this appraisal on several grounds. They argue, *inter alia*, that recovery under the Act would not be greater than without it, that the waiver of defenses required by the Act, 42 U.S.C. § 2210(n) (1970 ed., Supp. V), is an idle gesture since those involved in the development of nuclear energy would likely be held strictly liable under common-law principles; [FN34] that the claim-administration procedure under the Act delays rather than expedites individual recovery; and finally that recovery of even limited compensation is uncertain since the liability ceiling does not vary with the number of persons injured or amount of property damaged. The extension of short state statutes of limitations and the provision of omnibus [FN35] coverage do not save the Act, in their view, since such provisions could equally well be included in a fairer plan which would assure greater compensation.

FN34. See *Rylands v. Fletcher*, L.R. 3 E. & I. App. (H.L.1868). See generally W. Prosser, Law of Torts § 79, p. 516 (4th ed. 1971); Cavers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power, 77 Harv.L.Rev. 644, 649 (1964).

FN35. See n. 3, *supra*.

[15] We disagree. We view the congressional *assurance* of a $560 million fund for recovery, accompanied by an express statutory commitment, to "take whatever action is deemed necessary ***91** and appropriate to protect the public from the consequences of" a nuclear accident, 42 U.S.C. § 2210(e) (1970 ed., Supp. V), to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. The record in this case raises serious questions about the ability of a utility or component manufacturer to satisfy a judgment approaching $560 million--the amount guaranteed under the Price-Anderson Act. [FN36] Nor are we persuaded that the ****2640** mandatory waiver of defenses required by the Act is of no benefit to potential claimants. Since there has never been, to our knowledge, a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative. At the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the question of liability after an accident. Further, even if strict liability were routinely applied, the common-law doctrine is subject to exceptions for acts of God or of third parties [FN37]--two of the very factors which appellees emphasized in the District Court in ***92** the course of arguing that the risks of a nuclear accident are greater than generally admitted. All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies--not known in modern times for either their speed or economy.

FN36. The expert testimony before the District Court indicated that Duke Power, one of the largest utilities in the country, could not be expected to accumulate more than $200 million for damages claims without reaching the point of insolvency. App. 393-397. This amount, even when coupled with the amount of available private insurance, would be less than the $560 million provided by the Act. Moreover, if the liability were of sufficient magnitude to force the utility or component manufacturer into bankruptcy or reorganization, recovery would likely be further reduced and delayed. See Joint Committee on Atomic Energy, Issues of Financial Protection in Nuclear Activities in Selected Materials on Atomic Energy Indemnity and Insurance Legislation, 93d Cong., 2d Sess., 110 (Comm. Print 1974).

FN37. See Prosser, *supra*, n.34, at 520-521.

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Appellees' remaining objections can be briefly treated. The claim- administration procedures under the Act provide that in the event of an accident with potential liability exceeding the $560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for "possible latent injury claims which may not be discovered until a later time." 42 U.S.C. § 2210(*o*)(3) (1970 ed., supp. v). althoUgh somE DELAY MIGht follow from compliance with this statutory procedure, we doubt that it would approach that resulting from routine litigation of the large number of claims caused by a catastrophic accident. [FN38] Moreover, the statutory scheme insures the equitable distribution of benefits to all who suffer injury--both immediate and latent; under the common-law route, the proverbial race to the courthouse would instead determine who had "first crack" at the diminishing resources of the tortfeasor, and fairness could well be sacrificed in the process. The remaining contention that recovery is uncertain because of the aggregate rather than individualized nature of the liability ceiling is but a thinly disguised version of the contention that the $560 million figure is inadequate, which we have already rejected.

> FN38. The Act explicitly provides for "payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident." 42 U.S.C. § 2210(m). Unlike the normal tort recovery situation, these emergency payments are made prior to the determination of injury and the setting of damages, and are not conditioned on the execution of any release by the victim. *Ibid.*

In the course of adjudicating a similar challenge to the ***93** Workmen's Compensation Act in *New York Central R. Co. v. White*, 243 U.S., at 201, 37 S.Ct., at 252, the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at ****2641** the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

[16][17] Although the District Court also found the Price-Anderson Act to contravene the "equal protection provision that is included within the Due Process Clause of the Fifth Amendment," 431 F.Supp., at 224-225, appellees have not relied on this ground since the equal protection arguments largely track and duplicate those made in support of the due process claim. In any event, we conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations--particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy--is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other ***94** causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price-Anderson Act is, of course, not pertinent to the equal protection analysis. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378, 93 S.Ct. 1652, 1665, 36 L.Ed.2d 318 (1973). [FN39]

> FN39. Appellees also contend that the Price-Anderson Act effects an unconstitutional "taking" because in the event of a catastrophic nuclear accident their property would be destroyed without any assurance of just compensation. We find it unnecessary to resolve the claim that such an accident would constitute a "taking" as that term has been construed in our precedents since on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy, 28 U.S.C. § 1491 (1976 ed.). See *Regional Rail Reorganization Act Cases*, 419 U.S., at 125-136, 95 S.Ct., at 349-354. Appellees concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge to the Price-Anderson Act under the Just Compensation

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> Clause must fail. Brief for Appellees 71 n. 56. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day.

Accordingly, the decision of the District Court is reversed, and the cases are remanded for proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice STEWART, concurring in the result.

With some difficulty, I can accept the proposition that federal subject- matter jurisdiction under 28 U.S.C. § 1331 (1976 ed.) exists here, at least with respect to the suit against the Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

***95** But there never has been such an accident, and it is sheer speculation that one will ever occur. For this reason I think there is no present justiciable controversy, and that the appellees were without standing to initiate this litigation.

On the issue of standing, the Court relies on the "present" injuries of increased water temperatures and low-level radiation emissions. Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. Apart from a "but for" connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject-matter jurisdiction.

Surely a plaintiff does not have standing simply because his challenge, if successful, will remove the injury relied on for standing purposes *only* because it will put the ****2642** defendant out of existence. Surely there must be *some* direct relationship between the plaintiff's federal claim and the injury relied on for standing. Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450; *United States v. SCRAP*, 412 U.S. 669, 687-690, 93 S.Ct. 2405, 2415-2417, 37 L.Ed.2d 254; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617-618, 93 S.Ct. 1146, 1148-1149, 35 L.Ed.2d 536. An interest in the local water temperature does not, in short, give these appellees standing to bring a suit under 28 U.S.C. § 1331 (1976 ed.) to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident.

For these reasons, I would remand these cases to the District Court with instructions to dismiss the complaint.

Mr. Justice REHNQUIST, with whom Mr. Justice STEVENS joins, concurring in the judgment.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on district court jurisdiction ***96** as carefully defined in our statutes and cases. Because I believe the preservation of these limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249-250, 71 S.Ct. 692, 694-695, 95 L.Ed. 912 (1951).

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North Carolina courts. [FN1] Second, they contend that the Act works an unconstitutional taking of their property for public use without just compensation. They purport to base District Court jurisdiction upon 28 U.S.C. §

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1337 (1976 ed.) which covers "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

> FN1. Appellees have explicitly abandoned their claim based upon the so-called equal protection component of the Fifth Amendment "since in this case any equal protection arguments would be largely duplicative of appellees' due process arguments." Brief for Appellees, 21 n. 26.

I

It is apparent that appellees' first asserted basis for relief does not state a claim "arising under" the Price-Anderson Act. Their complaint alleges that the operation of the two power plants will cause immediate injury to property within their vicinity. App. 32, ¶ 21. The District Court explicitly found that these injuries "give rise to an immediate right of action for redress. Under the law of North Carolina a right of action arises as soon as a wrongful act has created 'any injury, however ***97** slight,' to the plaintiff." 431 F.Supp. 203, 221 (W.D.N.C.1977) (citations omitted). This right of action provided by state, not federal, law is the property of which the appellees contend the Act deprives them without due process. Thus, the constitutionality of the Act becomes relevant only if the appellant Duke Power Co. were to invoke the Act as a defense to appellees' suit for recovery under their North Carolina right of action.

It has long been established that the mere anticipation of a possible federal defense to a state cause of action is not sufficient to invoke the federal- question jurisdiction of the district courts. In *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), the plaintiffs sought to compel the specific performance ****2643** of a contract by which the railroad had granted them free passes for life. Although their contract was not predicated upon federal law, the plaintiffs contended that federal-question jurisdiction was established by the presence of an Act of Congress forbidding railroads to issue free passes. This Court held that the District Court did not have jurisdiction to consider whether the Act was inapplicable or unconstitutional:

> "It is the settled interpretation of these words ['arising under'], as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *Id.*, at 152, 29 S.Ct., at 43.

***98** Just as the underlying claim in *Mottley* arose under Kentucky contract law, the underlying claim in this case arises under North Carolina tort law. This Court has construed the "arising under" language of 28 U.S.C. § 1337 (1976 ed.) just as it has the similar language of 28 U.S.C. § 1331 (1976 ed.). *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

Nor does the fact that appellees seek only declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976 ed.), support a different result. This Court has held that the well-pleaded complaint rule applied in *Mottley* is fully applicable in cases seeking only declaratory relief, because the Declaratory Judgment Act merely expands the remedies available in the district courts without expanding their jurisdiction. "It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673, 70 S.Ct. 876, 880, 94 L.Ed. 1194 (1950). See also *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3566, pp. 437-438 (1975). [FN2]

> FN2. The Court asserts that its decision today does not undermine the well-pleaded complaint doctrine because of its conclusion "that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment." *Ante*, at 2629 n. 13. The supposed claim against the Commission arises only under

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federal law, since the complaint does not allege and the District Court did not find that North Carolina law would provide any remedy against it as a joint tortfeasor. On the Court's theory of the case, then, it need not decide whether jurisdiction could be obtained over Duke Power under § 1331. *Ante*, at 2630 n. 16. That is a particularly felicitous conclusion from the Court's point of view, since the complaint does not allege that each member of the plaintiff class has a claim in excess of $10,000. against Duke Power, which is a prerequisite to jurisdiction under § 1331. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

Despite the Court's assurances, it is conceivable that the practical effect of today's decision could be an erosion of the well-pleaded complaint doctrine. Had the plaintiffs in *Mottley* joined as defendants a federal agency having as ephemeral a relation to the statute challenged there as does the Commission to the statute involved here, the District Court, according to today's decision, would have had jurisdiction to consider the constitutionality of the statute, even though its judgment would not have been binding against the Louisville & Nashville Railroad. Innumerable federal statutes and regulations affect the daily decisions of private parties, who would undoubtedly appreciate the sort of advisory opinion rendered today on the validity of those provisions. This Court should not encourage the hope that such opinions may be obtained by suing an appropriate federal agency under a claim which verges on the frivolous.

***99 **2644** Appellees do not contend that the Price-Anderson Act itself grants to them personal rights which may be vindicated in a federal proceeding. Since the only property rights they assert arise under North Carolina law, the District Court had no jurisdiction to consider whether the setting up of an Act of Congress as a defense against those rights would deny them due process of law under the Fifth Amendment.

Indeed, the Court does not even contend that there is an independent statutory source of jurisdiction over Duke. *Ante*, at 2630 n. 16. It suggests instead that the complaint states a claim against the Nuclear Regulatory Commission, not as a joint tortfeasor under North Carolina law, but as the administrator of an unconstitutional federal statute. The Court's theory is that the complaint alleges the existence of an implied right of action under the Fifth Amendment to obtain relief against arbitrary federal statutes. It can hardly be said that this theory of the case emerges with crystal clarity from either the complaint or the brief of the appellees.

More importantly, there is no allegation in this complaint that the Nuclear Regulatory Commission has taken or will take any unconstitutional action at all. The complaint alleges only that the Commission granted construction permits to ***100** Duke, and that it will enter into an agreement "to indemnify Duke for any nuclear incident exceeding the amount of $125,000,000 subject to a maximum liability of $560,000,000." App. 31, ¶ 13. Neither of these actions is alleged to be unconstitutional. The gist of the complaint is the asserted unconstitutionality of 42 U.S.C. § 2210(e) (1970 ed., Supp. V), which limits Duke's liability. But this limitation of liability is separate and apart from the indemnity agreement which the Commission is authorized to execute under 42 U.S.C. § 2210(d) (1970 ed., Supp. V). The Commission has nothing whatever to do with the administration of the limitation of liability; whatever administration of that statute there is to be is left in the hands of the District Court. 42 U.S.C. § 2210(*o*) (1970 ed. and supp. v). the dIstrict Court, of course, is not a party to this suit. [FN3]

FN3. Appellees' challenge to the construction permits was rejected in *Carolina Environmental Study Group v. United States*, 166 U.S.App.D.C. 416, 510 F.2d 796 (1975). It is true, as the Court remarks, *ante*, at 2635 n. 26, that "absent the execution of such [indemnity] agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play." That logical connection, however, does not amount to an allegation that the Commission's execution of an indemnity agreement is itself unconstitutional. The only federal action challenged by this complaint is a hypothetical district court's hypothetical invocation of the statute in the event of a hypothetical nuclear accident. In that entire string of hypothetical events, no action of the Commission is alleged to be unconstitutional.

It simply cannot be said that these allegations make out an actual controversy against the Commission. While the Commission may be quite interested in the constitutionality of the statute, that is hardly sufficient to establish a justiciable controversy. *Muskrat v. United States*, 219 U.S. 346, 361-362, 31 S.Ct. 250, 255-256, 55 L.Ed. 246 (1911). While appellees may have been damaged by Duke's

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decision to construct these plants, there is no "challenged action of the defendant" Commission to which their damage "fairly can be traced." *Simon v. Eastern Ky. Welfare* ***101** *Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976). If Duke decided to proceed with construction despite a declaration of the statute's unconstitutionality, there would be nothing that the Commission could do to aid appellees. Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against that defendant. *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975). In short, appellees' only conceivable controversy is with Duke, over whom the District Court had no jurisdiction.

****2645** II

As appellees themselves describe the second aspect of their complaint, "the central issue is whether in the circumstances of this case, the complete destruction of appellees' property by a nuclear accident, occurring at one of Duke's plants, would be a 'taking' by the United States, as that term is defined in the Fifth Amendment." Brief for Appellees 62. This statement makes clear that appellees' claim arises not under the Price-Anderson Act but under the Fifth Amendment itself. Jurisdiction under § 1337 extends only to actions vindicating rights created by an Act of Congress. Compare *Switchmen v. National Mediation Board*, 320 U.S. 297, 300, 64 S.Ct. 95, 96, 88 L.Ed. 61 (1943), with *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337, 64 S.Ct. 146, 152, 88 L.Ed. 76 (1943). Since it cannot be maintained that the Price-Anderson Act *created* appellees' asserted right to be free from takings for public use without just compensation, it follows that District Court jurisdiction may not be predicated upon § 1337.

The District Court does have jurisdiction to consider claims of taking under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976 ed.), where the amount in controversy does not exceed $10,000. [FN4] "But the Act has long been construed as authorizing ***102** only actions for money judgments and not suits for equitable relief against the United States." *Richardson v. Morris*, 409 U.S. 464, 465, 93 S.Ct. 629, 631, 34 L.Ed.2d 647 (1973). It is incontrovertibly established that neither the Court of Claims nor the district courts have jurisdiction under the Tucker Act to issue the sort of declaratory relief granted here. Compare *ibid.*, with *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Thus, the record does not establish any jurisdictional basis upon which the District Court could grant declaratory relief on appellees' taking claim.

> FN4. The Court concludes, *ante*, at 2629-2630 n. 15, although appellees do not so contend, that their taking claim is cognizable under 28 U.S.C. § 1331(a) (1976 ed.), which grants jurisdiction to the district courts where the suit "arises under the Constitution." The Court cites only the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), in support of its conclusion that this claim may be maintained under § 1331. It is, of course, well established that "when 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." *Hagans v. Lavine*, 415 U.S. 528, 535 n. 5, 94 S.Ct. 1372, 1378, 39 L.Ed.2d 577 (1974). In the *Regional Rail Reorganization Act Cases* this Court's opinion did not even cite the statutory basis for jurisdiction, much less consider its validity. To conclude that § 1331 embraces a "taking" claim makes the Tucker Act largely superfluous, cf. *United States v. Testan*, 424 U.S. 392, 404, 96 S.Ct. 948, 956, 47 L.Ed.2d 114 (1976), and will permit the district courts to consider claims of over $10,000 which previously could only be litigated in the Court of Claims. *Richardson v. Morris*, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed.2d 647 (1973). Such a significant expansion of the jurisdiction of the district courts should not be accomplished without the benefit of arguments and briefing.

There being no basis for District Court jurisdiction over either of appellees' claims, its judgment should be reversed and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

Mr. Justice STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this litigation together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees;

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we are then asked to remedy an alleged due process violation ***103** that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees' standing; [FN*] it is even more remarkable ****2646** that this occurs in a case in which, as Mr. JUSTICE REHNQUIST demonstrates, there is no federal jurisdiction in the first place.

FN* With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound--from tax statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539.

The Court's opinion will serve the national interest in removing doubts concerning the constitutionality of the Price-Anderson Act. I cannot, therefore, criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, my view of the proper function of this Court, or of any other federal court, in the structure of our Government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.

I join Mr. Justice REHNQUIST'S opinion concurring in the judgment.

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Tab 6

Supreme Court of the United States

W. J. USERY, Jr., Secretary of the United States Department of Labor, et al., Appellants,
v.
TURNER ELKHORN MINING COMPANY et al.
TURNER ELKHORN MINING COMPANY et al., Appellants,
v.
W. J. USERY, Jr., Secretary of the United States Department of Labor, et al.

Nos. 74-1302, 74-1316.

Argued Dec. 2, 1975.
Decided July 1, 1976.

Action was brought by coal mine operators attacking constitutionality of black lung benefit provisions of Coal Mine Health and Safety Act of 1969. The Three- Judge District Court for the Eastern District of Kentucky, 385 F.Supp. 424, found amended Act constitutional on its face except in regard to two provisions concerning determination of miner's total disability due to pneumoconiosis, and appeals were taken. The Supreme Court, Mr. Justice Marshall, held that due process clause poses no bar to requiring coal mine operator to provide compensation for former miner's death or disability due to pneumoconiosis arising out of employment in its mines even if former miner terminated his employment in the industry before the Act was passed; that Congress did not act arbitrarily in selecting ten and 15-year figures as reference points for presumptions of disability due to pneumoconiosis; and that challenged provisions of Act were constitutionally sound.

Affirmed in part, reversed in part, and vacated and remanded in part.

Mr. Chief Justice Burger concurred in the judgment.

Mr. Justice Powell filed concurring opinion.

Mr. Justice Stewart filed opinion concurring in part and dissenting in part in which Mr. Justice Rehnquist joined.

West Headnotes

[1] Courts ⚿96(3)
106k96(3) Most Cited Cases

Supreme Court's summary affirmance in prior case did not foreclose district court's determination of unconstitutionality regarding issues which were not before Supreme Court on prior appeal.

[2] Courts ⚿90(1)
106k90(1) Most Cited Cases

Although several questions presented had been raised and decided in prior case which had been disposed of by summary affirmance, Supreme Court, having heard oral argument and entertained full briefing on such issues together with other questions raised, would proceed to treat them more fully.

[3] Constitutional Law ⚿48(1)
92k48(1) Most Cited Cases

Legislative acts adjusting burdens and benefits of economic life come to Supreme Court with presumption of constitutionality, and burden is on one complaining of due process violation to establish that legislature has acted in arbitrary and irrational way.

[4] Constitutional Law ⚿81
92k81 Most Cited Cases

Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, even though effect of legislation is to impose new duties or liability based on past acts.

[5] Labor Relations ⚿13
232Ak13 Most Cited Cases

Justification for retrospective imposition of liability on coal mine operators for pneumoconiosis arising out of employment in coal mines of miners who terminated their work in the industry before Coal Mine Health and Safety Act of 1969, as amended by Black Lung Benefits Act of 1972, was enacted had

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to take into account possibility that operators may not have known of danger of their employees' contracting pneumoconiosis, and that even if they did know of danger their conduct may have been taken in reliance upon current state of the law, which imposed no liability on them for disabling pneumoconiosis. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[6] Labor Relations ⚷13
232Ak13 Most Cited Cases

Imposition of liability on coal mine operators under Coal Mine Health and Safety Act of 1969, which Act as amended requires operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines even if former employee terminated his employment in mines before Act was passed, for disabilities bred in the past was justified as rational measure to spread costs of employees' disability to those who profited from the fruits of their labor, the operators and coal consumers. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[7] Constitutional Law ⚷70.3(9.1)
92k70.3(9.1) Most Cited Cases
(Formerly 92k70.3(9))

Whether broader cost-spreading scheme than Coal Mine Health and Safety Act of 1969, which as amended requires coal mine operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines even if former employee terminated his employment before Act was passed, would have been wiser or more practical under the circumstances was not a question of constitutional dimension. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[8] Constitutional Law ⚷301(4)
92k301(4) Most Cited Cases
(Formerly 92k301)

Due process clause poses no bar to requiring coal mine operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if former employee terminated his employment in the industry before statute requiring such compensation was passed. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932; U.S.C.A.Const. Amend. 5.

[9] Constitutional Law ⚷70.3(9.1)
92k70.3(9.1) Most Cited Cases
(Formerly 92k70.3(9))

[9] Labor Relations ⚷8
232Ak8 Most Cited Cases

Whether impairment of health of coal miner and fact that he had been rendered unable to perform kind of work to which he adapted himself merits compensation is public policy matter left primarily to determination of legislature, and such factors are not so insignificant as not to be rightful basis for compensation, and thus statutory definition providing that coal miner is totally disabled if pneumoconiosis prevents him from engaging in gainful employment requiring skills and abilities comparable to his employment in mines was not unconstitutionally arbitrary and irrational on theory that it provided compensation for former miners who might well be employable in other lines of work. Federal Coal Mine Health and Safety Act of 1969, § 402(f), as amended 30 U.S.C.A. § 902(f).

[10] Labor Relations ⚷8
232Ak8 Most Cited Cases

[10] Labor Relations ⚷13
232Ak13 Most Cited Cases

Effect of statutory "irrebuttable presumption" of total disability establishing entitlement where coal miner is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment is permissible, and thus such provision, being part of statute regulating purely economic matters, was not rendered invalid by Congress' choice of statutory language on theory that Congress accomplished result in impermissible manner by defining eligibility in terms of "total disability" and directing "irrebuttable presumption" of total disability upon factual showing that did not necessarily satisfy statutory definition of total disability. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(3) as amended 30 U.S.C.A. § 921(c)(3).

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[11] Labor Relations ⚿13
232Ak13 Most Cited Cases

Benefits authorized under statutory provision that clinical evidence of miner's complicated pneumoconiosis gives rise to irrebuttable presumption that he was totally disabled by pneumoconiosis at time of his death and that his death was due to pneumoconiosis were intended not simply as compensation for damages due to miner's death, but as deferred compensation for injury suffered during miner's lifetime as result of illness itself, and thus such benefits presented no problem in connection with retrospective application of provision to employees who terminated their employment before statute authorizing benefits was passed. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(3) as amended 30 U.S.C.A. § 921(c)(3).

[12] Labor Relations ⚿8
232Ak8 Most Cited Cases

[12] Labor Relations ⚿13
232Ak13 Most Cited Cases

In view of agreement that pneumoconiosis is caused by breathing coal dust and medical evidence indicating noticeable incidence of pneumoconiosis in cases of miners with ten years' mine employment, it was not "purely arbitrary" for Congress to select ten-year figure as point of reference for statutory rebuttable presumptions that coal miner with ten years' employment in mines is presumed to have contracted pneumoconiosis from employment and that death of coal miner with ten years' employment is presumed to have been due to pneumoconiosis; nor were such ten-year presumptions arbitrary because they failed to account for varying degrees of exposure. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(1, 2) as amended 30 U.S.C.A. § 921(c)(1, 2); Federal Rules of Evidence, rule 301, 28 U.S.C.A.

[13] Labor Relations ⚿8
232Ak8 Most Cited Cases

[13] Labor Relations ⚿13
232Ak13 Most Cited Cases

In light of medical testimony to effect that 15-year point marks beginning of linear increase in prevalence of disease with years spent underground, 15 years' durational basis of statutory presumption that coal miner employed for 15 years in underground mines who is able to marshal evidence demonstrating totally disabling respiratory or pulmonary impairment is rebuttably presumed totally disabled by pneumoconiosis was not arbitrary. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(4) as amended 30 U.S.C.A. § 921(c)(4).

[14] Constitutional Law ⚿55
92k55 Most Cited Cases

Congress has plenary authority over promulgation of evidentiary rules for federal courts.

[15] Labor Relations ⚿8
232Ak8 Most Cited Cases

[15] Labor Relations ⚿13
232Ak13 Most Cited Cases

In view of significant evidence presented to Congress demonstrating that X-ray testing which fails to disclose pneumoconiosis cannot be depended upon as trustworthy indicator of absence of disease, Congress' resolution of doubts in favor of disabled miner through enactment of provision that no claim for black lung benefits shall be denied solely on basis of chest X-ray did not render enactment arbitrary under standards of rationality appropriate to legislation in question. Federal Coal Mine Health and Safety Act of 1969, § 413(b) as amended 30 U.S.C.A. § 923(b).

[16] Constitutional Law ⚿55
92k55 Most Cited Cases

When it comes to evidentiary rules in matters not within specialized judicial competence or completely commonplace, it is primarily for Congress to amass the stuff of actual experience and cull conclusions from it.

[17] Labor Relations ⚿13
232Ak13 Most Cited Cases

[17] Workers' Compensation ⚿1388
413k1388 Most Cited Cases

Limitation on rebuttal evidence contained in

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statutory section, which provides that miner employed for 15 years in underground mine who is able to demonstrate totally disabling respiratory or pulmonary impairment is rebuttably presumed totally disabled by pneumoconiosis and his death rebuttably presumed due to pneumoconiosis, and which applies only to "the Secretary," applies only to the Secretary of Health, Education and Welfare and is inapplicable to coal mine operators, and thus evidence with which coal miner operator may rebut such presumption is not restricted. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(4) as amended 30 U.S.C.A. § 921(c)(4).

[18] Federal Courts ⚿479
170Bk479 Most Cited Cases
(Formerly 30k170(1))

Where coal mine operators' amended complaint never challenged statutory or constitutional validity of regulations promulgated by Secretary of Health, Education and Welfare authorizing limitations on rebuttal evidence in determination of coal mine operator's liability for black lung benefits, and in absence of any mention of regulations in opinion and judgment of district court or in briefs and oral arguments of the parties, Supreme Court found it inappropriate to consider regulations' statutory or constitutional validity. Federal Coal Mine Health and Safety Act of 1969, §§ 411(b), 422(h) as amended 30 U.S.C.A. §§ 921(b), 932(h).

****2885** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***1** Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, provides benefits to coal miners suffering from "black lung disease" (pneumoconiosis), and to survivors of miners who have died from, or while totally disabled by, the disease. Financial responsibility for payment of the benefits is divided into three parts: (1) Under Part B of Title IV claims filed between December 30, 1969 (enactment date), and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare (HEW), and paid by the United ****2886** States; (2) under s 415 of Part B claims filed during the transition period between the Federal Government benefit provision under Part B, Supra, and the state plan or operator benefit provision under Part C, Infra (July 1 to December 31, 1973), are adjudicated by the Secretary of Labor and paid by the United States. Federal payments to these claimants terminate on December 31, 1973, and the claimant's coal mine employer assumes responsibility to make continuing payments as if Part C and ***2** s 422 had applied (see (3), *infra*); and (3) under Part C, claims filed after December 31, 1973, are to be processed under an approved state workmen's compensation law and, absent such an approved plan, claims are to be filed with and adjudicated by the Secretary of Labor, d paid by the mine operators s 422. Under that provision an operator, who is entitled to a hearing in connection with these claims, is liable for benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible, the operator's liability covering the period from January 1, 1974, to December 30, 1981. Payments for benefits under Part C are to the same category of persons (a miner or certain survivors) and in the same amounts as under Part B. A miner is "totally disabled" and thus entitled to compensation "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time," s 402(f). The Act prescribes several "presumptions" for use in determining compensable disability: Under s 411(c)(3) a miner shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis (the disease's incurable and final stage) is "irrebuttably presumed" to be totally disabled due to the disease; if such a miner has died, it is irrebuttably presumed that he was totally disabled by the disease at the time of death, and that his death was due thereto. There are three rebuttable presumptions (none of which may, under s 413(b), be defeated solely by a chest X-ray): (1) if a miner with 10 or more years' mine employment contracts pneumoconiosis, it is presumed that the disease arose out of such employment, s 411(c)(1); (2) if he died from a respiratory disease it is presumed that death was due to pneumoconiosis, s 411(c)(2); (3) if a miner, or the survivor of a miner, with 15 or more years' underground coal mine employment is able,

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despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, it is presumed that the total disability is attributable to the disease, that the miner was totally disabled thereby when he died, and that death was due to the disease, s 411(c)(4), and the final sentence of that provision specifies that "(t)he Secretary may rebut (this latter) presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment ***3** did not arise out of, or in connection with, employment in a coal mine." A number of operators brought this suit claiming that the Act is unconstitutional under the Due Process Clause of the Fifth Amendment insofar as it requires benefit payments with respect to miners who left mine employment before the Act's effective date; that the statutory definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operator's ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators are inconsistent with the Act and unconstitutional. The District Court upheld each challenged provision as constitutional, with two exceptions: (1) It held s 411(c)(3) unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." (2) Reading the evidence limitation on rebuttal in s 411(c)(4) to apply to an operator's defense in a s 415 transition-period case, the court held the limitation ****2887** arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. And, taking the provision to mean that an operator may defend against liability only on the ground that pneumoconiosis did not arise out of employment in *any* coal mine (rather than in a coal mine for which the operator was responsible) the District Court found the provision an arbitrary and unreasonable limitation on rebuttal evidence relevant and proper under s 422(c). The court enjoined the Secretary of Labor from seeking to apply the two provisions thus found unconstitutional. *Held:*

1. This Court's summary affirmance in National Independent Coal Operators Assn. v. Brennan, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172, did not foreclose the District Court's rulings regarding ss 411(c)(3) and (4), which were not before the Court on that appeal. Pp. 2891-2892.

2. The challenged provisions do not violate the Due Process Clause of the Fifth Amendment. Pp. 2891-2903.

(a) The Clause does not bar requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in its mines before the Act was passed. Retrospective application of the Act in this manner can be justified as serving to spread costs in a rational manner by allocating to the operator an actual cost of its business, whose avoidance might be thought to have enlarged ***4** the operator's profits. *.Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, distinguished. Pp. 2891-2894, 2896-2898.

(b) Though the operators contend that the s 402(f) definition of total disability is arbitrary because former miners who might be employable in other lines of work are compensated, a miner disabled under s 402(f)'s standards has suffered health impairment, and has been rendered unable to perform the work to which he has adapted himself, factors which afford a rational basis for compensation. P. 2895.

(c) The effect of s 411(c)(3)'s "irrebuttable presumption" of total disability to establish entitlement where a miner is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment is clearly permissible, and the provision, being part of a statute regulating purely economic matters, is not rendered invalid by Congress' choice of statutory language. Pp. 2895-2897.

(d) The presumptions in ss 411(c)(1) and (2) are valid because there is a "rational connection between the fact proved and the ultimate fact presumed," Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78. In view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' mine employment, it was not "purely arbitrary" for Congress to select the 10-year figure as a reference point for the presumptions; not are the 10-year

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presumptions arbitrary because they fail to account for varying degrees of exposure. Pp. 2898-2899.

(e) The 15-year durational basis of the presumption in s 411(c)(4) is likewise unassailable, particularly in light of medical testimony in the Senate Hearings on the 1969 Act. Pp. 2899, 2900.

(f) Congress had evidence showing doubts about the reliability of negative X- ray evidence as indicating the absence of the disease. That through its adoption of s 413(b) Congress ultimately resolved those doubts in the disabled miner's favor does not render that provision arbitrary. Pp. 2900-2901.

(g) The District Court improperly invalidated the limitation on evidence contained in s 411(c)(4) because the limitation is inapplicable to operators and applies only to the Secretary of HEW. Thus the Act does not restrict the evidence with which an operator may rebut the s 411(c)(4) presumption. Pp. 2901-2903.

385 F.Supp. 424, affirmed in part; reversed in part; vacated and remanded in part.

****2888 *5** R. RMcMahan, Chicago, Ill., for Turner Elkhorn Mining Co. et al.

Lawrence G. Wallace, Washington, D.C., for John T. Dunlop et al.

Mr. Justice MARSHALL delivered the opinion of the Court.

Twenty-two coal mine operators (Operators) brought this suit to test the constitutionality of certain aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. s 901 Et seq. (1970 ed. and Supp. IV). The Operators, potentially liable under the amended Act to compensate certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines, sought declaratory and injunctive relief against the Secretary of Labor and the ***6** Secretary of Health, Education, and Welfare, who are responsible for the administration of the Act and the promulgation of regulations under the Act.

On cross-motions for summary judgment, a three-judge District Court for the Eastern District of Kentucky, convened pursuant to 28 U.S.C. ss 2282 and 2284, found the amended Act constitutional on its face, except in regard to two provisions concerning the determination of a miner's total disability due to pneumoconiosis. The court enjoined the Secretary of Labor from further application of those two provisions. 385 F.Supp. 424 (1974). After granting a stay of the three-judge court's order, 421 U.S. 944, 95 S.Ct. 1673, 44 L.Ed.2d 99 (1975), we noted probable jurisdiction of the cross-appeals. 421 U.S. 1010, 95 S.Ct. 2413, 44 L.Ed.2d 678 (1975). We conclude that the amended Act, as interpreted, is constitutionally sound against the Operators' challenges.

I

Coal workers' pneumoconiosis black lung disease affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment. [FN1] The disease is caused by long-term inhalation of coal dust. [FN2] Coal workers' pneumoconiosis (hereafter ***7** pneumoconiosis) is generally dgnosed on the basis of X-ray opacities indicating nodular lesions on the lungs of a patient with a long history of coal dust exposure. As the Surgeon General has stated, however, post-mortem examination data have indicated a greater prevalence of the disease than X-ray diagnosis reveals.

FN1. The House and Senate Reports on the 1969 Act placed the number of afflicted active and retired miners at 100,000. S.Rep.No.91-411, p. 6 (1969), and H.R.Rep.No.91-563, p. 17 (1969), U.S. Code Cong. & Admin.News 1969, p. 2503. The Senate Report, Supra, at 7, specified that, on the basis of X-ray examination, the disease rate was 10% For then-active coal miners, and 20% For inactive coal miners. Other estimates have run significantly higher. See E. g., Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 2, p. 641 (1969).

FN2. Coal workers' pneumoconiosis is a distinct clinical entity, and is not the only type of pneumoconiosis. The remarks of the Surgeon General, reproduced in H.R.Rep.No.91-563, Supra, at 15, indicate that the pathological condition of pneumoconiosis may also be caused by inhalation of other dusty materials, such as cotton fibers or silica.

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According to the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated." [FN3] Simple pneumoconiosis, ordinarily identified by X-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant respiratory impairment. Complicated pneumoconiosis, generally far more serious, involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually [FN4] produces significant **2889 pulmonary impairment and marked respiratory disability. This disability limits the victim's physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death. [FN5]

FN3. S.Rep.No.91-411, Supra, at 7-8; H.R.Rep.No.91-563, Supra, at 15-16.

FN4. There was evidence before Congress that the complicated stage of the disease is sometimes exhibited with "mild pulmonary function changes and little or no disability." Hearings on S. 355, Supra, N. 1, at 858.

FN5. Ibid.

Removing the miner from the source of coal dust has so far proved the only effective means of preventing the contraction of pneumoconiosis, and once contracted the disease is irreversible in both its simple and complicated stages. No therapy has been developed. Finally, because the disease is progressive, [FN6] at least in its complicated *8 stage, its mptoms may become apparent only after a miner has left the coal mines.

FN6. Ibid.

In order to curb the incidence of pneumoconiosis, Congress provided in Title II of the Federal Coal Mine Health and Safety Act of 1969, s 201 Et seq., 30 U.S.C. s 841 Et seq., for limits on the amount of dust to be permitted in the ambient air of coal mines. Additionally, in view of the then-established prevalence of irreversible pneumoconiosis among miners, and the insufficiency of state compensation programs, Congress passed Title IV of the 1969 Act, s 401 Et seq., 30 U.S.C. s 901 Et seq., to provide benefits to afflicted miners and their survivors. These benefit provisions were subsequently broadened by the Black Lung Benefits Act of 1972. 30 U.S.C. s 901 Et seq. (1970 ed., Supp. IV).

As amended, the Act divides the financial responsibility for payment of benefits into three parts. Under Part B of Title IV, ss 411-414, 30 U.S.C. ss 921-924 (1970 ed. and Supp. IV), claims filed between December 30, 1969, the date of enactment, and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare and paid by the United States. [FN7]

FN7. As of December 31, 1974, 556,200 claims had been filed under Part B of the law. As of that date, with all but 400 cases decided, 509,900 individuals had established eligibility as black lung beneficiaries under the Act. Department of Health, Education, and Welfare, Fifth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, p. 3 (1975).

Under Part C of Title IV, ss 421-431, 30 U.S.C. ss 931-941 (1970 ed. and Supp. IV), claims filed after December 31, 1973, are to be processed under an applicable state workmen's compensation law approved by the Secretary of Labor under the standards set forth in s 421, 30 U.S.C. s 931 (1970 ed. and Supp. IV). In *9 the absence of such an approved state program, and to date no state program has been approved, claims are to be filed with and adjudicated by the Secretary of Labor, and paid by the mine operators. s 422, 30 U.S.C. s 932 (1970 ed. and Supp. IV). Under s 422 an operator who is entitled to a hearing in connection with these claims is liable for Part C benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible. The operator's liability for Part C benefits covers the period from January 1, 1974, to December 30, 1981. Payments of benefits under Part C are to the same categories of persons a miner or certain survivors and in the same amounts, as under Part B. ss 422(c), (d); see s 412(a), 30 U.S.C. s 922(a) (1970 ed. and Supp. IV). [FN8]

FN8. The individual claimant is entitled to benefits at a rate equal to 50% Of the minimum monthly payment to which a totally disabled federal employee in Grade GS-2 is entitled. s 412(a)(1), 30 U.S.C. s 922(a)(1). At current rates, the individual claimant's entitlement is $196.80 per month, or $2,361.60 per year. 40 Fed.Reg. 56886-56887 (1975); see 20 CFR s 410.510 (1975). These basic

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benefits are increased if the claimant has dependents; the maximum increase of 100% Is available if the claimant has three or more dependents. s 412(a)(4), 30 U.S.C. s 922(a)(4) (1970 ed., Supp. IV). See also 30 U.S.C. ss 922(a)(3), (5) (1970 ed., Supp. IV). Thus, the maximum in benefits to which a claimant could be entitled is $393.60 per month, or $4,723.20 per year. Benefits under Part C are reduced to account for certain alternative income. s 422(g), 30 U.S.C. s 932(g). In addition to these monthly benefits, the operators are responsible for claimants' medical expenses. See s 422(a), 30 U.S.C. s 932(a) (1970 ed., Supp. IV), incorporating 33 U.S.C. s 907 (1970 ed., Supp. IV).

**2890 Claims filed during the transition period between the Federal Government benefit provision under Part B, and state plan or operator benefit provision under Part C that is, July 1 to December 31, 1973 are adjudicated *10 under s 415 of Part B, 30 U.S.C. s 925 (1970 ed., Supp. IV), by the Secretary of Labor. The United States is responsible for payment of these claims until December 31, 1973. Responsible operators, having been notified a claim and entitled to participate in a hearing thereon, are thereafter liable for benefits as if the claim had been filed pursuant to Part C and s 422 had been applicable to the operator.

The Act provides that a miner shall be considered "totally disabled," and consequently entitled to compensation, "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." s 402(f), 30 U.S.C. s 902(f) (1970 ed., Supp. IV). [FN9] The Act also prescribes several "presumptions" for use in determining compensable disability. [FN10] Under s 411(c)(3), a miner *11 shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis is "irrebuttably presumed" to be totally disabled due to pneumoconiosis; if he has died, it is irrebuttably presumed that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. 30 U.S.C. s 921(c)(3) (1970 ed., Supp. IV). In any event, the presumption operates conclusively to establish entitlement to benefits.

FN9. Section 402(f), as set forth in 30 U.S.C. s 902(f) (1970 ed., Supp. IV), provides in full:

"The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42."

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung arising out of employment in a coal mine." s 402(b), 30 U.S.C. s 902(b) (1970 ed., Supp. IV).

FN10. These presumptions are applicable directly to Part B adjudications by the Secretary of HEW, and indirectly to transition-period and Part C adjudications by the Secretary of Labor by operation of ss 422(h) and 411(b), 30 U.S.C. ss 932(h), 921(b) (1970 ed. and Supp. IV). See S.Rep.No.92-743, p. 21 (1972), U.S.Code Cong. & Admin.News 1972, p. 2305. See also ss 422(f)(2), 430, 30 U.S.C. ss 932(f)(2), 940 (1970 ed., Supp. IV).

The other presumptions are each explicitly rebuttable by an operator seeking to avoid liability. There are three such presumptions. First, if a miner with 10 or more years' employment in the mines contracts pneumoconiosis, it is rebuttably presumed that the disease arose out of such employment. s 411(c) (1), 30 U.S.C. s 921(c)(1) (1970 ed., Supp. IV). Second, if a miner with 10 or more years' employment in the mines died from a "respirable disease", it is rebuttably presumed that his death was due to pneumoconiosis. s 411(c)(2), 30 U.S.C. s 921(c)(2) (1970 ed., Supp. IV). Finally, if a miner, or the survivor of a miner, with 15 or more years' employment in underground coal mines is able, despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, the Act rebuttably presumes that the total disability is due to pneumoconiosis, that the miner was totally disabled by pneumoconiosis when he died, and that the miner's death was due to pneumoconiosis. s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV). [FN11] Section 411(c)(4) specifically provides: "The Secretary *12 may rebut (this latter) presumption only by establishing that (A) such miner does not, or did not, have

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pneumoconiosis, or that (B) his respiratory or pulmonary **2891 impairment did not arise out of, or in connection with, employment in a coal mine." Moreover, under s 413(b), 30 U.S.C. s 923(b) (1970 ed., Supp. IV), none of these three rebuttable presumptions may be defeated solely on the basis of a chest X-ray. [FN12]

FN11. The use of this presumption in Part C adjudications is limited in some regards not significant in this case. See ss 422(f)(2), 430, 30 U.S.C. ss 932(f)(2), 940 (1970 ed., Supp. IV).

FN12. Section 413(b), as set forth in 30 U.S.C. s 923(b) (1970 ed., Supp. IV), provides in pertinent part: "(N)o claim for benefits Under this part shall be denied solely on the basis of the results of a chest roentgenogram." (Emphasis added.) Section 413(b) is found in Part B of Title IV. Section 430, as set forth in 30 U.S.C. s 940 (1970 ed., Supp. IV), provides, however, that "(t)he amendments made by the Black Lung Benefits Act of 1972 to part B . . . shall, to the extent appropriate, also apply (with limitations not relevant here) to . . . part (C)." The legislative history, moreover, makes clear that the s 413(b) limitation on use of X-ray evidence, enacted as s 4(f) of the 1972 Act, was intended to apply to Part C claims as well as Part B claims, see H.R.Conf.Rep.No.92- 1048, p. 9 (1972), U.S.Code Cong. & Admin.News 1972, p. 2338, and the Operators so concede. Brief for Operators 21.

II

In initiating this suit against the defendant Secretaries (hereafter Federal Parties), the Operators contended that the amended Act is unconstitutional insofar as it requires the payment of benefits with respect to miners who left employment in the industry before the effective date of the Act; that the Act's definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operators' ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators, and the provision of medical benefits, are inconsistent with the Act and constitutionally defective.

*13 The three-judge District Court held that all issues as to the validity of the challenged regulations were within the jurisdiction of a single district judge, and the court entered an order so remanding them. 385 F.Supp., at 426. The District Court upheld each challenged statutory provision as constitutional, with two exceptions. First, the District Court held that s 411(c)(3)'s irrebuttable presumption is unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." 385 F.Supp., at 430. Second, reading the limitation on evidence in rebuttal to s 411(c)(4)'s presumption of total disability due to pneumoconiosis to apply to an operator's defense in a s 415 transition-period case, the District Court found that limitation unconstitutional in two respects. It held the limitation arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. 385 F.Supp., at 430. And taking the provision to mean that an operator may defend against liability only on the ground that the pneumoconiosis did not arise out of employment in Any coal mine, rather than on the ground that it did not arise out of employment in a coal mine for which the operator was responsible, the District Court found the provision an unreasonable and arbitrary limitation on rebuttal evidence relevant and proper under s 422(c), 30 U.S.C. s 932(c). 385 F.Supp., at 430-431. The District Court accordingly entered an order declaring unconstitutional, and enjoining the Secretary of Labor from seeking to apply, s 411(c)(3)'s irrebuttable presumption and s 411(c)(4)'s limitation on rebuttable evidence.

The Operators' appeal, No. 74-1316, reasserts the constitutional challenges rejected by the District Court. *14 The appeal of the Federal Parties, No. 74-1302, seeks reversal of the declaration and injunction respecting the constitutionality of ss 411(c)(3) and (4). Neither side here questions the District Court's decision not to address the issues raised with respect to the Secretary of Labor's regulations. As we have already noted, we uphold the statute against all the constitutional contentions properly presented here. Because we read the limitation on rebuttal evidence in s 411(c)(4) as inapplicable to the Operators, however, we vacate that portion of the District Court's order which invalidates that limitation.

**2892 III

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[1][2] The Federal Parties direct our attention initially to National Independent Coal Operators Assn. v. Brennan, 372 F.Supp. 16 (DC), summarily aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974), which raised a number of issues identical to those presented here. Our summary affirmance in that case did not foreclose the District Court's determination of unconstitutionality regarding ss 411(c)(3) and (4), those issues not having been before us on the appeal. Several questions presented here most notably those of retroactivity and preclusion of sole reliance on X-ray testimony evidence were raised and decided in National Independent Coal Operators Assn. v. Brennan, but having heard oral argument and entertained full briefing on these issues together with the other questions raised in the case, we proceed to treat them here more fully. Cf. Edelman v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 62 (1974).

IV

The Operators contend that the amended Act violates the Fifth Amendment Due Process Clause by requiring them to compensate former employees who terminated their work in the industry before the Act was passed, ***15** and the survivors of such employees. [FN13] The Operators accept the liability imposed upon them to compensate employees working in coal mines now and in the future who are disabled by pneumoconiosis; and they recognize Congress' power to create a program for compensation of disabled inactive coal miners. But the Operators complain that to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time.

> FN13. For simplicity of discussion, we will generally refer to claims as though presented by the miner himself, although they may in fact be maintained upon death by a survivor. Neither the District Court nor the parties have distinguished miners'claims from survivors' claims under the constitutional attacks raised in this case.

[3] It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, E. g., Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955). And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); see also Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (1912).

[4] To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated ***16** before the date of enactment, the Act has some retrospective effect although, as we have noted, the Act imposed no liability on operators until 1974. [FN14] And it may be that the liability imposed by the Act for disabilities suffered ****2893** by former employees was not anticipated at the time of actual employment. [FN15] But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See Fleming v. Rhodes, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947); Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948); Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Funkhouser v. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243 (1933).

> FN14. The Federal Parties suggest that since a claim for benefits under Part C must be filed within three years of the discovery of total disability due to pneumoconiosis (or the date of death), s 422(f)(1), 30 U.S.C. s 932(f)(1) (1970 ed., Supp. IV), the operators will not ordinarily be

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liable for any disabilities maturing before enactment of their responsibility. See also s 422(f)(2), 30 U.S.C. s 932(f)(2) (1970 ed., Supp. IV). This does not hold true, however, for nonunderground operators, since Part C liability did not apply to them until 1972. See Black Lung Benefits Act of 1972, s 3, 86 Stat. 153, amending ss 401, 402(b)(d), 411(c)(1), (2), 422(a), (h), 423(a), 30 U.S.C. ss 901, 902(b), (d), 921(c)(1), (2), 932(a), (h), 933(a) (1970 ed., Supp. IV). In any event, we think the point unnecessary to our conclusion.

FN15. The Operators have not contended, however, that the Act is constitutionally defective insofar as it requires them to provide compensation for Present employees whose disabilities may stem from exposure that was terminated before enactment of the Act.

[5] It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. ***17** The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis. [FN16] While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years, [FN17] and while they have not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them, we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence, cf. United States v. Peltier, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975), ***18** or blameworthiness, cf. Ibid.; DeVeau v. Braisted, 363 U.S. 144, 160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960).

FN16. Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. Id., at 147-148, 59 S.Ct., at 126. But see Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911).

FN17. Coal miner's pneumoconiosis was recognized in Great Britain as early as 1943. It was not generally recognized in the United States as an entity distinct from silicosis until the 1950's. S.Rep.No.91-411, p. 8 (1969).

[6] We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work ****2894** force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.

[7] Of course, as we have already indicated, a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal Government. But even taking the Operators' argument at face value, it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators,

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including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the ***19** wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. See, *e. g., Ferguson v. Skrupa*, 372 U.S., at 730-732, 83 S.Ct., at 1031; *Williamson v. Lee Optic Co., 348 U.S., at 488, 75 S.Ct., at 464.*

The Operators ultimately rest their due process argument on Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935), in which the Court found the Railroad Retirement Act of 1934 to be unconstitutional. Among the provisions specifically invalidated as arbitrary was a provision for employer-financed pensions for former employees who, though not in the employ of the railroads at the time of enactment, had been so employed within the year. Assuming that the portion of Alton invalidating this provision retains vitality, [FN18] we find it distinguishable from this case. The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored to allocate to the mine operator an actual, measurable cost of his business.

FN18. Mr. Chief Justice Hughes, joined by Justices Brandeis, Stone, and Cardozo, dissented from the Court's invalidating the Railroad Retirement Act altogether, but agreed with the Court that the provision for allowances to former employees was arbitrary. 295 U.S., at 374, 389, 55 S.Ct., at 773, 779.

[8] In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a ***20** former employee's death or disability due to pneumoconiosis arising out of employment in its mines, event if the former employee terminated his employment in the industry before the Act was passed.

V

We turn next to a consideration of the Operators' challenge to the "presumptions" and evidentiary rules governing adjudications of compensable disability under the Act.

A

The Act prescribes two alternative methods for showing "total disability," which is a prerequisite to compensation. First, a miner is "totally disabled" under the definition contained in s 402(f), if pneumoconiosis, simple or complicated,

> ****2895** "prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." [FN19]

FN19. For the full text of s 402(f) see n. 9, Supra.

Second, if a miner can show by clinical evidence (ordinarily X-ray evidence) that he is afflicted with complicated pneumoconiosis, the incurable and final stage of the disease, then the miner is deemed to be totally disabled under s 411(c)(3). [FN20] Thus, Congress has mandated that ***21** the final stage of the disease is ways compensable if its existence can be shown by positive clinical evidence, and that any stage of the disease is compensable when physically disabling under the terms of s 402(f). The Operators maintain that both of these standards are constitutionally untenable.

FN20. Section 411(c)(3), as set forth in 30 U.S.C. s 921(c)(3) (1970 ed., Supp. IV), provides:
"(I)f a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in

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> clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."

(1)

[9] The Operators contend that the definition of "total disability" set up in s 402(f) is unconstitutionally arbitrary and irrational, because it provides for the compensation of former miners who might well be employable in other lines of work, and who therefore are not truly disabled by their mining- generated afflictions. We think it patent that this attack on s 402(f) must fail. A miner disabled under s 402(f) standards has suffered in at least two ways: His health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself. Whether these interferences merit compensation is a public policy matter left primarily to the determination of the legislature. Cf. Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974). We cannot say that they are so insignificant as not to be a rational basis for compensation. Indeed, we long ago upheld against similar attack a workmen's compensation scheme providing benefits for injuries not depriving the employee of his ability to work. See New York Central R. Co. v. Bianc, 250 U.S. 596, 40 S.Ct. 44, 63 L.Ed. 1161 (1919); cf. Urie v. Thompson, 337 U.S. 163, 181-187, 69 S.Ct. 1018, 1030-1033, 93 L.Ed. 1282 (1949).

***22** (2)

[10] The District Court, relying on such cases as Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), invalidated s 411(c)(3) ' s "irrebuttable presumption" of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis. The presumption, the court explained,

> "forecloses all fact finding as to the effect of that disease upon a particular coal miner . . . . To the extent that such presumption purports to making a finding of total disability in terms other than those provided by (s 402(f)) as standards for total disability, it is unreasonable and arbitrary. As written, section (411(c)(3)) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled." 385 F.Supp., at 429-430.

We think the District Court erred in equating this case with those in the mold of Stanley and Vlandis.

2896 As an operational matter, the effect of s 411(c)(3)'s "irrebuttable presumption" of total disability is simply to establish entitlement in the case of a miner who is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment. [FN21] Indeed, the ***23 legislative history discloses that it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate. [FN22] Were the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. For, as we have already observed, destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers. New York Central R. Co. v. Bianc, supra. We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation. Since Congress can clearly draft a statute to accomplish precisely what it has accomplished through s 411(c)(3)'s presumption of disability, the argument is essentially that Congress has accomplished its result in an impermissible manner by defining eligibility in terms of "total disability" and erecting an "irrebuttable presumption" of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But in a statute such as this, regulating ***24** purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible. Cf. *Weinberger v. Salfi*, 422 U.S. 749, 767-785, 95 S.Ct. 2457, 2467-2476, 45 L.Ed.2d 522 (1975); *McDonald v. Board of Election*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234.

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FN21. Although the premise of s 411(c)(3), that the miner have a "chronic dust disease of the lung," does not explicitly provide that the disease must be one arising out of employment in a coal mine, it is clear under s 422(a), and hence under s 415(a)(5) as well, that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine. Section 422(a), as set forth in 30 U.S.C. s 932(a) (1970 ed., Supp. IV), provides that Part C liability "(shall) be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine."

FN22. The original House and Senate bills that gave rise to the Conference bill enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 each provided for compensation only for complicated pneumoconiosis. H.R. 13950, 91st Cong., 1st Sess., ss 112(b)(1), (7)(B), as it passed the House, 115 Cong.Rec. 32061 (1969), contained the diagnostic criteria presently embodied in s 411(c)(3), and deemed complicated pneumoconiosis to be "totally disabling" and compensable. S. 2917, 91st Cong., 1st Sess., ss 501-504, as amended on the floor, 115 Cong.Rec. 27632 (1969), and passed, Id., at 28243, established a program of interim benefits for total disability due to complicated pneumoconiosis, and directed the Secretary of Health, Education, and Welfare to develop standards for determining total disability due to complicated pneumoconiosis.

(3)

[11] In addition to creating an irrebuttable presumption of total disability, s 411(c)(3) provides that clinical evidence of a miner's complicated pneumoconiosis gives rise to an irrebuttable presumption that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. The effect of these presumptions, in particular the presumption of death due to pneumoconiosis, is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner's death was caused by pneumoconiosis. The Operators raise no separate challenge to these presumptions, and we would have no occasion to comment separately on them were it not for the Operators' general complaint against the application of the Act to employees who terminated their employment before the Act was **2897 passed. To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner by allocating to the operator an actual cost of his **25** business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

We think it clear, however, that the benefits authorized by s 411(c)(3)'s presumption of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's Death, but as deferred compensation for injury suffered during the miner's lifetime as a result of his illness itself. Thus, the Senate Report accompanying the 1972 amendments makes clear Congress' purpose to award benefits not only to widows whose husbands "(gave) their lives," but also to widows whose husbands "gave their health . . . in the service of the nation's critical coal needs." [FN23]

FN23. S.Rep.No.92-743, p. 8 (1972), U.S.Code Cong. & Admin.News 1972, p. 2312.

In the case of a miner who died with, but not from, pneumoconiosis Before the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness. And in the case of a miner who died with, but not from, pneumoconiosis After the Act was passed, the benefits serve an additional purpose: The miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures. In short, s 411(c)(3)'s presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems distinct from those considered in our prior discussion.

It might be suggested that the payment of benefits to defendant survivors is irrational as a scheme of compensation for injury suffered as a result of a miner's disability. But we cannot say that the scheme is wholly **26** unreasonable in providing

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benefits for those who were most likely to have shared the miner's suffering. Nor can we say that the scheme is arbitrary simply because it spreads the payment of benefits over a period of time. [FN24]

FN24. Under the present scheme, the payment of monthly benefits is not without limit. Section 422(e), as set forth in 30 U.S.C. s 932(e) (1970 ed., Supp. IV), quite clearly provides that "(n)o payment of benefits shall be required under this section . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after December 30, 1969." This time limitation, applicable in Part C cases by its terms, is also applicable to transition-period cases by virtue of s 415(a)(5), 30 U.S.C. s 925(a)(5) (1970 ed., Supp. IV). Thus, the operator is liable for monthly payments only for a period of eight years. The total amount payable to a single dependent survivor during this period under current rates, is approximately $18,900. The maximum amount for which the operator would be liable, if the miner had four or more dependent survivors, is approximately $37,800. See n. 8, Supra.

We might face a more difficult problem in applying s 411(c)(3)'s presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness. But the Operators in their facial attack on the Act have not suggested that a miner whose condition was serious enough to activate the **2898 s 411(c)(3) presumptions might not have been affected in any way by his condition, or that the family of such a miner might not have noticed it. Under the *27 circumstances, we decline to engage in speculation as to whether such cases may arise. [FN25]

FN25. Our analysis of the retrospective application of the s 411(c)(3) presumption of death due to pneumoconiosis is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis. See ss 422(a), (c), 412(a)(2), (3), (5), 411(a), 30 U.S.C. ss 932(a), (c), 922(a)(2), (3), (5), 921(a) (1970 ed. and Supp. IV).

B

[12] Turningour attention to the statutory regulations of proof of s 402(f) disability, we focus initially on the Operators' challenge to the presumptions contained in ss 411(c)(1) and (2). Section 411(c)(1) provides that a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment. [FN26] Section 411(c)(2) provides that if a coal miner with 10 years' employment in the mines dies from a respiratory disease, his death will be presumed to have been due to pneumoconiosis. [FN27] Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator. See Fed.Rule Evid. 301.

FN26. Section 411(c)(1), as set forth in 30 U.S.C. s 921(c)(1) (1970 ed., Supp. IV), provides in full: "(I)f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment."

FN27. Section 411(c)(2), as set forth in 30 U.S.C. s 921(c)(2) (1970 ed., Supp. IV), provides in full: "(I)f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis."

*28 We he consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78 (1910):

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

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See Atlantic Coast Line R. Co. v. Ford, 287 U.S. 502, 53 S.Ct. 249, 77 L.Ed. 457 (1933); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 19, 52 S.Ct. 103, 107, 76 L.Ed. 136 (1931). See also Leary v. United States, 395 U.S. 6, 29-53, 89 S.Ct. 1532, 1544-1557, 23 L.Ed.2d 57 (1969); Tot v. United States, 319 U.S. 463, 467-468, 63 S.Ct. 1241, 1244, 87 L.Ed. 1519 (1943). Moreover, as we have recognized:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67, 85 S.Ct. 754, 757, 13 L.Ed.2d 658 (1965).

Judged by these standards, the presumptions contained in ss411(c)(1) and (2) are constitutionally valid. The Operators focus their attack on the rationality of the presumptions' bases in duration of employment. But it is agreed here that pneumoconiosis is caused by breathing coal dust, and that the likelihood of a miner's developing the disease rests upon both the concentration of dust to which he was exposed and the duration of his exposure. Against this scientific background, it was not ***29** beyond Congress' authority to refer to exposure factors in establishing a presumption that throws the burden of going forward on the ****2899** operators. And in view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' employment in the mines, [FN28] we cannot say that it was "purely arbitrary" for Congress to select the 10-year figure as a point of reference for these presumptions. No greater mathematical precision is required. . Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911).

> FN28. See, E. g., Hearings on S. 355, Supra, n. 1, at 699 (testimony of Dr. Werner A. Laqueur).

The Operators insist, however, that the 10-year presumptions are arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others. We reject this contention. In providing for a shifting of the burden of going forward to the operators, Congress was no more constrained to require a preliminary showing of the degree of dust concentration to which a miner was exposed, a historical fact difficult for the miner to prove, than it was to require a preliminary showing with respect to all other factors that might bear on the danger of infection. It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under s 411(c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respiratory disease under s 411(c)(2) to presumptively establish that death was due to pneumoconiosis. In its "rough accommodations," Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913), Congress was surely entitled to select duration of employment, ***30** to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner. Mobile, J. & K. C. R. Co. v. Turnipseed, supra, 219 U.S., at 43, 31 S.Ct., at 138 .

[13] The Operators press the same due process attack upon the durational basis of the rebuttable presumption in s 411(c)(4), which provides, Inter alia, that a miner employed for 15 years in underground mines, who is able to marshal evidence demonstrating a totally disabling respiratory or pulmonary impairment, shall be rebuttably presumed to be totally disabled by pneumoconiosis. [FN29] Particularly ***31** in light of the Surgeon General's testimony at the Senate hearings on the 1969 Act to the effect that the 15-year point marks the beginning of linear increase in the prevalence of the disease with years spent underground, [FN30] we think it clear that the durational basis of this presumption is equally unassailable.

> FN29. Section 411(c)(4), as set forth in 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV), provides in full:
> "(I)f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it

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> is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

FN30. See S.Rep.No.92-743, p. 13 (1972).

C

[14] The Operators also challenge s 413(b) of the Act, which provides that "no ****2900** claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram (X-ray)." [FN31] Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts. See, E. g., Hawkins v. United States, 358 U.S. 74, 78, 79 S.Ct. 136, 138, 3 L.Ed.2d 125 (1958); Tot v. United States, 319 U.S., at 467, 63 S.Ct., at 1244; cf. Lindsley v. Natural Carbonic Gas Co., supra, 220 U.S., at 81, 31 S.Ct., at 341. The Operators contend, however, that s 413(b) denies them due process because X-ray evidence is frequently the sole evidence they can marshal to rebut a claim of pneumoconiosis. [FN32] We conclude that, given Congress' reasoned reservations regarding the reliability of negative X-ray evidence, it was entitled to preclude exclusive reliance on such evidence.

FN31. See n. 12, Supra.

FN32. The Operators frame their argument by saying that the effect of s 413(b) is to render the rebuttable presumptions of s 411(c) effectively irrebuttable. But this dressing adds nothing. Once it is determined that the limitation on X-ray evidence is permissible generally, it is irrelevant that the burden of going forward with some rebuttal evidence is thrown upon the operator by a permissible presumption rather than by the claimant's affirmative factual showing.

[15] Congress was presented with significant evidence demonstrating that X- ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy ***32** indicator of the absence of the disease. [FN33] In particular, the findings of the Surgeon General and others indicated that although X-ray evidence was generally the most important diagnostic tool in identifying the presence or absence of pneumoconiosis, when considered alone it was not a wholly reliable indicator of the Absence of the disease; that autopsy frequently disclosed pneumoconiosis where X-ray evidence had disclosed none; [FN34] and that pneumoconiosis may be masked from X-ray detection by other disease. [FN35]

FN33. Our attention has not been directed to any authoritative indications that X-ray evidence of the Presence of pneumoconiosis is untrustworthy.

FN34. Evidence was produced at the Senate hearings showing that in one study "approximately 25 percent of a random sample of some 200 coal miners whose medical records based upon X-ray findings showed no coal- worker's pneumoconiosis were found on post mortem examination to have the disease." S.Rep.No.92-743, Supra, at 12, U.S.Code Cong. & Admin.News 1972, p. 2316.

FN35. Id., at 9-16; H.R.Rep.No.92-460, pp. 8-10 (1971).

Taking these indications of the unreliability of negative X-ray diagnosis at face value, Congress was faced with the problem of determining which side should bear the burden of the unreliability. On the one hand, preclusion of any reliance on negative X-ray evidence would risk the success of some nonmeritorious claims; on the other hand, reliance on uncorroborated negative X-ray evidence would risk the denial of benefits in a significant number of meritorious cases. Congress addressed the problem by adopting a rule which, while preserving some of the utility, avoided the worst dangers of X-ray evidence. Section 413(b) does not make negative X-ray evidence inadmissible, or ineligible to be considered as ultimately persuasive evidence when

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taken together with other factors for example, a low level of coal dust concentration in the operator's mine, a relatively short duration ***33** of exposure to coal dust, or the likelihood that the miner is disabled by some other cause. [FN36] The prohibition is only against sole reliance upon negative X-ray evidence in rejecting a claim.

FN36. Section 413(b) directs additionally that "(i)n determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials." 30 U.S.C. s 923(b) (1970 ed., Supp. IV).

****2901** [16] The Operators attack the limitation on the use of negative X- ray evidence by suggesting that Congress' conclusion as to the unreliability of negative X-ray evidence is constitutionally unsupportable. Relying on other evidence submitted to Congress in 1972, [FN37] the Operators contend that the consensus of medical judgment on the question is that good quality X-ray evidence does reliably indicate the presence or absence of pneumoconiosis. In essence, the Operators seek a judicial reconsideration of the judgment of Congress on this issue. But the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion. As we have recognized in the past, however, when it comes to evidentiary rules in matters "not within specialized judicial competence or completely commonplace," it is primarily for Congress "to amass the stuff of actual experience ***34** and cull conclusions from it." *United States v. Gainey,* 380 U.S., at 67, 85 S.Ct., at 757. It is sufficient that the evidence before Congress showed doubts about the reliability of negative X-ray evidence. That Congress ultimately determined "to resolve doubts in favor of the disabled miner" [FN38] does not render the enactment arbitrary under the standard of rationality appropriate to this legislation.

FN37. This evidence was brought to the hearings by the Social Security Administration, whose rules the s 413(b) limitation was designed to overrule, and was credited by the minority of the House Committee on Education and Labor. H.R.Rep.No.92-460, Supra, at 22, 29-30.

FN38. S.Rep.No.92-743, Supra, at 11, U.S.Code Cong. & Admin.News 1972, p. 2315.

D

[17] Finally, the Operators challenge the limitation on rebuttal evidence contained in s 411(c)(4). That section, as we have indicated, provides that a miner employed for 15 years in underground mines who is able to demonstrate a totally disabling respiratory or pulmonary impairment shall be rebuttably presumed to be totally disabled by pneumoconiosis, and his death shall be rebuttably presumed to be due to pneumoconiosis. The final sentence of s 411(c)(4) provides that

"(t)he Secretary may rebut (the presumption provided herein) only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

The effect of this limitation on rebuttal evidence is, Inter alia, to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis. The Operators contend that this limitation erects an impermissible irrebuttable presumption, because it establishes liability even though it might be medically demonstrable in an individual case that the miner's ***35** pneumoconiosis was mild and did not cause the disability that the disability was wholly a product of other disease, such as tuberculosis or emphysema. Disability due to these diseases, as the Operators note, is not otherwise compensable under the Act.

The District Court, concluding that the quoted limitation on rebuttal evidence applied against an operator in a s 415 transition-period case, and recognizing that pneumoconiosis is not inherently disabling in the s 402(f) sense, judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense that the miner is not "totally disabled" due to pneumoconiosis under s

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402(f). Additionally, reading the second part of the s 411(c)(4) limitation on rebuttal to preclude an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible, the District Court found this aspect of s 411(c)(4) unconstitutional as well.

**2902 The Federal Parties urge on their cross-appeal that these constitutional judgments are erroneous. We need not inquire into the constitutional questions raised by the District Court, however, because we think it clear as a matter of statutory construction that the s 411(c)(4) limitation on rebuttal evidence is inapplicable to operators. By the language of s 411(c)(4), the limitation applies only to "the Secretary" and not to an operator seeking to avoid liability under s 415 or s 422. And this plain language is fortified by the legislative history. The Senate Report on s 411(c)(4) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator. [FN39]

FN39. Id., at 12. Similarly, the Conference Report refers to the limitation only as running against "the Secretary." S.Conf.Rep.No.92-780, p. 8 (1972); H.R.Conf.Rep.No.92-1048, p. 8 (1972).

*36 While apparently recognizing that the s 411(c)(4) limitation on rebuttal evidence could not apply against an operator in a Part C determination, the District Court believed that the limitation bound an operator in the determination of a claim filed during the s 415 transition period, "(s)ince under section (415) the operator is bound by the Secretary's finding of liability under Part B." 385 F.Supp., at 430. In so concluding, the District Court was in error. First, it would appear, again from the plain language of the statute, that the reference to "the Secretary" in s 411(c)(4) does not refer to the Secretary of Labor. On the contrary, s 402(c), 30 U.S.C. s 902(c), quite plainly defines "Secretary" when used in Part B, including s 411, as meaning the Secretary of Health, Education, and Welfare, not the Secretary of Labor. The Senate Report referred to above confirms this conclusion. Even assuming, however, that the s 411(c)(4) limitation on rebuttal by "the Secretary" may be taken to bind theSecretary of Labor insofar as he was required to Pay benefits for which the United States was liable during the transition period, s 415(a)(1), we have found nothing in the statute or in its legislative history to suggest that an operator is similarly bound because the Secretary of Labor is also to Adjudicate the operator's liability. s 415(a)(5). Indeed, such a reading would render a mine operator bound by the rebuttal limitation in s 415 transition-period cases, although not so bound in cases filed thereafter under Part C. And that result would be contrary to the language of s 415(a)(5), which prescribes that an operator "shall be bound by the determination of the Secretary of Labor (on a s 415 transition-period claim) as if the claim had been filed pursuant to part C."

In short, we conclude that the Act does not itself limit the evidence with which an operator may rebut the *37 s 411(c)(4) presumption. Accordingly, we vacate the order of the District Court declaring the s 411(c)(4) limitation on rebuttal evidence unconstitutional and enjoining the Secretary of Labor from limiting evidence in rebuttal to the s 411(c)(4) presumption. Cf. Van Lare v. Hurley, 421 U.S. 338, 344, 95 S.Ct. 1741, 1746, 44 L.Ed.2d 208 (1975); United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

[18] We are aware that regulations promulgated in 1972 by the Secretary of Health, Education, and Welfare under his s 411(b) authorization, 20 CFR ss 410.414, 410.454 (1975), applicable to Part C determinations under s 422(h), and expressly adopted in 1973 by the Secretary of Labor, 20 CFR pt. 718 (1975), authorize limitations on rebuttal evidence similar to those contained in s 411(c) (4), and appear to apply in determinations of an operator's liability. But the Operators' amended complaint never challenged the statutory or constitutional validity of these regulations. [FN40] Particularly **2903 in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, we find it inappropriate to consider their statutory or constitutional validity at this stage. [FN41]

FN40. It follows from our discussion of the s 411(c)(4) limitation on rebuttal that these regulations cannot stand as authoritative administrative interpretations of the statute itself. But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. See E. g., Mourning v. Family Publications

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Service Inc., 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). If the regulations promulgated here are to be upheld, it must be in this latter sense.

FN41. We see no reason to remand the case to the three-judge District Court for the purpose of determining whether the Operators should be granted leave to amend their complaint to include a statutory and constitutional challenge to the regulations. The three-judge court remanded to a single judge all questions regarding the validity of regulations challenged in the Operators' complaint, and that portion of the case is pending before a single judge. Any motion for leave to amend the complaint to include a challenge to any additional regulations can be addressed to that single judge.

*38 VI

In sum, the challenged provisions, as construed, are constitutionally sound against the Operators' facial attack. The judgment of the District Court as appealed from in No. 74-1316 is affirmed. The judgment of the District Court as appealed from in No. 74-1302 is reversed, except insofar as it declares unconstitutional, and enjoins the operation of, the limitation on rebuttal evidence contained in s 411(c)(4) of the Act. In this latter respect, the judgment in No. 74-1302 is vacated, and the case remanded with directions to dismiss.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

Mr. Justice STEVENS took no part in the consideration or decision of these cases.

Mr. Justice POWELL, concurring in part and concurring in the judgment in part.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969 (Act), 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. s 901 Et seq. (1970 ed. and Supp. IV). The Court rejects their contention in Part IV of its opinion. I concur in the judgment as to Part IV, and concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal *39 legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis. [FN1] Under Title VI miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, ss 411-414, 30 U.S.C. ss 921-924 (1970 ed. and Supp. IV). [FN2] Miners filing claims after June 30, 1973, are to collect benefits until 1981, see Ante, at 2897 n. 24, from their individual employers. ss 415, 421-431, 30 U.S.C. ss 925, 931-941 (1970 ed. and Supp. IV). [FN3] Under the statute, the class of claimants to which individual employers are liable **2904 includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment (former miners).

FN1. Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. s 201 Et seq., 30 U.S.C. s 841 Et seq.

FN2. As does the Court, I simplify by not distinguishing between claims byemployees and claims by their survivors. See Ante, at 2892 n. 13.

FN3. Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until December 31, 1973, after which they become the responsibility of individual mining concerns. s 415, 30 U.S.C. s 925 (1970 ed., Supp. IV). Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor ss 421-422, 30 U.S.C. ss 931-932 (1970 ed. and Supp. IV), but no such state programs have been approved. See Ante, at 2889.

The unprecedented feature of the Act is that miners may be eligible to receive benefits from a particular coal-mining concern even if the miner was no longer employed in the industry at the time of enactment. The *40 Department of Labor already has made initial determinations of liability against one of the Operators and in favor of claimants whose

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employment terminated decades ago. [FN4]

FN4. Favorable initial determinations have been made for claimants who left mine work in 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators 30 n. 1. These determinations rebut the federal parties' suggestion that in combination the initial period of federal liability and the statute of limitations specified in s 422(f)(1), 30 U.S.C. s 932(f)(1) (1970 ed., Supp. IV), will prevent employer liability to miners who left the industry before passage of the Act. See Ante, at 2892, n. 14.

II

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation. [FN5] They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, E. g., Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971), as there ***41** is no rational justification for imposing liability to former miners upon individual mine owners.

FN5. Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government particularly the Public Health Service." House Committee on Education and Labor, 91st Cong., 2d Sess., Legislative History/Federal Coal Mine Health and Safety Act 338 (Committee Print 1970), 115 Cong.Rec. 27627 (1969) (floor remarks). The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. But only prospective liability creates an incentive for occupational safety measures.

The Court recognizes that its evaluation of the rationality of the employers' challenged liability must take into account the retroactive nature of the liability:

"The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law. . . ." Ante, at 2893.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." Ante, at 2893. It nonetheless sustains the provision for retroactive liability, reasoning as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers." Ante, at 2893.

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now ****2905** be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally. . . ." Ante, at 2894.

***42** In my view whether the retroactive liability is constitutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective liability as a cost-spreading device is highly questionable.

If coal-mining concerns actually enjoyed "excess" profits in the preenactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could impose retrospective liability for the benefit of the miners concerned. But, in this context, the term "excess profits" must mean profits over and above those that operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide compensation, although under no obligation to do so. It is unlikely that such profits existed. The coal industry is highly competitive and

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prices normally are determined by market forces. One therefore would expect that, had a compensation increment been added to operating costs, the operators over the long term simply would have passed most of it on to consumers, thereby leaving their profitability relatively unaffected. In short, the talk of "excess profits" in any realistic sense is wholly speculative.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed onto consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened. One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the ***43** retroactive liability rather than pass those costs on to consumers. And they must bear such costs quite without regard to whether "excess profits" may have been made in some earlier years. [FN6]

> FN6. It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruits of (former employees') labor." Ante, at 2893. A coal-mining concern cannot retroactively increase its prices to the former customers who benefited from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

In some industries conditions might be such that the cost of retroactively imposed benefits could be spread to consumers. It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations. [FN7] Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly ***44** greater than that of their competitors. (ii) Some companies engaged in coal mining in years past on a much ****2906** larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale. [FN8] In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," Ante, at 2893, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

> FN7. Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present work force.

> FN8. In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR s 725.311 (1975). The validity of this regulation remains to be considered. See Ante, at 2891-2892.

III

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. E. g., Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); cf. Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Nor does the Constitution require that legislation on economic

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matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, E. g., United States v. Carolene Products Co., 304 U.S. 144, 148, 58 S.Ct. 778, 781, 82 L.Ed. 1234 (1938), and the operators had the heavy burden of showing the Act to be unconstitutional.

***45** The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above, and these facts are likely to vary widely among the Operators. [FN9] In this case, however, decided on the cross-motions for summary judgment, the Operators have failed to make any factual showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient in the absence of appropriate factual support to override the presumption of constitutionality. Accordingly, I agree that the federal parties were entitled to summary judgment on this record.

> FN9. I would not foreclose the possibility that a particular coal- mining concern, in a proper case, may be able to show that the impact of the Act on Its operations is irrational. Cf. Ante, at 2897.

Mr. Justice STEWART, with whom Mr. Justice REHNQUIST joins, concurring in part and dissenting in part.

While in all other respects joining the opinion and judgment of the Court, I cannot accept the Court's conclusion, Ante, at 2902-2903, that the limitation on rebuttal evidence in s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV), is inapplicable to "transition" determinations under s 415 insofar as those determinations bind operators. Section 415(a)(5) as set forth in 30 U.S.C. s 925(a)(5) (1970 ed., Supp. IV), provides that an "operator . . . shall be bound by the determination of the Secretary of Labor (on a transition) claim as if the claim had been filed pursuant to part C of this subchapter and section 932 of this title had been applicable to such operator." As the Court correctly observes, the critical question is thus whether the s 411(c)(4) limitation ***46** would apply "if the claim had been filed pursuant to part C . . . and section 932 . . . ."

The Court reads the "plain language" of s 411(c)(4), and in particular the reference to "the Secretary (of Health, Education, and Welfare)," to mean that "the limitation applies only to 'the Secretary' and not to an ****2907** operator seeking to avoid liability under s 415 (30 U.S.C. s 925) or s 422 (30 U.S.C. s 932)." Ante, at 2902. This reading, the Court concludes, is "fortified by the legislative history" and in particular by the "Senate Report on s 411(c) (4) (which) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator." Ibid.

The Court's analysis omits any consideration of the effect of s 430, as set forth in 30 U.S.C. s 940 (1970 ed., Supp. IV), which provides as follows:

> "The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to (Part C): Provided, That for the purpose of determining the applicability of the presumption established by section 921(c)(4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines."

Since the limitation on rebuttal evidence in s 411(c)(4) was created by the "amendments made by the Black Lung Benefits Act of 1972," it would seem to follow that the limitation applies to Part C determinations. This inference is reinforced by the Senate Report, which stated:

> "New section 430 requires that amendments to ***47** part B be applied, wherever appropriate, to part C. . . .
>
> "Questions were raised during the Committee deliberations over whether the amendments to part B would automatically be applicable, where appropriate, to part C.
>
> "Although it would appear clear that the same standards are to govern, the Committee concluded that it would be best to so specify.
>
> "It is contemplated by the Committee that the applicable portions of following sections of part B, as amended, would apply to part C: section 411, section 412 (except the last sentence of subsection (b) thereof), section 413, and section 414." S.Rep.No.92-743, p. 21 (1972), U.S.Code Cong. & Admin.News 1972, p. 2325.

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See also Id., at 33.

The only play in the tight linkage of Part C to the amendments to Part B is that afforded by the proviso in s 430 and by the phrase "to the extent appropriate" which appears in that section. The proviso does not remove the rebuttal limitation, but it does alter s 411(c)(4)'s allocation of the burden of proof in another crucial respect: It limits the period of employment which may be considered for purposes of determining the applicability of the presumption. The presence of the proviso is relevant in two respects. First, it underscores the basic applicability to Part C determinations of the s 411(c)(4) rebuttal presumption. Second, it demonstrates that Congress knew how to place a significant limitation on the applicability of that presumption when it chose to do so.

The care and precision which Congress used in drafting this qualifying language bears on the propriety of reading the phrase "to the extent appropriate" as obliquely qualifying the applicability of the rebuttal limitation to ***48** Part C determinations. That limitation is part and parcel of an elaborate reallocation of the burden of proving disability resulting from pneumoconiosis. Under prior Social Security procedure "if an X-ray (did) not show totally sabling pneumoconiosis, no further processing of a claim (was) allowed. Thus, any further evidence of disability (was) not allowed if the X- ray show(ed) negative." S.Rep.No.92-743, Supra, at 11, U.S.Code Cong. & Admin.News 1972, p. 2315. This heavy reliance on X-ray evidence had unfortunate consequences for coal miners because of the inability of X-ray examinations to detect pneumoconiosis in some instances. Congress responded to this particular problem by

> "prohibiting denial of a claim solely on the basis of an X-ray, by providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability ****2908** where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X- ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis." Ibid.

The 15-year rebuttable presumption embodied in s 411(c)(4) was perhaps the most significant feature of Congress' response. Based in part on testimony of the Surgeon General that "(f)or work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground," S.Rep.No.92-743, Supra, at 13, U.S.Code Cong. & Admin.News 1972, p. 2317, the presumption embodied a congressional decision to "giv(e) the benefit of the doubt," Id., at 11, U.S.Code Cong. & Admin.News 1972, p. 2315, to a specific class of claimants totally disabled by respiratory or pulmonary impairments who could not prove by X-ray evidence that the impairment resulted from pneumoconiosis. The presumption was rebuttable only if the respondent could show either that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, ***49** or in connection with, employment in a coal mine." s 411(c) (4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV).

It is difficult to believe that Congress would have used the phrase "to the extent appropriate" in s 430 to withdraw the protection of the rebuttal limitation under Part C while retaining the rebuttable presumption of which it is an integral part. Such an interpretation is inconsistent with the care Congress displayed in drafting the s 430 proviso. Moreover, it leads necessarily to other improbable results. The Court's approach, for instance, necessarily implies that Congress extended the benefit of the s 411(c)(4) presumption to "surface, as well as underground, miners (in specified circumstances)," S.Rep.No.92-743, Supra, at 2, U.S.Code Cong. & Admin.News 1972, p. 2306, with the intention that the protection would lapse as soon as Part C came into play. The relevant sentence in s 411(c)(4) states that "(t) he Secretary (of Health, Education, and Welfare) shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine." (Emphasis added.) If the operative principle is that provisions in s 411(c)(4) which bind "the Secretary (of Health, Education, and Welfare)" are automatically "inappropriate" for Part C proceedings, then surface miners would be stripped of the benefits of s 411(c)(4) as soon as the legislative scheme enters its transitional stage.

Moreover, the Court's reading of the statute is

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anomalous in terms of the overall structure of Part C. The primary goal of Congress in framing Part C was to transfer adjudicatory responsibilities over coal miners' pneumoconiosis claims to state workmen's compensation tribunals, but only if the state compensation law was ***50** found by the Secretary of Labor to provide "standards for determining death or total disability due to pneumoconiosis . . . substantially equivalent to . . . those standards established under part B of this subchapter . . . ." s 421(b)(2)(C), as set forth in 30 U.S.C. s 931(b)(2)(C) (1970 ed., Supp.). One of the Part B standards is the rebuttal limitation in s 411(c)(4). Thus, the Secretary of Labor would not be empowered to approve a state law which did not contain a "substantially equivalent" evidentiary limitation.

The delegation of adjudicatory responsibility to the Secretary of Labor under Part C was a backstop measure, intended to provide a forum for presentation of claims during any period after January 1, 1974, when a state workmen's compensation law was not included on the Secretary of Labor's list of state laws with provisions "substantially equivalent" to those in Part B. s 421(a), 30 U.S.C. s 931(a) (1970 ed., Supp. IV). See S.Rep.No.92-743, Supra, at 19-21. ****2909** Since the very reason for withholding approval of a state law and providing an alternative federal forum is lack of "substantial equivalence" between the state-law provisions and the "standards established under part B," including the rebuttal limitation in s 411(c)(4), it would be anomalous if the substitute federal forum could employ evidentiary rules which deviate substantially from those in Part B.

The statutory language and legislative history simply will not yield such an unlikely result. The phrase "to the extent appropriate" in s 430, 30 U.S.C. s 940 (1970 ed., Supp. IV), plainly refers to language in Part B which has no relevance to Part C, notably the language that specifies that "the Secretary (of Health, Education, and Welfare)" is to have certain adjudicative responsibilities. These are the references that are not "appropriate" under Part C, because Part C transfers adjudicative responsibilities to the States or, in the alternative, ***51** to the Secretary of Labor. The obvious purpose of the phrase "to the extent appropriate" is to accommodate minor linguistic variations resulting from this transfer of responsibility. Thus, the interaction of the phrase "to the extent appropriate" and the reference to "the Secretary" in the rebuttal limitation of s 411(c)(4) does not render the entire limitation "inappropriate" to Part C proceedings; it merely renders the reference to "the Secretary" inappropriate under Part C.

It is significant that the Court's interpretation of s 411(c)(4)'s rebuttal limitation is not urged or even suggested by any party to this suit. The Federal Parties' position is that the District Court erred by reading s 411(c) (4) to foreclose a showing that would refute total disability. That position is clearly correct. The s 411(c)(4) presumption comes into play only after the claimant establishes total disability. See s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV) ("and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption . . ."). In addition, the District Court ruled that s 411(c)(4) places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease did not arise out of coal mine employment. The Federal Parties urge that this construction is erroneous, because it overlooks the fact that under s 422(c), 30 U.S.C. s 932(c), a specific operator can also defeat liability by showing that the disability did not arise, even in part, out of employment in his mine during the period when he operated it. Again, the Federal Parties are clearly correct. If the operator makes the s 422(c) showing, then the s 411(c)(4) presumption and the rebuttal limitation is irrelevant. Accordingly, I would reverse the District Court's ruling that the s 411(c)(4) rebuttal limitation violates the Constitution.

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Tab 7

Supreme Court of the United States

The GLIDDEN COMPANY, etc., Petitioner,
v.
Olga ZDANOK et al.
Benny LURK, Petitioner,
v.
UNITED STATES.

Nos. 242 and 481.

Argued Feb. 21 and 26, 1962.
Decided June 25, 1962.

Certiorari to the United States Court of Appeals, 288 F.2d 99, which reversed the United States District Court for the Southern District of New York, 185 F.Supp. 441, in a diversity action for breach of seniority provisions of a collective bargaining agreement, together with certiorari to the United States Court of Appeals for the District of Columbia which at 111 U.S.App.D.C. 238, 296 F.2d 360 affirmed a conviction of a defendant in the United States District Court for the District of Columbia. The Supreme Court, Mr. Justice Harlan, held that the Court of Claims and the Court of Customs and Patent Appeals are courts created under judiciary article of the Constitution, and their judges, including retired judges, are and have been constitutionally protected in tenure and compensation, and therefore designation of judges of such courts to sit as a Court of Appeals judge and as a United States District Court judge was valid and judgments of Court of Appeals and District Court were not vitiated by respective participation of such judges.

Affirmed.

Mr. Justice Douglas and Mr. Justice Black dissented.

See also 28 F.R.D. 346.

West Headnotes

[1] Federal Courts ⚿455.1
170Bk455.1 Most Cited Cases
(Formerly 170Bk455, 106k383(1))

Certiorari would be granted in cases challenging validity of designation of a judge of the Court of Claims and a retired judge of Court of Customs and Patent Appeals to perform judicial duties in a Court of Appeals and a federal district court, limited to question of whether judgment in either of two cases wherein such designation occurred was vitiated by participation of such judges. 28 U.S.C.A. § 293(a).

[2] Constitutional Law ⚿58
92k58 Most Cited Cases

Apart from article of Constitution pertaining to vesting of the judicial power, neither tenure nor salary of federal officers is constitutionally protected from impairment by Congress. U.S.C.A.Const. art. 3, § 1.

[3] Statutes ⚿149
361k149 Most Cited Cases

Statutory declaration that judges of two federal courts should serve during good behavior and with undiminished salary was ineffective to bind any subsequent Congress unless such judges were invested at appointment with protections of article of Constitution pertaining to vesting of federal judicial powers. U.S.C.A.Const. art. 3, § 1.

[4] Judges ⚿6
227k6 Most Cited Cases

If there is a judicial office to be filled and one acting under color of authority fills that office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.

[5] Judgment ⚿494
228k494 Most Cited Cases

Although a United States attorney may be permitted on behalf of the public to upset an order issued upon defective judicial authority, a private litigant ordinarily may not, but such rule does not obtain when alleged defect of authority operates also as a limitation on appellate jurisdiction of the United States Supreme Court.

[6] Federal Courts ⚿461
170Bk461 Most Cited Cases

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(Formerly 30k170(2))

[6] Federal Courts ⚿479
170Bk479 Most Cited Cases
(Formerly 30k563)

[6] Federal Courts ⚿613
170Bk613 Most Cited Cases

Supreme Court would treat alleged defect in authority in filling a judicial office as jurisdictional and consider it on review even though not raised at earliest practicable opportunity, where challenge was based upon nonfrivolous constitutional grounds.

[7] Federal Courts ⚿461
170Bk461 Most Cited Cases
(Formerly 30k185(1))

[7] Federal Courts ⚿622
170Bk622 Most Cited Cases

Whether diversity of citizenship exists may be questioned on direct review for the first time in the United States Supreme Court.

[8] Judges ⚿12
227k12 Most Cited Cases

Litigants could challenge constitutional authority of certain federal judges to sit as a federal district court judge, and a Court of Appeals judge, in the Supreme Court, even if such judges acted under color of authority and filled the offices and discharged duties thereof, and litigants were not bound by de facto doctrine from questioning validity of the designations for the first time on appeal, where defect of authority related to basic constitutional protections designed in part for benefit of litigants. U.S.C.A. Const. art. 3, § 1.

[9] Federal Courts ⚿6
170Bk6 Most Cited Cases

Authority for the federal government to decide questions of state law exists only by virtue of the diversity clause in Article 3 of the Constitution. U.S.C.A.Const. art. 3.

[10] Judges ⚿7
227k7 Most Cited Cases

Question of whether a judge of the Court of Claims enjoyed constitutional independence was presented where such judge by designation sat as a Court of Appeals judge in a case in the Court of Appeals involving determination of a question of state law presented for its decision solely by reason of diverse citizenship of the litigants. U.S.C.A. Const. art. 3, § 1.

[11] Judges ⚿7
227k7 Most Cited Cases

[11] Judges ⚿22(1)
227k22(1) Most Cited Cases

Act of September 14, 1922, authorizing assignment of Court of Customs and Patent Appeals judges to serve on courts of the District of Columbia could not be viewed ex proprio vigore as conferring constitutionally protected tenure and compensation status on judges subsequently appointed to the Court of Customs and Patent Appeals. U.S.C.A. Const. art. 3, § 1.

[12] Judges ⚿7
227k7 Most Cited Cases

[12] Judges ⚿22(1)
227k22(1) Most Cited Cases

Judges designated for service on article III courts by the Chief Justice of the United States Supreme Court who are not previously endowed with constitutional security of tenure and compensation, gain nothing in regard to such security by the designation. U.S.C.A. Const. art. 3; 28 U.S.C.A. §§ 291-296.

[13] Judges ⚿7
227k7 Most Cited Cases

[13] Judges ⚿22(1)
227k22(1) Most Cited Cases

Constitutional quality of tenure and compensation extended to a judge appointed to the Court of Claims, and to a judge appointed to the Court of Customs and Patent Appeals at time of their confirmation, was dependent upon constitutional status of courts to which they were primarily appointed, and was not affected by fact they were designated for service on courts enjoying constitutional tenure and compensation protections.

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U.S.C.A. Const. art. 3; 28 U.S.C.A. §§ 291-296.

[14] Statutes ⚿220
361k220 Most Cited Cases

Subsequent legislation which declares intent of an earlier law is not conclusive in determining what the previous Congress meant, but the later law is entitled to weight when it comes to problem of construction, and especially is that so when Congress has been stimulated by judicial decisions to investigate historical materials involved and has drawn from them a contrary conclusion.

[15] Courts ⚿90(3)
106k90(3) Most Cited Cases

Considered practice of the Supreme Court is not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases.

[16] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Power given Congress in the Constitution to constitute tribunals inferior to the Supreme Court, relates to inferior courts provided for in section of the Constitution vesting federal judicial power. U.S.C.A.Const. art. 1, § 8, cl. 9; art. 3, § 1.

[17] Federal Courts ⚿1021
170Bk1021 Most Cited Cases

In territories of the United States, cases and controversies falling within article of the Constitution pertaining to vesting of federal judicial power may be heard and decided in courts constituted without regard to tenure and compensation limitations of that article, that is, having judges of limited tenure and entertaining business beyond range of conventional cases and controversies. U.S.C.A.Const. art. 3.

[18] Federal Courts ⚿491
170Bk491 Most Cited Cases

Territorial courts of the United States are subjected to the appellate jurisdiction of the United States Supreme Court in view of their exercise of a federal-question jurisdiction commensurate with that of regular federal courts.

[19] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Article of the Constitution vesting judicial power of the United States authorizes, but does not obligate, Congress to create inferior federal courts. U.S.C.A.Const. art. 3, § 1.

[20] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Whether a tribunal is to be recognized as one created under article of the Constitution pertaining to vesting of judicial power of the United States depends upon whether its establishing legislation complies with limitations of that article, that is, whether its business is federal business there specified and the judges and judgments are allowed the independence there expressly or impliedly made requisite. U.S.C.A.Const. art. 3.

[21] Federal Courts ⚿1072
170Bk1072 Most Cited Cases

All cases within grant of jurisdiction to the Court of Claims under the Tucker Act arise either immediately or potentially under federal law within meaning of article of the Constitution pertaining to vesting of judicial power of the United States. U.S.C.A.Const. art. 3, § 2; 28 U.S.C.A. § 1491.

[22] Constitutional Law ⚿56
92k56 Most Cited Cases

Congress is authorized, consistently with article of the Constitution vesting judicial power, to impose a limitation upon remedial powers of a federal court, limiting it to awarding damages, and not specific relief. U.S.C.A.Const. art. 3.

[23] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Congress is not compelled to vest entire jurisdiction provided for in article of the Constitution vesting judicial power upon inferior courts of its creation. U.S.C.A.Const. art. 3.

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[24] Federal Courts ⚷263
170Bk263 Most Cited Cases

Only in the sense that the United States is not amenable to suit of an individual without its consent is vesting of judicial power article's extension of judicial competence over controversies to which United States is a party ineffective to confer jurisdiction over suits to which it is a defendant, and once consent is given, there remains no barrier to justiciability. U.S.C.A.Const. art. 3.

[25] United States ⚷131
393k131 Most Cited Cases

Statutes giving litigants an election to sue the United States as principal in the Court of Claims, or to pursue their claims in any other court, including federal district courts, and providing for transfer between the Court of Claims and any federal district court when a suit within one court's exclusive jurisdiction is brought mistakenly in another, are evidences of congressional understanding that suits against the United States are justiciable in courts created under article of the Constitution vesting judicial power, and may not be lightly disregarded. 28 U.S.C.A. §§ 1406(c), 1500, 1506; U.S.C.A.Const. art. 3.

[26] Federal Courts ⚷492
170Bk492 Most Cited Cases

Congress, by giving jurisdiction to the Court of Claims by special act to award recovery for breach of a moral obligation, or to waive benefit of res judicata, has enlisted aid of judicial power whose exercise is amenable to appellate review in the Supreme Court.

[27] United States ⚷125(8)
393k125(8) Most Cited Cases

When Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

[28] Customs Duties ⚷85(2)
114k85(2) Most Cited Cases

[28] Federal Courts ⚷1071
170Bk1071 Most Cited Cases

[28] Patents ⚷113(1)
291k113(1) Most Cited Cases

Presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising judicial power provided for in article of the Constitution vesting judicial power, even though such courts might be judicially impotent to enforce certain of their decrees against the government. U.S.C.A.Const. art. 3.

[29] Jury ⚷12(1.2)
230k12(1.2) Most Cited Cases
(Formerly 230k12(2))

Suits against the government require legislative waiver of immunity, and are not "suits at common law," within the Seventh Amendment, and Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims. U.S.C.A. Const.Amend. 7.

[30] Judges ⚷7
227k7 Most Cited Cases

[30] Judges ⚷22(1)
227k22(1) Most Cited Cases

Absence of provision for a jury trial of counterclaims by the government in action before the Court of Claims did not prevent such courts from being considered courts within tenure and compensation protection of the judiciary article of the Constitution. U.S.C.A. Const. art. 3.

[31] Federal Courts ⚷1071
170Bk1071 Most Cited Cases

Matters referred by Congress to Court of Claims, and Court of Customs and Patent Appeals are submitted to them in a form consonant with limitation of judicial power to cases or controversies, imposed by article of the Constitution vesting the judicial power, even though their jurisdiction is specialized. U.S.C.A.Const. art. 3.

[32] District of Columbia ⚷3
132k3 Most Cited Cases

Restraints of federalism are removed from powers

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exercisable by Congress within theDistrict of Columbia.

[33] Federal Courts ⚿1032
170Bk1032 Most Cited Cases

Limitations implicit in the case or controversy provision of article of the Constitution vesting judicial power has no application in the District of Columbia, and national courts in the District can perform any of the local functions elsewhere performed by state courts. U.S.C.A.Const. art. 3.

[34] Federal Courts ⚿12.1
170Bk12.1 Most Cited Cases
(Formerly 170Bk12)

Restriction of federal judicial power to case or controversy expresses Framers' anxiety against undue intrusion upon general jurisdiction of state courts, and desire of the Framers to safeguard independence of the judicial from other government branches by so confining its cases, and in such respect, constitutional restriction remains applicable at least to courts invested with jurisdiction solely over matters of national import. U.S.C.A. Const. art. 3.

[35] Customs Duties ⚿85(.5)
114k85(.5) Most Cited Cases
(Formerly 114k85)

[35] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

[35] Patents ⚿113(1)
291k113(1) Most Cited Cases

Status of Court of Claims and Court of Customs and Patent Appeals as a court established under article of the Constitution vesting judicial power would not be permitted to turn upon fact a minuscule portion of their purported functions did not involve cases or controversies within article 3 of the Constitution. U.S.C.A.Const. art. 3.

[36] Customs Duties ⚿85(.5)
114k85(.5) Most Cited Cases
(Formerly 114k85)

[36] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

[36] Judges ⚿7
227k7 Most Cited Cases

[36] Judges ⚿22(1)
227k22(1) Most Cited Cases

[36] Judges ⚿29
227k29 Most Cited Cases

[36] Patents ⚿113(1)
291k113(1) Most Cited Cases

The Court of Claims and the Court of Customs and Patent Appeals are courts created under judiciary article of the Constitution, and their judges, including retired judges, are and have been constitutionally protected in tenure and compensation, and therefore designation of judges of such courts to sit as a Court of Appeals judge and as a United States District Court judge was valid and judgments of Court of Appeals and District Court were not vitiated by respective participation of such judges. U.S.C.A.Const. art. 3; 28 U.S.C.A. § 293(a).

****1462 *530** Chester Bordeau, New York City, for petitioner. Morris Shapiro, New York City, for respondents. Solicitor General Archibald Cox for United States, as intervener. Francis M. Shea, New York City, for United States Court of Claims, ****1463** as amicus curiae, by special leave of Court.

***531** Eugene Gressman, Washington, D.C., for petitioner. Solicitor General Archibald Cox for respondent. Roger Robb, Washington, D.C., for United States Court of Customs and Patent Appeals, as amicus curiae, by special leave of Court.

Mr. Justice HARLAN announced the judgment of the Court and an opinion joined by Mr. Justice BRENNAN and Mr. Justice STEWART.

In Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789, and Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independency by Article III of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article I. The Congress has since

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pronounced its disagreement by providing as to each that 'such court is hereby declared to be a court established under article III of the Constitution of the United ***532** States.' [FN1] The petitioners in these cases invite us to reaffirm the authority of our earlier decisions, and thus hold for naught these congressional pronouncements, at least as sought to be applied to judges appointed prior to their enactment.

FN1. Act of July 28, 1953, s 1, 67 Stat. 226, added to 28 U.S.C. s 171, 28 U.S.C.A. s 171 (Court of Claims); Act of August 25, 1958, s 1, 72 Stat. 848, added to 28 U.S.C. s 211, 28 U.S.C.A. s 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, s 1, 70 Stat. 532, added to 28 U.S.C. s 251, 28 U.S.C.A. s 251 (Customs Court).

[1] No. 242 is a suit brought by individual employees in a New York state court to recover damages for breach of a collective bargaining agreement, and removed to the Federal District Court for the Southern District of New York by the defendant employer on the ground of diversity of citizenship. The employees' right to recover was sustained by a divided panel of the Court of Appeals, in an opinion by Judge J. Warren Madden, then an active judge of the Court of Claims sitting by designation of the Chief Justice of the United States under 28 U.S.C. s 293(a), 28 U.S.C.A. s 293(a). [FN2] No. 481 is a criminal prosecution instituted in the United States District Court for the District of Columbia and resulting in a conviction for armed robbery. The trial was presided over by Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals sitting by similar designation. [FN3] The petitioner's application for leave to appeal to the Court of Appeals ***533** in forma pauperis, respecting the validity of this designation and alleged trial error, was upheld by this Court last Term, 366 U.S. 712, 81 S.Ct. 1229, 6 L.Ed.2d 845; we are now asked to review the Court of Appeals' affirmance of his conviction. Because of the significance of the 'designation' issue for the federal judicial system, we granted certiorari in the two cases, 368 U.S. 814, 815, 82 S.Ct. 56, 110, 7 L.Ed.2d 22, 23, limited to the question whether the judgment in either was vitiated by the respective participation of the judges named. [FN4]

FN2. 'The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals * * * to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.'

FN3. 28 U.S.C. s 294(d), 28 U.S.C.A. s 294(d) authorizes assignment of a retired judge from either court to 'perform such judicial duties as he is willing and able to undertake' in any circuit.

FN4. The petition in No. 481 sought certiorari only as to that issue.

****1464** The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation, [FN5] and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

FN5. 10 Stat. 612 (1855), as amended, 28 U.S.C. s 173, 28 U.S.C.A. s 173 (Court of Claims); 46 Stat. 590, 762 (1930), as amended, 28 U.S.C. s 213, 28 U.S.C.A. s 213 (Court of Customs and Patent Appeals). Judge Madden was appointed in 1941, Brief for Petitioner in No. 242, pp. 7--8, and retired in 1961, 290 F.2d xvi; Judge Jackson was appointed in 1937, Brief for Petitioner in No. 481, pp. 9--10, and retired in 1952, 193 F.2d xv.

[2][3] Article III, s 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior ***534** Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished

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during their Continuance in Office.' [FN6]

FN6. The bearing of s 2 of Art. III on petitioners' claims is discussed later. Infra, 370 U.S., pp. 562--583, 82 S.Ct., pp. 1479-- 1490.

Apart from this provision, it is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress. Crenshaw v. United States, 134 U.S. 99, 107--108, 10 S.Ct. 431, 433, 434, 33 L.Ed. 825; cf. Butler v. Pennsylvania, 10 How. 402, 416--418, 13 L.Ed. 472. The statutory declaration, therefore, that the judges of these two courts should serve during good behavior and with undiminished salary, see note 5, supra, was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III. United States v. Fisher, 109 U.S. 143, 145, 3 S.Ct. 154, 155, 27 L.Ed. 885; see McAllister v. United States, 141 U.S. 174, 186, 11 S.Ct. 949, 953, 35 L.Ed. 693. And the petitioners naturally point to the Bakelite and Williams cases, supra, as establishing that no such constitutional protection was in fact conferred.

The distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context, [FN7] we would be well advised to decide these cases on narrower grounds if any are fairly available. But for reasons that follow, we find ourselves unable to do so.

FN7. The abstractness of the present controversy is graphically demonstrated by the disparity in volume between records and briefs. The records in both cases amount to but 66 pages of motions, opinions, and the like, with no relevant transcripts of proceedings, while the bries extend to 533 pages exclusive of appendices.

***535** I.

No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States, has seized upon this circumstance to suggest that the petitioners should be precluded by the so-called de facto doctrine from ****1465** questioning the validity of these designations for the first time on appeal.

[4][5] Whatever may be the rule when a judge's authority is challenged at the earliest practicable moment as it was in United States v. American-Foreign S.S. Corp., 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491, in other circumstances involving judicial authority this Court has described it as well settled 'that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.' McDowell v. United States, 159 U.S. 596, 602, 16 S.Ct. 111, 113, 40 L.Ed. 271. The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, Frad v. Kelly, 302 U.S. 312, 58 S.Ct. 188, 82 L.Ed. 282, a private litigant ordinarily may not. Ball v. United States, 140 U.S. 118, 128--129, 11 S.Ct. 761, 764, 765, 35 L.Ed. 377.

[6] The rule does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 67 S.Ct. 1168, 91 L.Ed. 1391 (three-judge court); United States v. Emholt, 105 U.S. 414, 26 L.Ed. 1077 (certificate of divided opinion). In other circumstances as well, when the statute claimed to restrict authority is not merely technical ***536** but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. E.g., American Construction Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372, 387--388, 13 S.Ct. 758, 764, 765, 37 L.Ed. 486.

A fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds. In McDowell v. United States itself, supra, at 598--599, 16 S.Ct. at 111, 112, the Court, while holding that any defect in statutory authorization for a particular intracircuit assignment was immunized from examination by the de facto doctrine, specifically passed upon and upheld the constitutional authority of Congress to provide for such an assignment. And in Lamar v. United States,

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241 U.S. 103, 117--118, 36 S.Ct. 535, 539, 540, 60 L.Ed. 912, the claim that an intercircuit assignment violated the criminal venue restrictions of the Sixth Amendment and usurped the presidential appointing power under Art. II, s 2, was heard here and determined upon its merits, despite thefact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

[7][8] The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See O'Donoghue v. United States, 289 U.S. 516, 532--534, 53 S.Ct. 740, 743, 744, 77 L.Ed. 1356. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded ***537** on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. Mansfield, ****1466** C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462; City of Gainesville v. Brown-Crummer Investment Co., 277 U.S. 54, 59, 48 S.Ct. 454, 455, 72 L.Ed. 781. We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below.

II.

The Court of Appeals for the District of Columbia found it unnecessary to reach the question whether Judge Jackson enjoyed constitutional security of tenure and compensation. It held that even if he did not, Congress might authorize his assignment to courts in the District of Columbia, by virtue of its power 'To exercise exclusive Legislation in all Cases whatsoever' over the District. Art. I, s 8, cl. 17. The Solicitor General, in support of that ruling, argues here that because the criminal charge against petitioner Lurk was violation of a local statute, D.C. Code, 1961, s 22--2901, rather than of one national in application, its trial did not require the assignment of an Article III judge.

[9][10] The question thus raised is itself of constitutional dimension, and one which we need not reach if an Article III judge was in fact assigned. In the companion case, No. 242, the necessity for such a judge is uncontested. The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants. [FN8] Authority for the Federal Government to ***538** decide questions of state law exists only by virtue of the Diversity Clause in Article III. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.,Ct. 817, 82 L.Ed. 1188; see Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284, 15 L.Ed. 372. For this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented. Since decision of that question involves considerations bearing directly upon the constitutional status of Judge Jackson, we deem it appropriate to dispose of both cases of the same grounds, without at present intimating any view as to the correctness of the holding below by the Court of Appeals for the District of Columbia.

> FN8. Under our limited writ of certiorari, 368 U.S. 814, 82 S.Ct. 56, 7 L.Ed.2d 22, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf Teamsters Local 174, etc., v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593.

III.

The next question is whether the character of the judges who sat in these cases may be determined without reference to the character of the courts to which they were originally appointed. If it were plain that these judges were invested upon confirmation with Article III tenure and compensation, it would be unnecessary for present purposes to consider the constitutional status of the Court of Claims and the Court of Customs and Patent Appeals.

[11] No such course, however, appears to be open. The statutes under which Judge Madden and Judge Jackson were appointed speak of service only on those courts. 28 U.S.C. ss 171, 211, 28 U.S.C.A. ss 171, 211. They were not, as were the judges

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selected for the late Commerce Court, appointed as 'additional circuit judges,' Act of June 18, 1910, c. 309, 36 Stat. 539, 540, whose tenure might be constitutionally secured regardless of the fortunes of their courts. See 50 Cong.Rec. 5409--5418 (1913); Donegan v. Dyson, 269 U.S. 49, 46 S.Ct. 55, 70 L.Ed. 159; Frankfurter and Landis, The Business of the Supreme Court (1927), 168--173. It is true that at the time of Judge Jackson's appointment there was in force a statute authorizing assignment of Court of Customs and Patent Appeals judges to serve on the courts of the ***539** District of Columbia. Act of September 14, 1922, c. 306, s 5, ****1467** 42 Stat. 837, 839. At that time, however, before the O'Donoghue decision, there seems to have been a consensus that the courts of the District were not confined or protected by Article III; as late as 1930, this Court regarded it as 'recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts * * *.' Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 468, 50 S.Ct. 389, 390, 74 L.Ed. 969; and see Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894, 899--903 (1930). The 1922 Act cannot therefore be viewed ex proprio vigore as conferring Article III status on judges subsequently appointed to the Court of Customs and Patent Appeals. [FN9]

FN9. The debates and reports in Congress display no awareness of the problem. See H.R.Rep.No.1152, 67th Cong., 2d Sess. (1922); 62 Cong.Rec. 190--191, 207--209 (1921).

[12][13] A more novel suggestion is that the assignment statute itself, 28 U.S.C. ss 291--296, 28 U.S.C.A. ss 291--296, authorized the Chief Justice to appoint inferior Article III judges in the course of designating them for service on Article III courts. [FN10] See Shartel, Federal Judges--Appointment, Supervision, and Removal--Some Possibilities under the Constitution, 28 Mich.L.Rev. 485 (1930); cf. Ex parte Siebold, 100 U.S. 371, 397--398, 25 L.Ed. 717; Rice v. Ames, 180 U.S. 371, 378, 21 S.Ct. 406, 409, 45 L.Ed. 577. But we need not consider the constitutional questions involved in this suggestion, for the statute does not readily lend itself ***540** to such a construction. If nothing else, the authority given the Chief Justice in 28 U.S.C. s 295, 28 U.S.C.A. s 295, to revoke assignments previously made is wholly inconsistent with a reading of the statute as empowering him to appoint inferior Article III judges. Judges assigned by the Chief Justice who are not previously endowed with constitutional security of tenure and compensation thus can gain nothing by the designation. [FN11]

FN10. Article II, s 2, cl. 2 of the Constitution provides that the President
'* * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all others Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'

FN11. Compare the statute creating the Emergency Court of Appeals, to consist of three or more judges 'designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals.' Act of January 30, 1942, c. 26, s 204(c), 56 Stat. 23, 32, 50 U.S.C.A.Appendix, s 924(c).

It is significant that Congress did not enact the present broad assignment statute until after it had declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts. Act of August 25, 1958, 72 Stat. 848. A major purpose of these declarations was to eliminate uncertainty whether regular Article III judges might be assigned to assist in the business of those courts when disability or disqualification made it difficult for them to obtain a quorum. [FN12] Those doubts, suggested by dicta in Ex parte Bakelite Corp., 279 U.S. 438, 460, 49 S.Ct. 411, 416, 73 L.Ed. 789, would be expanded rather than allayed were we to hold that ****1468** the judges of the Court of Claims and the Court of Customs and Patent Appeals enjoy the protections of Article III while leaving at large the status of those courts. For these various reasons, the constitutional quality of tenure and compensation extended ***541** Judges Madden and Jackson at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed.

FN12. Hearings on H.R. 1070 before Subcommittee No. 2 of the House Committee on the Judiciary, pp. 6--7, 24 (Unpublished, May 19,

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1953; on file with the Clerk of the Committee) (testimony of Judge Howell of the Court of Claims); H.R.Rep.No.695, 83d Cong., 1st Sess. 2, 5--6 (1953); U.S.Code Cong. and Admin.News 1953, p. 2006; S.Rep.No.275, 83d Cong., 1st Sess. 2 (1953); H.R.Rep.No.2349, 85th Cong., 2d Sess. (1958); S.Rep.No.2309, 85th Cong., 2d Sess. (1958), U.S.Code Cong. and Admin.News 1958, p. 3909; 104 Cong.Rec. 16095 (1958) (remarks of Representative Keating).

IV.

[14] In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plain that it was far from attempting any such thing. Typical is a statement in the 1958 House Report that the purpose of the legislation was to 'declare which of the powers Congress was intending to exercise when the court was created.' H.R.Rep.No.2349, 85th Cong., 2d Sess. 3 (1958); accord, H.R.Rep.No.695, 83d Cong., 1st Sess. 3, 5, 7 (1953); and see S.Rep.No.275, 83d Cong., 1st Sess. 2 (1953), substituted for S.Rep.No.261, 83d Cong., 1st Sess. 2 (1953); 99 Cong.Rec.8943, 8944 (1953) (remarks of Senator Gore).

'Subsequent legislation which declares the intent of an earlier law,' this Court has noted, 'is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.' Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90, 79 S.Ct. 141, 145, 3 L.Ed.2d 132; accord, New York, P. & N.R. Co. v. Peninsula Exchange, 240 U.S. 34, 39, 36 S.Ct. 230, 232, 60 L.Ed. 511. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. United States v. Hutcheson, 312 U.S. 219, 235--237, 61 S.Ct. 463, 467, 468, 85 L.Ed. 788. As examination of the House and Senate Reports makes evident, that is what occurred ***542** here. E.g., S.Rep.No.2309, 85th Cong., 2d Sess. 2--3 (1958); H.R.Rep.No. 695, 83d Cong., 1st Sess. 3--5 (1953).

At the time when Bakelite and Williams were decided, the Court did not have the benefit of this congressional understanding. The Williams case, for example, arose under the Legislative Appropriation Act of June 30, 1932, c. 314, s 107(a)(5), 47 Stat. 382, 402, which reduced the salary of all judges 'except judges whose compensation may not, under the Constitution, be diminished during their continuance in office.' Mr. Justice Sutherland, who wrote the Court's opinions in both Williams and O'Donoghue, was plainly disadvantaged by the absence of congressional intimation as to which judges of which courts were to be deemed exempted. See O'Donoghue v. United States, 289 U.S. 516, 529, 53 S.Ct.740, 742.

In the Bakelite case, to be sure, Mr. Justice Van Devanter said of an argument drawn from tenuous evidence of congressional understanding that it 'mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.' 279 U.S., at 459, 49 S.Ct. at 416. Yet he would hardly have denied that explicit evidence of legislative intendment concerning the factors he thought controlling may be relevant and indeed highly persuasive. In any event, the Bakelite dictum did not embarrass the Court in deciding O'Donoghue, where it looked searchingly at 'congressional practice' to determine what classification that body 'recognizes.' 289 U.S., at 548--550, 53 S.Ct. at 749, 750. We think the forthright statement of understanding ****1469** embraced in the 1953 and 1958 declarations may be taken as similarly persuasive evidence for the problem now before us.

To give due weight to these congressional declarations is not of course to compromise the authority or responsibility ***543** of this Court as the ultimate expositor of the Constitution. The Bakelite and Williams decisions have long been considered of questionable soundness. See, e.g., Brown, The Rent in Our Judicial Armor, 10 G.W.L.Rev. 127 (1941); Hart and Wechsler, The Federal Courts and the Federal System (1953), 348--351; 1 Moore, Federal Practice (2d ed. 1961), 71 n. 21. They stand uneasily next to O'Donoghue, much of whose reasoning in sustaining the Article III status of the District of Columbia superior courts seems

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applicable to the Court of Claims and the Court of Customs and Patent Appeals. In Pope v. United States, 323 U.S. 1, 13--14, 65 S.Ct. 16, 23, 89 L.Ed. 3, where the Solicitor General argued at length against the continued vitality of Bakelite and Williams, their authority was regarded as an open question.

[15] Furthermore, apart from this Court's considered practice not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases, e.g., United States v. South Buffalo R. Co., 333 U.S. 771, 774--775, 68 S.Ct. 868, 870, 92 L.Ed. 1077; see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405--408, 52 S.Ct. 443, 446--448, 76 L.Ed. 815 and n. 1--3 (Brandeis, J., dissenting), there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of stare decisis--protection of generated expectations--actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.

V.

[16] The Constitution nowhere makes reference to 'legislative courts.' The power given Congress in Art. I, s 8, cl. 9, 'To constitute Tribunals inferior to the Supreme Court,' plainly relates to the 'inferior Courts' provided for in Art. III, s 1; it has never been relied on for establishment of any other tribunals.

***544** The concept of a legislative court derives from the opinion of Chief Justice Marshall in American Insurance Co. v. Canter, 1 Pet. 511, 7 L.Ed. 242, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

> 'These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.' 1 Pet., at 546.

[17][18] By these arresting observations the Chief Justice certainly did not ****1470** mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief Justice meant, and what the case has ever after been ***545** taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; [FN13] courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

> FN13. Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so. Benner v. Porter, 9 How. 235, 243, 13 L.Ed. 119; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L.Ed. 659; Reynolds v. United States, 98 U.S. 145, 154, 25 L.Ed. 244; United States v. Coe, 155 U.S. 76, 86, 15 S.Ct. 16, 19, 39 L.Ed. 76; Balzac v. Porto Rico, 258 U.S. 298, 312--312, 42 S.Ct. 343, 348, 66 L.Ed. 627; International Longshoremen's & etc., Union v. Juneau Spruce Corp., 342 U.S. 237, 240-- 241, 72 S.Ct. 235, 237, 238, 96 L.Ed. 275; cf. Martin v. Hunter's Lessee, 1 Wheat. 304, 338, 4 L.Ed. 97; see Pope v. United States, 323 U.S. 1, 13--14, 65 S.Ct. 16, 23, 89 L.Ed. 3.

The reasons for this are not difficult to appreciate

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so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. [FN14] But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant ***546** number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge. [FN15]

FN14. Under Barber v. Barber, 21 How. 582, 584, 16 L.Ed. 226, for example, the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all such local matters, the territorial courts took cognizance of them. Simms v. Simms, 175 U.S. 162, 167--168, 20 S.Ct. 58, 60, 44 L.Ed. 115; De la Rama v. De la Rama, 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765.

FN15. Benner v. Porter, 9 How. 235, 240, 244, 13 L.Ed. 119. For statutory techniques since developed to avoid the interregnal problems involved in that case, see Metlakatla Indian Community etc., v. Egan, 363 U.S. 555, 557--559, 80 S.Ct. 1321, 1322, 1323, 4 L.Ed.2d 1397; 1 Moore, Federal Practice (2d ed. 1961), 32--34.

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of ****1471** veto. [FN16] The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized. [FN17]

FN16. See Clinton v. Englebrecht, 13 Wall. 434, 441--445, 20 L.Ed. 659; Hornbuckle v. Toombs, 18 Wall. 648, 655--656, 21 L.Ed. 966.

FN17. Compare Clinton v. Englebrecht, supra, 13 Wall., at 446, 447, with Dreyer v. Illinois, 187 U.S. 71, 83--84, 23 S.Ct. 28, 32, 47 L.Ed. 79.

Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee ***547** of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

The same confluence of practical considerations that dictated the result in Canter has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. In United States v. Coe, 155 U.S. 76, 85--86, 15 S.Ct. 16, 19, 39 L.Ed. 76, for example, the Court sustained the authority of the Court of Private Land Claims to adjudicate claims under treaties to land in the territories, but left it expressly open whether such a course might be followed within the States. The Choctaw and Chickasaw Citizenship Court was similarly created to determine questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the National Government. See Stephens v. Cherokee Nation, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041; Ex parte Joins, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110; Wallace v. Adams, 204 U.S. 415, 27 S.Ct. 363, 51 L.Ed. 547. Upon like considerations, Article III has been viewed as inapplicable to courts

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created in unincorporated territories outside the mainland, Downes v. Bidwell, 182 U.S. 244, 266--267, 21 S.Ct. 770, 778, 779, 45 L.Ed. 1088; Balzac v. Porto Rico, 258 U.S. 298, 312--313, 42 S.Ct. 343, 348, 66 L.Ed. 627; cf. Dorr v. United States, 195 U.S. 138, 145, 149, 24 S.Ct. 808, 811, 813, 49 L.Ed. 128, and to the consular courts established by concessions from foreign countries, In re Ross, 140 U.S. 453, 464--465, 480, 11 S.Ct. 897, 900, 905, 35 L.Ed. 581. [FN18]

FN18. See generally, as to each of these courts, 1 Moore, Federal Practice (2d ed. 1961), 40--44, 47--50.

The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, ***548** the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the Canter holding has not been deemed controlling. O'Donoghue v. United States, 289 U.S. 516, 536--539, 53 S.Ct. 740, 745, 746.

Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. McAllister v. United States, 141 U.S. 174, ****1472** 186, 11 S.Ct. 949, 953, 35 L.Ed. 693. [FN19] By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. See Mookini v. United States, 303 U.S. 201, 205, 58 S.Ct. 543, 545, 82 L.Ed. 748. As the Bakelite and Williams opinions recognize, the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect powers enjoyed by the National Government over subject matter--roughly, payment of debts and collection of customs revenue-- and not over localities. What those opinions fail to deal with is whether that distinction deprives American Insurance Co. v. Canter of controlling force.

FN19. We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them.

The Bakelite opinion did not inquire whether there might be such a distinction. After sketching the history of the territorial and consular courts, it continued at once:

'Legislative courts also may be created as special tribunals to examine and determine various matters, ***549** arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' 279 U.S., at 451, 49 S.Ct. at 413.

Since in the Court's view the jurisdiction conferred on both the Court of Claims and the Court of Customs and Patent Appeals included 'nothing which inherently or necessarily requires judicial determination,' [FN20] both could have been and were created as legislative courts.

FN20. Ex parte Bakelite Corp., 279 U.S. 438, 453, 458, 49 S.Ct. 411, 414, 416, 73 L.Ed. 789; accord, Williams v. United States, 289 U.S. 553, 579, 53 S.Ct. 751, 759, 77 L.Ed. 1372.

We need not pause to assess the Court's characterization of the jurisdiction conferred on those courts, beyond indicating certain reservations about its accuracy. [FN21] Nor need we now explore the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article III courts. We may and do assume, for present purposes, that none of the jurisdiction vested in our two courts is of that sort, so that all of it might be committed for final determination to non-Article III tribunals, be they denominated legislative courts or administrative agencies.

FN21. Williams itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U.S.C. s 1491, 28 U.S.C.A. s 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. 289 U.S., at 581, 53 S.Ct. at 760; see, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312, 327, 13 S.Ct. 622, 626, 37 L.Ed. 463. As for

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> Bakelite, its reliance, 279 U.S., at 458 n. 26, 49 S.Ct. at 416, on Cary v. Curtis, 3 How. 236, 11 L.Ed. 576, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available. See 3 How., at 250.

But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial ***550** non sequitur of the Bakelite and Williams opinions. Each assumed that because Congress might have assigned specified jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying statutory assurances of life tenure and undiminished compensation. In so doing, each appears to have misunderstood the trust ****1473** of the celebrated observation by Mr. Justice Curtis, that

> '* * * there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284, 15 L.Ed. 372.

This passage, cited in both the Bakelite and Williams opinions, [FN22] plainly did not mean that the matters referred to could not be entrusted to Article III courts. Quite the contrary, the explicit predicate to Justice Curtis' argument was that such courts could exercise judicial power over such cases. For the very statute whose authorization of summary distress proceedings was sustained in the Murray case, also authorized the distrainee to bring suit to arrest the levy against the United States in a Federal District Court. And as to this, the author of the opinion stated, just before his more trenchant remark quoted above:

> FN22. 279 U.S., at 451 note 8, 49 S.Ct. at 413; 289 U.S., at 579, 53 S.Ct. at 759.

> 'The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld ***551** their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.' [FN23]

> FN23. 18 How., at 284.

Thus Murray's Lessee, far from furnishing authority against the proposition that the Court of Claims is a constitutional court, actually supports it.

[19] To deny that Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision would be to deprive it of the very choice that Mr. Justice Curtis insisted it enjoys. Of course possession of the choice, assuming it is coextensive with the range of matters confided to the courts, [FN24] subjects those courts to the continuous possibility that their entire jurisdiction may be withdrawn. See Williams v. United States, 289 U.S. 553, 580--581, 53 S.Ct. 751, 760, 77 L.Ed. 1372. But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, s 1, authorized but did not obligate Congress to create inferior federal courts. 1 Farrand, The Records of the Federal Convention (1911), 118, 124--125; The Federalist, No. 81 (Wright ed. 1961), at 509 (Hamilton). Once created, they passed almost a century without exercising any very significant jurisdiction. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv.L.Rev. 49, 65--70 (1923); Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499 (1928). Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. Turner v. Bank of North America, 4 Dall. 8, 10 note, 1 L.Ed. 718 (Chase, J.); ***552** Cary v. Curtis, 3 How. 236, 245, 11 L.Ed. 576; Sheldon v. Sill, 8 How. 441, 449, 12 L.Ed. 1147; Kline v. Burke Construction Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 82, 67 L.Ed. 226. Even if it should be conceded that the Court of Claims or the Court of Customs and Patent Appeals is any more likely to be supplanted, we do not think the factor of constitutional significance. [FN25]

> FN24. But see note 21, supra.

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FN25. See generally Hart and Wechsler, The Federal Courts and the Federal System (1953), 312--340, and more specifically, 370 U.S., pp. 567--568, 82 S.Ct., pp. 1481--1482, infra.

**1474 [20] What has been said should suffice to demonstrate that whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. To ascertain whether the courts now under inquiry can meet those tests, we must turn to examine their history, the development of their functions, and their present characteristics.

VI.

A. Court of Claims.--The Court of Claims was created by the Act of February 24, 1855, c. 122, 10 Stat. 612, primarily to relieve the pressure on Congress caused by the volume of private bills. As an innovation the court was at first regarded as an experiment, and some of its creators were reluctant to give it all the attributes of a court by making its judgments final; instead it was authorized to hear claims and report its findings of fact and opinions to Congress, together with drafts of bills designed to carry its recommendations into effect. s 7, 10 Stat. 613; see Cong.Globe, 33d Cong., 2d Sess. 70--72 (1854) (remarks of Senators Brodhead and Hunter). From the outset, however, a majority of the court's proponents insisted that its judges be given life tenure as a means of assuring independence *553 of judgment, and their proposal won acceptance in the Act. s 1, 10 Stat. 612; see Cong. Globe, 33d Cong., 2d Sess. 71, 108--109 (Senator Hunter); 72 (Senator Clayton); 106 (Senator Brodhead); 110 (Senator Pratt); 114, 902 (the votes). Indeed there are substantial indications in the debates that Congress thought it was establishing a court under Article III. Cong.Globe, 33d Cong., 2d Sess. 108--109 (Senator Hunter); 110--111 (Senator Pratt); 111 (Senator Clayton); 113 (Senators Stuart and Douglas).

By the end of 1861, however, it was apparent that the limited powres conferred on the court were insufficient to relieve Congress form the laborious necessity of examining the merits of private bills. In his State of the Union message that year, President Lincoln recommended that the legislative design to provide for the independent adjudication of claims against the United States be brought to fruition by making the judgments of the Court of Claims final. The pertinent text of his address is as follows, Cong.Globe, 37th Cong., 2d Sess., Appendix, p. 2:

'It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department * * *. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.'

By the Act of March 3, 1863, c. 92, s 5, 12 Stat. 765, 766, Congress adopted the President's recommendation and made the court's judgments final, with appeal to the *554 Supreme Court provided in certain cases. The significance of this nearly contemporaneous enactment for the light it sheds on the aims of the 1855 Congress is apparent.

There was one further impediment. Section 14 of the 1863 Act, 12 Stat. 768, provided that 'no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated **1475 for by the Secretary of the Treasury.' In Gordon v. United States, 2 Wall. 561, 17 L.Ed. 921, this Court refused to review a judgment of the Court of Claims because it construed that section as giving the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the offensive section, Act of March 17, 1866, c. 19, s 1, 14 Stat. 9, once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive. Thereafter, the Supreme Court promulgated rules governing appeals from the court, 3 Wall. vii-- viii, and took jurisdiction under them for the first time in De Groot v. United States, 5 Wall. 419, 18 L.Ed. 700.

The early appeals entertained by the Court furnish striking evidence of its understanding that the Court of Claims had been vested with judicial power. In De Groot the court had been given jurisdiction by

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special bill only after the passage of two private bills had failed to produce agreement by administrative officials upon adeqquate recompense. This Court was thus presented with a vivid illustration of the ways in which the same matter might be submitted for resolution to a legislative committee, to an executive officer, or to a court, Murray's Lessee, supra, and nevertheless accepted appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review. Marbury v. Madison, 1 Cranch 137, 174-- 175, 2 L.Ed. 60.

After the repeal of s 14, the Court was quick to protect the Court of Claims' judgments from executive revision. ***555** In United States v. O'Grady, 22 Wall. 641, 22 L.Ed. 772, a judgment had been diminished by the Secretary of the Treasury in an amount equal to a tax assertedly due, although the United States had not pleaded a set-off as it was entitled by the 1863 Act to do. [FN26] The Court of Claims and this Court on appeal held the deduction unwarranted in law, with the following pertinent closing observation:

> FN26. s 3, 12 Stat. 765, now 28 U.S.C. s 1503, 28 U.S.C.A. s 1503. See also 18 Stat. 481 (1875), as amended, 31 U.S.C. s 227, 31 U.S.C.A. s 227, requiring the Comptroller General to bring suit against a nonconsenting judgment creditor if that official believes a debt not previously asserted as a set-off is due the United States.

'Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal it taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for a new trial.' [FN27]

> FN27. 22 Wall., at 648.

Like views abound in the early reports. In United States v. Union Pacific R. Co., 98 U.S. 569, 603, 25 L.Ed. 143, for example, referring to Article III, the Court said:

'Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution.'

Such remained the view of the Court as late as Miles v. Graham, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067, decided in 1925. There it was held, on the authority of Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, that the salary of a Court of Claims judge appointed even after enactment of the taxing statute in question was not subject to such diminution. Although the case was afterwards overruled on this point, O'Malley v. Woodrough, 307 U.S. 277, 283, 59 S.Ct. 838, 840, 83 L.Ed. 1289, what is of continuing interest is the ***556** Court's reliance in Miles upon Evans v. Gore, where Mr. Justice Van Devanter for the Court devoted six full pages to recitation of the ****1476** importance of the guarantees of tenure and salary contained in Article III. [FN28] How it was possible to say in Bakelite, 279 U.S., at 455, 49 S.Ct. at 415, that the Court in Miles, decided only five years after Evans and with copious quotation from it, was unaware of the crucial question whether Article III extended its protection to a judge of the Court of Claims, is very difficult to understand.

> FN28. Evans v. Gore, 253 U.S. 245, 248--254, 40 S.Ct. 550, 551, 553.

In actuality, the Court's pre-Bakelite view of the Court of Claims in supported by the evidence of increasing confidence placed in that tribunal by Congress. The Tucker Act, s 1, 24 Stat. 505 (1887), now 28 U.S.C. s 1491, 28 U.S.C.A. s 1491 , greatly expanded the jurisdiction of the court by authorizing it to adjudicate

'All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *.'

[21] All of the cases within this grant of jurisdiction arise either immediately or potentially under federal law within the meaning of Art. III, s 2. Osborn v. Bank of the United States, 9 Wheat. 738, 818--819, 823--825, 6 L.Ed. 204; see Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; Federal Crop Insurance Corp. v.

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Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10; Mishkin, The Federal 'Question' in the District Courts, 53 Col.L.Rev. 157, 184--196. The cases heard by the Court have ***557** been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 U.S.C. s 1331, 28 U.S.C.A. s 1331, of the District Courts. E.g., Causby v. United States, 60 F.Supp. 751, 104 St.Cl. 342, remanded for further findings, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (eminent domain); Lovett v. United States, 66 F.Supp. 142, 104 Ct.Cl. 557, aff'd, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (bill of attainder); Shapiro v. United States, 69 F.Supp. 205, 107 Ct.Cl. 650 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

[22] Indeed there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief. United States v. Alire, 6 Wall. 573, 18 L.Ed. 947; United States v. Jones, 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90; see Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 123--126. No question can be raised of Congress' freedom, consistently with Article III, to impose such limitation upon the remedial powers of a federal court. Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330, 58 S.Ct. 578, 581, 82 L.Ed. 872 (Norris- LaGuardia Act). But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703--704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628; Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed.B.J. 179 (1961).

'If there are such things as political axioms,' said Alexander Hamilton, 'the propriety of the judicial power of a government ****1477** being coextensive with its legislative, may be ranked among the number.' The Federalist, ***558** No. 80 (Wright ed. 1961), at 500. His sentiments were not ignored by the Framers of Article III. The Randolph plan, which formed the basis of that article, called for establishment of a national judiciary coextensive in authority with the executive and legislative branches. IV Farrand, The Records of the Federal Convention (rev. ed. 1937), 47--48. For, as Hamilton observed, a chief defect of the Confederation had been '* * * the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.' The Federalist, No. 22 (Wright ed. 1961), at 197. But because of the barrier of sovereign immunity, the laws controlling governmental rights and obligations could not for years obtain a fully definitive exposition. The creation of the Court of Claims can be viewed as a fulfillment of the design of Article III.

B. The Court of Customs and Patent Appeals.--The Court of Customs Appeals, as it was first known, was established by s 29 of the Customs Administrative Act of 1890, c. 407, 26 Stat. 131, as added by s 28 of the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 105, to review by appeal final decisions of the Board of General Appraisers (now Customs Court) respecting the classification and rate of duty applicable to imported merchandise. The Act was silent about the tenure of the judges, as had been the Judiciary Act of 1789, c. 20, ss 3, 4, 1 Stat. 73--75, 28 U.S.C.A. ss 133, 457 , 141, 41. The salary, first set at $10,000, was afterwards lowered to the $7,000 then being paid to circuit judges, Act of February 25, 1910, c. 62, s 1, 36 Stat. 202, 214, but before the first nominations had been received or confirmed, see 45 Cong.Rec. 2959, 4003 (1910); and, although it has since been increased, it has never been diminished. [FN29] After the Bakelite case had ***559** been decided, Congress expressly conferred tenure during good behavior upon the court's judges, in the Tariff Act of 1930, s 646, 46 Stat. 590, 762. [FN*] Representative Chindblom, in supporting the measure, stated that 'when this court was established it was believed to be a constitutional court (so) that it was not necessary to fix the term.' 71 Cong.Rec. 2043 (1929).

FN29. Under the Legislative Appropriation Act of June 30, 1932, c. 314, 47 Stat. 382--the statute under which the Williams and O'Donoghue cases arose--the judges of the Court of Customs and Patent Appeals accepted a reduction in salary from $12,500 to $10,000. That court had not, however, been specified for reduction by Congress; the action of the judges was understandable coming as

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it did after Bakelite had been decided; and under s 109 of the Act, 47 Stat. 403, the Treasury was authorized to accept reductions in payment voluntarily tendered by judges whose salary was constitutionally exempt from diminution.

FN* Now 28 U.S.C.A. ss 213, 371, 372.

The debates in the Senate at the time of the court's creation bear out this observation. See 44 Cong.Rec. 4185--4225 (1909). For under the Customs Administrative Act of 1890, c. 407, s 15, 26 Stat. 131, 138, review of decisions of the Board of General Appraisers had been vested in the Circuit Courts, undoubted Article III courts; it was this jurisdiction that was proposed to be transferred to the new court. [FN30] The debates accordingly concerned themselves with whether there was a need for a specialized court in the federal judicial system to deal with customs matters.

FN30. 36 Stat. 106. Provision was made for the transfer of pending cases and of appeals from final decisions in and of the Circuit Courts and Courts of Appeals. 36 Stat. 106, 107. The very first case heard by the Court of Customs Appeals was an appeal from the Circuit Court for the Southern District of New York in Hansen v. United States, 1 Ct.Cust.App. 1; it also took jurisdiction of a case transferred from the Court of Appeals for the Ninth Circuit in United States v. Seattle Brewing & Malting Co., 1 Ct.Cust.App. 362.

As was said some 35 years age, 'an important phase of the history of the federal judiciary deals with the movement ****1478** for the establishment of tribunals whose business was to be limited to litigation arising from a restricted ***560** field of legislative control.' Frankfurter and Landis, The Business of the Supreme Court (1927), 147. In certain areas of federal judicial business there has been a felt need to obtain, first, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; second, the speedy resolution of controversies available on a docket unencumbered by other matters; and, third, the certainty and definition that come from nationwide uniformity of decision. See generally id., at 146--186. Needs such as these provoked formation of the Commerce Court and the Emergency Court of Appeals. They also prompted establishment of the Court of Customs and Patent Appeals and its investiture with jurisdiction over customs, tariff, and patent and trademark litigation. 28 U.S.C. ss 1541--1543, 28 U.S.C.A. ss 1541 --1543.

The parallelism with the Commerce Court is especially striking. That court was created to exercise the jurisdiction previously held by the Circuit Courts to review orders of the Interstate commerce Commission. Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. It was needed, so its sponsors believed, to afford uniform, expert, and expeditious judicial review. See President Taft's message to Congress, 45 Cong.Rec. 379 (1910), in the course of which he stated:

'Reasons precisely analogous to those which induced the Congress to create the court of customs appeals by the provisions in the tariff act of August 5, 1909, may be urged in support of the creation of the commerce court.'

When disfavor with the court caused its abolition three years later, Act of October 22, 1913, c. 32, 38 Stat. 208, 219, it was decided in Congress after extensive debate that the judges then serving on it were protected in tenure by Article III, and they were thereafter assigned to sit on ***561** other constitutional courts. See, e.g., 48 Cong.Rec. 7994 (1912) (remarks of Senator Sutherland); and see Donegan v. Dyson, 269 U.S. 49, 46 S.Ct. 55, 70 L.Ed. 159.

The Emergency Court of Appeals was similarly created, by the Act of January 30, 1942, c. 26, 56 Stat. 23, to exercise exclusive equity jurisdiction to determine the validity of regulations, price schedules, and orders issued by the wartime Office of Price Administration. [FN31] Its Article III status was recognized inLockerty v. Phillips, 319 U.S. 182, 187--188, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339 .

FN31. Its functions were continued under the Defense Production Act of 1950, c. 932, s 408, 64 Stat. 798, 808, 50 U.S.C.A.Appendix, s 2108, to determine the validity of price and wage stabilization orders issued under that Act. On April 18, 1962, after denial of certiorari in the last case on its docket, Rosenzweig v. Boutin, 369 U.S. 818, 82 S.Ct. 830, the court terminated its existence. 299 F.2d 1--21.

Of course the judges of those courts were appointed as judges of inferior federal courts generally, or drawn from among those previously appointed as

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such. See page 538 of 370 U.S., page 1466 of 82 S.Ct. and note 11, supra. But by 1942 at least, when the latter court was created, Congress was well aware of the doubt created by the Bakelite and Williams decisions whether Article III judges could sit on non-Article III tribunals. Its action in authorizing judges of the District Courts and Courts of Appeals to sit on the Emergency Court thus reflects its understanding that that court was being created under Article III.

[23] Such an understanding parallels that of previous Congresses since the adoption of the Constitution. Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its creation; until 1875 it conferred very little of it indeed. See 370 U.S., pp. 551--552, 82 S.Ct., pp. 1473--1474, supra. The Court of Customs and Patent Appeals therefore fits harmoniously into the federal judicial system authorized by Article III.

****1479 *562** VII.

Article III, s 2 provides in part:

'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *--to Controversies to which the United States shall be a Party * * *.'

The cases heard by the Court of Claims and the Court of Customs and Patent Appeals all arise under federal law, as we have seen; they are also cases in which the United States is a party. But in Williams v. United States, 289 U.S. 553, 572--578, 53 S.Ct. 751, 757, 759, 77 L.Ed. 1372, far from making of that circumstance a further proof that the Court of Claims exercises the judicial power contemplated by Article III, this Court held that it did not because that article, so it was said, does not make justiciable controversies to which the United States is a party defendant.

The Court's opinion dwelt in part upon the omission of the word 'all' before 'Controversies' in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that 'it is a constitution we are expounding.' McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579. But it would be needlessly literal to suppose that the Court rested its holding on this point. Rather it deemed controlling the rule, 'well settled and understood' at the time of the Constitutional Convention, that 'the sovereign power is immune from suit.' 289 U.S., at 573, 53 S.Ct. at 757. Accordingly it becomes necessary to reconsider whether that principle has the effect claimed of rendering suits against the United States nonjusticiable in a court created under Article III.

***563** At least one touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort 'recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems.' United Steelworkers v. United States, 361 U.S. 39, 44, 60, 80 S.Ct. 1, 4, 185, 4 L.Ed.2d 12 (FRANKFURTER, J., concurring). There can be little doubt that that test is met here. Suits against the English sovereign by petition of liberate, monstrans de droit, and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were wellestablished before the Revolution. See 9 Holdsworth, History of English Law, 7--45 (1926). Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution. E.g., 9 Laws of Va. 536, 540 (1778) (Hening 1821); see Higginbotham's Executrix v. Commonwealth, 25 Gratt. 627, 637--638 (Va.1874). This history was known by Congress when it established the Court of Claims, see Cong. Globe, 33d Cong., 2d Sess. 73 (1854) (remarks of Senator Pettit), and undoubtedly was familiar to the Framers of the Constitution, most of them lawyers.

[24] Hamilton's view, quoted in the Williams case, 289 U.S., at 576, 53 S.Ct. at 758, are not to the contrary. To be sure, Hamilton argued that 'the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.' The Federalist, No. 81 (Wright ed. 1961), at 511. But that is because there was no surrender of sovereign immunity in the plan of the convention; [FN32] so ***564** that, for suits against the United States, it remained '****1480** inherent in the nature of sovereignty not to be amenable to the suit of an

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individual without its consent.' Ibid. (Emphasis in original.) In this sense, and only in this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For 'behind the words of the constitutional provisions are postulates which limit and control.' Principality of Monaco v. Mississippi, 292 U.S. 313, 322, 54 S.Ct. 745, 748, 78 L.Ed. 1282. But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability. Cf. Cohens v. Virginia, 6 Wheat. 264, 383--385, 5 L.Ed. 257.

FN32. As there was, for example, in suits between States and by the United States against a State. Rhode Island v. Massachusetts, 12 Pet. 657, 720, 9 L.Ed. 1233; United States v. Texas, 143 U.S. 621, 639--646, 12 S.Ct. 488, 491--493, 36 L.Ed. 285.

So the Court had given itself to understand before Williams was decided. In United States v. Louisiana, 123 U.S. 32, 35, 8 S.Ct. 17, 18, 31 L.Ed. 69, it held maintainable under Article III a suit brought in the Court of Claims by a State against the United States with Congress' consent. And in Minnesota v. Hitchcock, 185 U.S. 373, 384, 22 S.Ct. 650, 654, 46 L.Ed. 954, which reaffirmed that ruling, the Court said:

'This is a controversy to which the United States may be regarded as a party. It is one, therefore to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant.'

Further in the same opinion, 185 U.S., at 386, 22 S.Ct. at 655, the Court significantly remarked:

'While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.'

***565** To deny that proposition now would be to call into question a large measure of the jurisdiction exercised by the United States District Courts. Under the Federal Tort Claims Act, s 410(a), 60 Stat. 842, 843--844 (1946), as amended, 28 U.S.C. s 1346(b), 28 U.S.C.A. s 1346(b), those courts have been emplowered to determine the tort liability of the United States in suits brought by individual plaintiffs. In so doing, they exercise functions akin to those of the Court of Claims, as is evidenced by the statutory authorization of appeals to that court from their judgments, with the consent of the appellee. s 412(a) (2), 60 Stat. 844--845 (1946), as amended, 28 U.S.C. s 1504, 28 U.S.C.A. s 1504.

In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, s 2, 24 Stat. 505 (1887), as amended, 28 U.S.C. s 1346(a)(2), 28 U.S.C.A. s 1346(a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than $10,000. Under that Act a District Court sits 'as a court of claims,' United States v. Sherwood, 312 U.S. 584, 591, 61 S.Ct. 767, 771, 85 L.Ed. 1058, and affords the same rights and privileges to suitors against the United States. Bates Manufacturing Co. v. United States, 303 U.S. 567, 571, 58 S.Ct. 694, 696, 82 L.Ed. 1020. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 109--111.

There have been and are further statutory indications that Congress regards the two courts interchangeably. In 1921, Mr. Justice Brandeis compiled a list of 17 statutes passed during World War I, permitting suit against the United States for the value of propertyseized for use in the war effort, and authorizing them to be instituted in either the Court of Claims or one of the District Courts. United States v. Pfitsch, 256 U.S. 547, 553 note 1, 41 S.Ct. 569, 571, 65 L.Ed. 1084. Today, 28 U.S.C. s 1500, 28 U.S.C.A. s 1500 gives litigants an election to sue the United States as principal in the Court of Claims or to ***566** pursue their claims against its agents in ****1481** any other court, including the District Courts. See National Cored Forgings Co. v. United States, 132 F.Supp. 454, 132 Ct.Cl. 11. In addition, by the Act of September 13, 1960, ss 1, 2(a), 74 Stat. 912, Congress added ss 1406(c) and 1506 to Title 28 of the United States Code, 28 U.S.C.A. ss 1406(c), 1506, providing for transfer between the Court of Claims and any District Court when a suit within one court's exclusive jurisdiction is brought mistakenly in another.

[25] These evidences of congressional understanding that suits against the United States are justiciable in courts created under Article III may

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not be lightly disregarded. Nevertheless it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court. It remains to consider whether that circumstance suffices to render nonjudicial the decision of claims against the United States in the Court of Claims.

First. Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. E.g., 45 Stat. 602 (1928), as amended, 25 U.S.C. ss 651--657, 25 U.S.C.A. ss 651-- 657; Indians of California v. United States, 98 Ct.Cl. 583, 599. Congress has waived the benefit of res judicata, Cherokee Nation v. United States, 270 U.S. 476, 486, 46 S.Ct. 428, 432, 70 L.Ed. 694, and of defenses based on the passage of time, United States v. Alcea Band of Tillamooks, 329 U.S. 40, 45--46, 67 S.Ct. 167, 169, 170, 91 L.Ed. 29; United States v. Central Eureka Mining Co., 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228.

[26] In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. United States v. Alcea Band of Tillamooks, supra; see Colgate v. United States, 280 U.S. 43, 47--48, 50 S.Ct. 22, 23, 74 L.Ed. 157. Indeed the Court has held ***567** that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. United States v. Realty Co., 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215.

[27] The issue was settled beyond peradventure in Pope v. United States, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery--as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims--was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. Consent judgments, the Court recalled, are nonetheless judicial judgments. See 323 U.S., at 12, 65 S.Ct. at 22, and cases cited. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

Second. Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this this Court. E.g., District of Columbia v. Eslin, 183 U.S. 62, 22 S.Ct. 17, 46 L.Ed. 85. But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then sub judice, Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264; its power can be no less when dealing with an inferior federal court, In re Hall, 167 U.S. 38, 42, 17 S.Ct. 723, 724, 42 L.Ed. 69. For as Hamilton assured those of his contemporaries who were concerned about the reach of ****1482** power that might be vested in a federal judiciary, 'it ought to be recollected that the national legislature will have ample authority to make ***568** such exceptions, and to prescribe such regulations as will be calculated to obviate or remove (any) * * * inconveniences.' The Federalist, No. 80 (Wright ed. 1961), at 505.

The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite Ex parte McCardle, supra, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. United States v. Klein, 13 Wall. 128, 20 L.Ed. 519. Surely no such concern would have been manifested if it had not been thought that the Court of Claims was invested with judicial power. [FN33]

FN33. Pocono Pines Assembly Hotels Co. v. United States, 73 Ct.Cl. 447, leave to file petition for writ of mandamus or prohibition denied, 285 U.S. 526, 52 S.Ct. 392, 76 L.Ed. 923, in which the Congress 'remanded' a final and unappealed decision against the United States to the Court of Claims for new findings, does not detract from the

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authority of Klein. Without examining anything else, it is enough to note that the considerations governing a grant or denial of a petition for mandamus are, like those controlling the issuance of a writ of certiorari, so discretionary with the Court as to deprive a denial of precedential effect on this score. Compare Sup.Ct. Rule 30 with Rule 19(1), (2), 28 U.S.C.A., and cf. Brown v. Allen, 344 U.S. 443, 488, 491--492, 73 S.Ct. 397, 431, 438, 439, 97 L.Ed. 469 (opinion of FRANKFURTER, J.).

VIII.

[28] A more substantial question relating to the justiciability of money claims against the United States arises from the impotence of a court to enforce its judgments. It was Chief Justice Taney's opinion, in Gordon v. United ***569** States, afterwards published at 117 U.S. 697, 702, that the dependence of the Court of Claims upon an appropriation by Congress to carry its awards into effect negatived the possession of judicial power:

'The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power.'

But Taney's opinion was not the opinion of the Court. It was a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren. The opinion of the Court, correctly reported for the first time in United States v. Jones, 119 U.S. 477, 478, 7 S.Ct. 283, 284, 30 L.Ed. 440, makes clear that its refusal to entertain the Gordon appeal rested solely on the revisory authority vested in the Secretary of the Treasury before the repeal of s 14. See also United States v. Alire, 6 Wall. 573, 576, 18 L.Ed. 947; United States v. O'Grady, 22 Wall. 641, 647, 22 L.Ed. 772; Langford v. United States, 101 U.S. 341, 344--345, 25 L.Ed. 1010--in each of which the limitation of the Gordon decision to the difficulties caused by s 14 clearly appears.

Nevertheless the problem remains and should be considered. Its scope has, However, been reduced by the Act of July 27, 1956, s 1302, 70 Stat. 678, 694, 31 U.S.C. s 724a, 31 U.S.C.A. s 724a, a general appropriation act which eliminates the need for subsequent separate appropriations to pay judgments below $100,000. A judgment creditor of this order simply files in the General Accounting Office a certificate of the judgment signed by the clerk and the chief judge of the Court of Claims, and is paid. 28 U.S.C. s 2517(a), 28 U.S.C.A. s 2517(a). For judgments of this dimension, therefore, there need ****1483** be no concern about the issuance of execution.

For claims in excess of $100,000, 28 U.S.C. s 2518, 28 U.S.C.A. s 2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain ***570** of our problem, for Art. I, s 9, cl. 7, vests exclusive responsibility for appropriations in Congress, [FN34] and the Court early held that no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made. Reeside v. Walker, 11 How. 272, 291, 13 L.Ed. 693.

FN34. 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *.'

The problem was recognized in the Congress that created the Court of Claims, where it was pointed out that if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States. Cong.Globe, 33d Cong., 2d Sess. 113 (1854) (remarks of Senator Stuart). The subsequent vesting of such jurisdiction in the District Courts, 370 U.S., pp. 565--566, 82 S.Ct. pp. 1480--1481, supra, of course bears witness that at least the Congress has not thought such a criterion imperative.

Ever since Congress first accorded finality to judgments of the Court of Claims, it has sought to avoid interfering with their collection. Section 7 of the Act of March 3, 1863, 12 Stat. 765, 766, provided for the payment of final judgments out of general appropriations. In 1877, Congress shifted for a time to appropriating lump sums for judgments certified to it by the Secretary of the Treasury, not in order to question the judgments but to avoid the possibility that a large judgment might exhaust the prior appropriation. Act of March 3, 1877, c. 105, 19 Stat. 344, 347; see 6 Cong.Rec. 585--588 (1877). A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv.L.Rev. 677, 685--686 n. 63. This historical record, surely more

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favorable to prevailing parties than that obtaining in private litigation, may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.

*571 The Court did not think so in La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461--462, 20 S.Ct. 168, 181--182, 44 L.Ed. 223, where the issue was the justiciability under Article III of a declaratory judgment action brought by the United States in the Court of Claims to determine its liability for payment of an award procured by the defendant from an international arbitral commission assertedly through fraud. See also Nashville, C. & St. L.R. Co. v. Wallace, 288 U.S. 249, 263, 53 S.Ct. 345, 348, 77 L.Ed. 730. Nor has it thought so when faced with the exactly analogous problem presented by suits for money between States in the original jurisdiction. That jurisdiction has been upheld, for example, in South Dakota v. North Carolina, 192 U.S. 286, 318--321, 24 S.Ct. 269, 275--277, 48 L.Ed. 448, notwithstanding the Court's recognition of judicial impotence to compel a levy of taxes or otherwise by process to enforce its award. See especially the opinions of Chief Justice Fuller and Chief Justice White at the beginning and inconclusive end of the extended litigation between Virginia and West Virginia, 206 U.S. 290, 319, 27 S.Ct. 732, 741, 51 L.Ed. 1068 (1907) and 246 U.S. 565, 38 S.Ct. 400, 59 L.Ed. 1272 (1918), in which the Court asserted jurisdiction to award damages for breach of contract despite persistent and never-surmounted challenges to its power to enforce a decree. [FN35] If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely **1484 on the good faith of the United States. We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising the judicial power provided for in Article III.

FN35. See also the intervening opinions and dispositions: 209 U.S. 514, 28 S.Ct. 614, 52 L.Ed. 914; 220 U.S. 1, 36, 31 S.Ct. 330, 336, 55 L.Ed. 353; 222 U.S. 17, 19--20, 32 S.Ct. 4, 5--6, 56 L.Ed. 71; 231 U.S. 89, 34 S.Ct. 29, 58 L.Ed. 135 ; 234 U.S. 117, 34 S.Ct. 889, 58 L.Ed. 1243; 238 U.S. 202, 35 S.Ct. 795, 59 L.Ed. 1272; 241 U.S. 531, 36 S.Ct. 719, 60 L.Ed. 1147.

*572 IX.

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.

[29][30] A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in United States v. Sherwood, 312 U.s. 584, 587, 61 S.Ct. 767, 770, 85 L.Ed. 1058, the legitimacy of that nonjury mode of trial does not depend upon the supposed 'legislative' character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not 'suits at common law' within the meaning of the Seventh Amendment. McElrath v. United States, 102 U.S. 426, 439--440, 26 L.Ed. 189. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. Minneapolis & St. L.R. Co. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961; see 74 Harv.L.Rev. 414, 415 (1960). [FN36]

FN36. The provision in 28 U.S.C. s 2503, 28 U.S.C.A. s 2503, for Commissioners to take evidence and make preliminary rulings is conformable in all respects with the practice of masters in chancery. For the judicial quality of the proceedings, see the Revised Rules of the Court of Claims, effective December 2, 1957, 140 Ct.Cl. II, 28 U.S.C. App., p. 5237, as amended, id. (Supp. III), p. 863, 28 U.S.C.A.

[31] The principal question raised by the parties under this head of the argument is whether the matters referred by Congress to the Court of Claims and the Court of Customs and Patent Appeals are submitted to them in a form consonant with the limitation of judicial power to 'cases or *573 controversies' imposed by Article III. We may consider first the bulk of jurisdiction exercised by the two courts, reserving for separate treatment in the next section of this opinion two areas which may reasonably be regarded as presenting special

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difficulty.

'Whether a proceeding which results in a grant is a judicial one,' said Mr. Justice Brandeis for a unanimous Court, 'does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. * * * It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. * * * It may give to the individual the option of either an administrative or a legal remedy. * * * Or it may provide only a (legal) remedy. (See 370 U.S., pp. 549--552, 82 S.Ct. pp. 1472--1474, supra.) Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status.' Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426--427, 70 L.Ed. 738. (Citations omitted.)

**1485 It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U.S.C. s 1491, 28 U.S.C.A. s 1491, advance to judgment 'according to the regular course of legal procedure.' Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 131--223. Such cases, which account for as much as 95% of the court's work, [FN37] form the staple *574 judicial fare of the regular federal courts. There can be no doubt that, to the 'expert feel of lawyers,' United Steelworkers v. United States, 361 U.S. 39, 44, 60, 80 S.Ct. 1, 4, 185, 4 L.Ed.2d 12 (Frankfurter, J., concurring), they constitute cases or controversies.

FN37. In 1950, Tucker Act cases constituted 2,350 of the 2,472 proceedings conducted by the court. Wilkinson, The United States Court of Claims, 36 A.B.A.J. 89, 159 (1950). The percentage may well have been augmented since that time by the extension of Tucker Act jurisdiction to Indian claims accruing after August 13, 1946. 28 U.S.C. s 1505, 28 U.S.C.A. s 1505, added by 63 Stat. 102 (1949).

The balance of the court's jurisdiction to render final judgments may likewise be assimilated to the traditional business of courts generally. Thus the court has been empowered to render accountings, [FN38] to decide if debts [FN39] or penalties [FN40] are due the United States, and to determine the liability of the United States for patent or copyright infringement [FN41] and for other specially designated torts. [FN42] In addition, it has been given jurisdiction to review, on issues of law including the existence of substantial evidence, decisions of the Indian Claims Commission. [FN43] Each of these cases, like those under the Tucker Act, is contested, is concrete, and admits of a decree of a sufficiently conclusive character. See Aetan Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-- 241, 57 S.Ct. 461, 463--464, 81 L.Ed. 617.

FN38. 28 U.S.C. s 1494, 28 U.S.C.A. s 1494 (contractor or their sureties); 28 U.S.C. ss 1496, 2512, 28 U.S.C.A. ss 1496, 2512 (disbursing officers).

FN39. R.S. s 5261 (1878), as amended, 45 U.S.C. s 87, 45 U.S.C.A. s 87 (governmentaided railroads).

FN40. 28 U.S.C. s 1499, 28 U.S.C.A. s 1499 (violations of the Eight-Hour Law, 37 Stat. 137 (1912), as amended, 40 U.S.C. s 324, 40 U.S.C.A. s 324).

FN41. 28 U.S.C. (Supp. III) s 1498, 28 U.S.C.A. s 1498.

FN42. 28 U.S.C. ss 1495, 2513, 28 U.S.C.A. ss 1495, 2513 (wrongful imprisonment); 28 U.S.C. s 1497, 28 U.S.C.A. s 1497 (trespass to oyster beds).

FN43. 60 Stat. 1049, 1054 (1946), 25 U.S.C. s 70s, 25 U.S.C.A. s 70s.

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. s 1541, 28 U.S.C.A. s 1541. [FN44] Contests over classification *575 and valuation of imported merchandise have long been maintainable in inferior federal courts. Under R.S. s 3011 (1878), suits after protest against the collector were authorized in the circuit courts. E.g., Greely's

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Administrator v. Burgess, 18 How. 413, 15 L.Ed. 455; Iasigi v. The Collector, 1 Wall. 375, 17 L.Ed. 686. When the Customs Administrative Act of 1890 was passed, c. 407, 26 Stat. 131, repealing that section and creating a Board of General Appraisers to review determinations of the collector, a further right of review was provided in the Circuit Courts. See **1486 De Lima v. Bidwell, 182 U.S. 1, 175, 21 S.Ct. 743, 744, 45 L.Ed. 1041. This Court took unquestioned appellate jurisdiction from those courts on numerous occasions. E.g., United States v. Ballin, 144 U.S. 1, 12 S.Ct. 507, 36 L.Ed. 321; Hoeninghaus v. United States, 172 U.S. 622, 19 S.Ct. 305, 43 L.Ed. 576. It has continued to accept review by certiorari from the Court of Customs Appeals since the jurisdiction of the Circuit Courts was transferred to it in 1909. E.g., Five Per Cent. Discount Cases, 243 U.S. 97, 37 S.Ct. 346, 61 L.Ed. 617; Barr v. United States, 324 U.S. 83, 65 S.Ct. 522, 89 L.Ed. 765. That the customs litigation authorized by s 1541 conforms to conventional notions of case or controversy seems no longer open to doubt.

FN44. 42 Stat. 15 (1921), as amended, 19 U.S.C. s 169, 19 U.S.C.A. s 169, makes 28 U.S.C. s 1541, 28 U.S.C.A. s 1541 applicable as well to the antidumping statute. See also 46 Stat. 735 (1930), as amended, 19 U.S.C. s 1516(b), (c), 19 U.S.C.A. s 1516(b, c), permitting classification or valuation cases to be initiated by protest from a competing domestic manufacturer, after which the importer's consignee may be made a party to suit in the Customs Court, with appeal to the Court of Customs and Patent Appeals.

Doubt has been expressed, however, about the jurisdiction conferred by 28 U.S.C. s 1542, 28 U.S.C.A. s 1542 and 60 Stat. 435 (1946), as amended, 15 U.S.C. s 1071, 15 U.S.C.A. s 1071, to review application and interference proceedings in the Patent Office relative to patents and trademarks. Parties to those proceedings are given an election to bring a civil action to contest the Patent Office decision in a District Court under 35 U.S.C. ss 145, 146, 35 U.S.C.A. ss 145, 146, or to seek review in the Court of Customs and Patent Appeals under 35 U.S.C. s 141, 35 U.S.C.A. s 141. If the latter choice is made, the Court confines its review to the evidence adduced before the Patent *576 Office and to the questions of law preserved by the parties; its decision 'shall be entered of record in the Patent Office and govern the further proceedings in the case.' 35 U.S.C. s 144, 35 U.S.C.A. s 144. The codification 'omitted as superfluous' the last sentence in the existing statute: 'But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.' Act of July 8, 1870, c. 230, s 50, 16 Stat. 198, 205; see Reviser's Note to 35 U.S.C. s 144, 35 U.S.C.A. s 144.

The latter provision was evidently instrumental in prompting a decision of this Court, at a time when review of Patent Office determinations was vested in the Court of Appeals for the District of Columbia, that the ruling called for by the statute was not of a judicial character. Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 699, 47 S.Ct. 284, 286, 71 L.Ed. 478. That is the most that the Postum holding can be taken to stand for, as United States ex rel. Bernardin v. Duell, 172 U.S. 576, 588--589, 19 S.Ct. 286, 290, 43 L.Ed. 559, had upheld the judicial nature of the review in all other respects. [FN45] And the continuing vitality of the decision even to this extent has been seriously weakened if not extinguished by the subsequent holding in Hoover Co. v. Coe, 325 U.S. 79, 88, 65 S.Ct. 955, 959, 89 L.Ed. 1488, sustaining the justiciability of the alternative remedy by civil action even though the Court deemed 'the effect of adjudication in equity the same as that of decision on appeal.' See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals: Patent Office and Tariff Commission Cases, 18 G.W.L.Rev. 192, 194--198 (1950).

FN45. Curiously, Duell was not cited in Postum, while the cases that were--Frasch v. Moore, 211 U.S. 1, 29 S.Ct. 6, 53 L.Ed. 65; Atkins & Co. v. Moore, 212 U.S. 285, 29 S.Ct. 390, 53 L.Ed. 515; Baldwin Co. v. Howard Co., 256 U.S. 35, 41 S.Ct. 405, 65 L.Ed. 816--had, as the Court recognized, held only that the statutory scheme of review did not produce a 'final judgment' as required by the statute then governing appeals to the Court.

*577 At the time when Postum was decided, the proceeding in equity against the Patent Office was cumulative rather than alternative with the review by appeal, and it seems likely that it was this feature of the statute which caused the Court to characterize the judgment of the Court of Appeals as 'a mere administrative decision.' 272 U.S., at 698, **1487

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47 S.Ct., at 285. Thereafter Congress made the remedies alternative, Act of March 2, 1927, c. 273, s 11, 44 Stat. 1335, 1336, and it was this amended jurisdiction that it later transferred to the Court of Customs and Patent Appeals, renaming the court in the process. Act of March 2, 1929, c. 488, 45 Stat. 1475.

It may still be true that Congress has given to the equity proceeding a greater preclusive effect than that accorded to decisions of the Court of Customs and Patent Appeals. [FN46] Even so, that circumstance alone is insufficient to make those decisions nonjudicial. Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738, decided by the same Court as Postum and not there questioned, is controlling authority. For the Court there held that a naturalization proceeding in a Federal District Court was a 'case' within the meaning of Article III, even though the Government was empowered by statute [FN47] to bring a later bill in equity for cancellation of the certificate.

FN46. See Stern and Gressman, Supreme Court Practice (1950), 44--46. But see Hobart Mfg. Co. v. Landers, Frary & Clark, 26 F.Supp. 198, 202, aff'd per curiam, 2 Cir., 107 F.2d 1016; Battery Patents Corp. v. Chicago Cycle Supply Co., 7 Cir., 111 F.2d 861, 863; Reviser's Note, 35 U.S.C. s 144, 35 U.S.C.A. s 144.

FN47. Naturalization Act of June 29, 1906, c. 3592, s 15, 34 Stat. 596, 601.

Mr. Justice Brandeis, the author of the Tutun opinion, had also prepared the Court's opinion in United States v. Ness, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321, which upheld the Government's right to seek denaturalization even upon grounds known to and ***578** asserted unsuccessfully by it in the naturalization court. [FN48] Proceedings in that court, the opinion explained, were relatively summary, with no right of appeal, whereas the denaturalization suit was plenary enough to permit full presentation of all objections and was accompanied with appeal as of right. 245 U.S., at 326, 38 S.Ct., at 121. These differences made it reasonable for Congress to allow the Government another chance to contest the applicant's eligibility.

FN48. For later developments, see Schneiderman v. United States, 320 U.S. 118, 123--125, 63 S.Ct. 1333, 1335--1337, 87 L.Ed. 1796; Knauer v. United States, 328 U.S. 654, 671--673, 66 S.Ct. 1304, 1313--1314, 90 L.Ed. 1500; Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120.

The decision in Tutun, coming after Ness, draws the patent and trademark jurisdiction now exercised by the Court of Customs and Patent Appeals fully within the category of cases or controversies. So much was recognized in Tutun itself, 270 U.S., at 578, 46 S.Ct., at 427, where Mr. Justice Brandeis observed:

'If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. 'It is in this respect,' as stated in Johannessen v. United States, 32 S.Ct. 613, 615, 225 U.S. 227, 238 (56 L.Ed. 1066) 'closely analogous to a public grant of land (Rev.Stat. s 2289 et seq. * * , or of the exclusive right to make, use and vend a new and useful invention (Rev.Stat., s 4883, et seq. * * .'' (Emphasis added.)

Like naturalization proceedings in a District Court, appeals from Patent Office decisions under 35 U.S.C. s 144, 35 U.S.C.A. s 144 are relatively summary--since the record is limited to the evidence allowed by that office-- and are not themselves subject to direct review by appeal as of right. [FN49] It ***579** was as reasonable for Congress, therefore, to bind only the ****1488** Patent Office on appeals and to give private parties whether or not participants in such appeals a further opportunity to contest the matter on plenary records developed in litigation elsewhere. This practice but furnishes a further illustration of the specialized jurisdiction of the Court of Customs and Patent Appeals, akin to that of the Commerce Court, in passing upon the consistency with law of expert administrative judgments without undertaking to conclude private parties in nonadministrative litigation. We conclude that the Postum decision must be taken to be limited to the statutory scheme in existence before the transfer of patent and trademark litigation to that court.

FN49. We intimate no opinion whether 28 U.S.C. s 1256, 28 U.S.C.A. s 1256 was intended by Congress to make patent and trademark cases reviewable by certiorari in this Court. See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 G.W.L.Rev. 192, 194--198 (1950).

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X.

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. s 1543, 28 U.S.C.A. s 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U.S.C. ss 1492 and 2509, 28 U.S.C.A. ss 1492, 1509. The judicial quality of the former was called into question though not resolved in Ex parte Bakelite Corp., 279 U.S. 438, 460--461, 49 S.Ct. 411, 416--417, 73 L.Ed. 789, [FN50] while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by In re Sanborn, 148 U.S. 222, 13 S.Ct. 577, 37 L.Ed. 429. [FN51]

FN50. Section 316(c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, involved in Bakelite, was reenacted in virtually identical terms by s 337(c) of the Tariff Act of 1930, 46 Stat. 590, 703, as amended, 19 U.S.C. s 1337(c), 19 U.S.C.A. s 1337(c).

FN51. Sanborn involved the departmental reference jurisdiction of the Court of Claims, since repealed by 67 Stat. 226 (1953); but the functions performed by the court in that case were not in substance different from those it still performs on request by Congress.

***580** At the outset we are not with a suggestion by the Solicitor General that even if the decisions called for by these heads of jurisdiction are nonjudicial, their compatibility with the status of an Article III court has been settled by O'Donoghue v. United States, 289 U.S. 516, 545--548, 53 S.Ct. 740, 748--749, 77 L.Ed. 1356. It is true that O'Donoghue upheld the authority of Congress to invest the federal courts for the District of Columbia with certain administrative responsibilities--such as that of revising the rates of public utilities [FN52]--but only such as were related to the government of the District. See Pitts v. Peak, 60 App.D.C. 195, 197, 50 F.2d 485, 487, cited and relied upon in O'Donoghue, 289 U.S., at 547--548, 53 S.Ct., at 749. [FN53] To extend that holding ****1489** to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the O'Donoghue opinion to the need there for an independent national judiciary.

FN52. See Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

FN53. Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389, 74 L.Ed. 969, which sustained the authority of the Court of Appeals for the District of Columbia to render an 'administrative' decision respecting the issuance of a radio broadcasting license to a station in Schenectady, New York, was decided at a time when the courts of the District were regarded wholly as legislative courts. Id., at 468, 50 S.Ct., at 390.

It is significant that all of the jurisdiction at issue in the Keller, Postum, and General Electric cases has long since been transformed into judicial business. The change with respect to review of Patent Office decisions took place, as we have seen, 370 U.S., p. 577, 82 S.Ct., p. 1487, supra, before the transfer of that jurisdiction to the Court of Customs and Patent Appeals. Review of the Public Utilities Commission was restricted to questions of law upon the evidence before the Commission, in the Act of August 27, 1935, s 2, 49 Stat. 882, D.C.Code, 1961, s 43--705. See Public Utilities Comm'n v. Pollak, 343 U.S. 451, 458, 72 S.Ct. 813, 818, 96 L.Ed. 1068. And the Act of July 1, 1930, c. 788, 46 Stat. 844, likewise made review of the Radio Commission judicial, as was recognized in Federal Radio Comm'n v. Nelson Bros., etc., Co., 289 U.S. 266, 274--278, 53 S.Ct 627, 632--633, 77 L.Ed. 1166.

***581** [32][33] The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in Kendall v. United States ex rel. Stokes, 12 Pet. 524, 619, 9 L.Ed. 1181:

'There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice.'

Thus those limitations implicit in the rubric 'case or controversy' that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45--46, need have no application in the

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District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts. [FN54]

FN54. The D.C.Code, 1961, Tit. 11, c. 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. Byers v. McAuley, 149 U.S. 608, 619, 13 S.Ct. 906, 910, 37 L.Ed. 867. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, D.C.Code, s 11--306; see Bottomley v. Bottomley, 104 U.S.App.D.C. 311, 262 F.2d 23, are beyond the ken of the federal courts in the States. Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383, 50 S.Ct. 154, 155, 74 L.Ed. 489.
The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, D.C.Code, ss 31--101, 21--308, is probably traceable to Art. II, s 2 of the Constitution. See note 10, supra; Ex parte Siebold, 100 U.S. 371, 397--398, 25 L.Ed. 717.

[34] But those are not the only limitations embodied in Article III's restriction of judicial power to cases or controversies. ***582** The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to 'cases of a Judiciary nature,' see II Farrand, op. cit., supra, at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article III court.

The jurisdictional statutes in issue, s 337 of the Tariff Act of 1930 and 28 U.S.C. ss 1492, 2509, 28 U.S.C.A. ss 1492, 2509, appear to subject the decisions called for from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. See, e.g., Chicago & Southern Air Lines, Inc., v. Waterman S.S. Corp., 333 U.S. 103, 113--114, 68 S.Ct. 431, 437--438, 92 L.Ed. 568; Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436. Whether they actually do so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the statutes. For disposition of the present cases, we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, ****1490** and to proceed on the assumption that it cannot be entertained by an Article III court.

[35] It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

***583** The overwhelming majority of the Court of Claims' business is composed of cases and controversies. See 370 U.S., pp. 573--574, 82 S.Ct., pp. 1484, 1485, supra. In the past year, it heard only 10 reference cases, Annual Report of the Administrative Office of the United States Courts (1961), 318; and its recent annual average has not exceeded that figure, Pavenstedt, The United States Court of Claims as a Forum for Tax Cases, 15 Tax L.Rev. 1, 6 n. 23 (1959). The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions. In the past fiscal year, that court disposed of 41 customs cases and 112 patent or trademark cases, but heard no appeals from the Tariff Commission. Annual Report of the Administrative Office of the United States Courts (1961), 318. Indeed we are advised that in all the years since 1922, when the predecessor to s 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases. [FN55] Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional attempt to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions.

FN55. Brief on behalf of the chief judge and the associate judges of the United States Court of Customs and Patent Appeals as amici curiae, p. 10.

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The Congress that enacted the assignment statute with its accompanying declarations was apprised of the possibility that a re-examination of the Bakelite and Williams decisions might lead to disallowance of some of these courts' jurisdiction. See 99 Cong.Rec. 8944 (1953) (remarks of Senator Gore); 104 Cong.Rec. 17549 (1958) (remarks of Senator Talmadge.) Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.

*584 CONCLUSIONS.

Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, their judges--including retired judges, Booth v. United States, 291 U.S. 339, 350--351, 54 S.Ct. 379, 380--381, 78 L.Ed. 836--are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an ex post facto resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the Bakelite and Williams decisions. See, e.g., Judge Madden writing for the Court of Claims in Pope v. United States, 53 F.Supp. 570, 100 Ct.Cl. 375, rev'd, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3. The factors set out at length in this opinion, which were not considered in the Bakelite and Williams opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

[36] That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprive them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should **1491 be given such assignments may be and has been a proper subject for congressional debate, e.g., 62 Cong.Rec. 190--191, 207--209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been devoted to patent, tax, antitrust, or any other specialized *585 field of law in which many eminently well- qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.

The judgments of the Courts of Appeals are affirmed.

Affirmed.

Mr. Justice FRANKFURTER took no part in the decision of this case.

Mr. Justice WHITE took no part in the consideration or decision of this case.

Mr. Justice CLARK, with whom THE CHIEF JUSTICE joins, concurring in the result.

I cannot agree to the unnecessary overruling of Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789 (1929), and Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933). Both were unanimous opinions by most distinguished Courts, [FN1] headed in the Bakelite case by Chief Justice Taft and in Williams by Chief Justice Hughes.

FN1. Bakelite: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone, Williams: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo.

Long before Glidden v. Zdanok was filed, the Congress had declared the Court of Claims 'to be a court established under article III of the Constitution of the United States.' Act of July 28, 1953, s 1, 67 Stat. 226, 28 U.S.C.A. s 171. Not that this ipse dixit made the Court of Claims an Article III court, for it must be examined in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges. But the 1953 Act did definitely establish the intent of the Congress, which prior to that time was not clear in light of the Williams holding 20 years earlier that it was not an Article III court.

*586 It is my belief that prior to 1953 the Court of Claims had all of the characteristics of an Article III court--jurisdiction over justiciable matters, issuance

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of final judgments, judges appointed by the President with consent of the Senate--save as to the congressional reference matters. It was the fact that a substantial portion of its jurisdiction consisted of congressional references that compelled the decision in Williams that it was not an Article III court and therefore the salaries of its judges could be reduced. [FN2] Since that time the Article III **1492 jurisdiction of the Court of Claims has been enlarged by including original jurisdiction under several Acts, e.g., suits against the United States for damages for unjust conviction, Act of May 24, 1938, ss 1--4, 52 Stat. 438, 28 U.S.C. s 1495, 28 U.S.C.A. s 1495, and appellate jurisdiction over tort suits against the United States tried in the District Courts, Act of Aug. 2, 1946, s 412(a)(2), 60 Stat. 844, 28 U.S.C. s 1504, 28 U.S.C.A. s 1504, and over suits before the Indian Claims Commission, Act of May 24, 1949, s 89(a), 63 Stat. 102, 28 U.S.C. s 1505, 28 U.S.C.A. s 1505. In addition, the former jurisdiction over questions referred by the Executive branch was withdrawn in 1953. Act of July 28, 1953, s 8, 67 Stat. 226. The result is that practically all of the court's jurisdiction ***587** is now comprised of Article III cases. And I read the 1953 Act as unequivocally expressing Congress' intent that this court--the jurisdiction of which was then almost entirely over Article III cases--should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

> FN2. "From the outset Congress has required it (the Court of Claims) to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time." Williams v. United States, supra, 289 U.S. at 569, 53 S.Ct. at 756 (quoting from Ex parte Bakelite). 'Further reflection tends only to confirm the views expressed in the Bakelite opinion * * * and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that, if the Court of Customs Appeals is a legislative court, so also is the Court of Claims.' Williams, at 571, 53 S.Ct. at 757. The Bakelite decision was posited squarely on the legislative reference function. See Ex parte Bakelite, supra, 279 U.S. 454--458, 49 S.Ct. 414--416.

It is true that Congress still makes legislative references to the court, averaging some 10 a year. The acceptance of jurisdiction of either executive or legislative references calling for advisory opinions has never been honored by Article III courts. Indeed, this Court since 1793 has consistently refused so to act. Correspondence of the Justices, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 486--489. Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). I do not construe the legislative history of the 1953 Act to be so clear as to require the Court of Claims to carry on this function, which appears to be minuscule. On the contrary, the congressional mandate clearly and definitely declared the court 'to be a court established under article III.' I would carry out that mandate. In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it cannot render advisory opinions.

Likewise I find that the Court of Customs and Patent Appeals has been an Article III court since 1958. It was created by the Congress in 1909 to exercise exclusive appellate jurisdiction over customs cases. Payne-Aldrich Tariff Act of Aug. 5, 1909, 36 Stat. 11, 105--108. At that time these cases were reviewed by Circuit Courts of Appeals--clearly of Article III status-- 36 Stat. 106, and they have since been considered on certiorari by this Court without suggestion that they were not 'cases' in the Article III sense. E.g., The Five Per Cent. Discount ***588** Cases, 243 U.S. 97, 37 S.Ct. 346, 61 L.Ed. 617 (1917). [FN3] The Congress enlarged the jurisdiction of the Court of Customs and Patent Appeals in 1922 to include appeals on questions of law from Tariff Commission findings in proceedings relating to unfair practices in the import trade. Tariff Act of 1922, 42 Stat. 943, 944. In 1929 this Court in Bakelite, supra, which involved a tariff matter, found these references to be of an advisory nature and on this basis declared the Court of Customs and Patent Appeals to be a legislative rather than an Article III court. The Bakelite decision indicates that this Court was of the impression that the tariff jurisdiction of the Court of Customs and Patent Appeals would be significant. However, since that time that court has handled but four such references--and only one in the **1493 last 27 years. At about the same time that the Bakelite opinion came down, Congress transferred the appellate jurisdiction in patent and trademark cases from the Court of Appeals of the District of

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Columbia to the Court of Customs and Patent Appeals. Act of March 2, 1929, ss 1, 2, 45 Stat. 1475. Thus, contrary to the apparent assumption in Bakelite, the business of that court now consists exclusively of Article III cases--with tariff references practically nonexistent (one in the last 27 years). In view of this evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such. Act of Aug. 25, 1958, s 1, 72 Stat. 848, 28 U.S.C.A. s 211.

FN3. That its original jurisdiction was in 'cases' in the Article III, s 2, sense cannot be questioned. See In re Frischer & Co., 16 Ct.Cust.App. 191, 198 (1928); Osborn v. Bank of U.S., 9 Wheat. 738, 819, 6 L.Ed. 204 (1824); Interstate Commerce Commission v. Brimson, 154 U.S. 447, 487, 14 S.Ct. 1125, 1137, 38 L.Ed. 1047 (1894); Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426--427, 70 L.Ed. 738 (1926).

As I have indicated, supra, the handling of the tariff references--numbering only 6 in 40 years--is not an Article III court function. The Congress has declared ***589** the Court of Customs and Patent Appeals to be an Article III court. It should, therefore, if and when such a case arose, with due deference refuse to exercise such jurisdiction. [FN4]

FN4. The validity of Judge Jackson's participation, as the Government points out, might also be sustained under the Act of September 14, 1922, c. 306, s 5, 42 Stat. 837, 839, which provided for the assignment of judges of the Court of Customs Appeals to the courts of the District of Columbia. This Act was on the books when Judge Jackson took his seat on the Court of Customs and Patent Appeals as well as when the Lurk case was tried.

I see nothing in the argument that the 1953 and 1958 Acts so changed the character of these courts as to require new presidential appointments. Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts. Much more drastic changes have been made without reappointment. [FN5] And there is no significance to the fact that Judge Jackson, who presided over the Lurk trial, was not in active status in 1958 when Congress declared his court to be an Article III court. He remained in office as a judge of that court even though retired, cf. Booth v. United States, 291 U.S. 339, 54 S.Ct. 379, 78 L.Ed. 836 (1934), and his judgeship was controlled by any act concerning the jurisdiction of that court or the status of its judges.

FN5. Nor does my holding carry any implication that judgments entered prior to the date of these Acts in which judges of these courts participated might be collaterally attacked. Ex parte Ward, 173 U.S. 452, 19 S.Ct. 459, 43 L.Ed. 765 (1899).

I would affirm.

Mr. Justice DOUGLAS with whom Mr. Justice BLACK concurs, dissenting.

The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the Court of Appeals in No. 242 and ***590** on the District Court [FN1] in No. 481. The problem is an impersonal one, concerning the differences between an Article I court and an Article III court. ****1494** My Brother HARLAN calls it a problem of a 'highly theoretical nature.' Far from being 'theoretical' it is intensely practical, for it deals with powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.

FN1. The District Court of the District of Columbia, like the 'inferior courts' established by Congress under Art. III, s 1, of the Constitution, is an Article III court (O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356), even though it possesses powers that Article III courts could not exercise. Congress, acting under its plenary power granted by Art. I, s 8, to legislate for the District of Columbia, has from time to time vested in the courts of the District administrative and even legislative powers. See, e.g., Keller v. Potomac Electric Co., 261 U.S. 428, 440--443, 43 S.Ct. 445, 447--448, 67 L.Ed. 731 (review of rate making); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 698--701, 47 S.Ct. 284, 285--286, 71 L.Ed. 478 (patent and trademark appeals); Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 467--468, 50 S.Ct. 389, 390, 74 L.Ed. 969 (review of radio station licensing; cf. Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 274--278, 53 S.Ct. 627, 631--633, 77 L.Ed. 1166). Congress has also authorized District Court judges to appoint members of the Board of Education. D.C.Code, s 31--101.
In O'Donoghue v. United States, supra, 289 U.S.

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at 545, 53 S.Ct. at 748, the Court said:

'The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over nonfederal causes of action, or over quasi judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state.'

The eighteenth-century courts in this country performed many administrative functions. See Pound, Organization of Courts (1940), pp. 88--89. The propriety of the union of legislative and judicial powers in a state court was assumed in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

Prior to today's decision the distinction between the two courts had been clear and unmistakable. By Art. I, s 8, Congress is given a wide range of powers, including ***591** the power 'to pay the Debts' of the United States and the power to 'lay and collect Taxes, Duties, Imposts and Excises.' By Art. I, s 8, Congress is also given the power 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Pursuant to the latter--the Necessary and Proper Clause--the Court of Claims was created 'to pay the Debts'; [FN2] and the Court of Customs and Patent Appeals was created in furtherance of the collection of duties. My Brother HARLAN shows that the Court of Customs Appeals traces back to the Payne-Aldrich Tariff Act of August 5, 1909, which should be proof enough that it is an administrative court, performing essentially an executive task. [FN3]

FN2. 'Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

'Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.' Ex parte Bakelite Corp., 279 U.S. 438, 451--452, 49 S.Ct. 411, 413, 73 L.Ed. 789.

FN3. 'The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact, their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.' Ex parte Bakelite Corp., supra, note 2, at 458, 49 S.Ct. at 416.

****1495 *592** In Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, the Court in a unanimous decision written by Mr. Justice Sutherland held that the Court of Claims, though exercising judicial power, was an Article I court. And in Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article I court. Taft was Chief Justice when Ex parte Bakelite was decided. Hughes was Chief Justice when Williams v. United States was decided. I

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mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

Mr. Justice Van Devanter in Ex parte Bakelite marked the line between the Court of Claims and the Court of ***593** Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

'Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.' Id., at 449, 49 S.Ct. at 412.

My Brother HARLAN emphasizes that both Judge Madden of the Court of Claims and Judge Jackson of the Court of Customs and Patent Appeals 'enjoy statutory assurance of tenure and compensation'; and so they do. But that statement reveals one basic difference between an Article III judge and an Article I judge. The latter's tenure is statutory and statutory only; Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is during 'good behaviour'; moreover, Article III provides that its judges shall have a compensation that 'shall not be diminished during their Continuance in Office.' See O'Malley v. Woodrough, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289. To repeat, there is not a word in Article I giving its courts such protection in tenure or in salary. A constitutional amendment would be necessary to supply Article I judges with the guarantees ***594** of tenure and salary that Article III gives its judges. The majority attempts to evade this problem by looking to so-called 'Congressional intent' to find the creation of an Article III court. Congress, however, has always understood ****1496** that it was only establishing Article I courts when it created the Court of Claims and the Court of Customs and Patent Appeals. The tenure it affixed to the judges of those tribunals was of necessity statutory only, as no mandate or requirement of Article I was involved.

The importance of these provisions to the independence of the judiciary needs no argument. Hamilton stated the entire case in The Federalist No. 79 (Lodge ed. 1908), pp. 491--493:

'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that permanent salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of ***595** the United States 'shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.'

'This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to- day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity

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to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. * * *

'This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

'The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and ***596** disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own ****1497** Constitution in respect to our own judges.'

We should say here what was said in United States ex rel. Toth v. Quarles, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8:

'* * * the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.'

Tenure that is guaranteed by the Constitution is a badge of a judge of an Article III court. The argument that mere statutory tenure is sufficient for judges of Article III courts was authoritatively answered in Ex parte Bakelite Corp., supra, 279 U.S. at 459--460, 49 S.Ct. at 416:

'* * * the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges, and declared that they should ***597** hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the territories, Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.' (Italics added.)

Congress could make members of the Interstate Commerce Commission lifetime appointees. Yet I suppose no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals. But if any agency member is disqualified, why is a member of another Article I tribunal, viz., the Court of Claims or the Court of Customs and Patent Appeals, qualified? No distinction can be drawn based on the functions performed by the Interstate Commerce Commission and those performed by the other two legislative tribunals. In each case some adjudicatory functions are performed. [FN4] Though the judicial functions of the Interstate Commerce Commission are as distinct as those of the Court of Claims, they nevertheless derive from Article I; and they are functions that Congress can exercise directly or delegate to an agency. Williams v. United States, supra, 289 U.S. pp. 567--571, 53 S.Ct. at 755--756. To make the present decision turn on whether the Court of Claims and the Court of Customs and Patent Appeals perform 'judicial' functions is to adopt a false standard. The manner in which the majority reasons exposes the fallacy.

FN4. The Interstate Commerce Commission has long entered reparation orders directing carriers to

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pay shippers specified sums of money plus interest for excessive and unreasonable rates. See Meeker v. Lehigh Valley R. Co., 236 U.S. 434, 35 S.Ct. 337, 59 L.Ed. 659; II Sharfman, The Interstate Commerce Commission (1931), pp. 387--388.

**1498 The majority says that once the United States consents to be sued all problems of 'justiciability' are satisfied; and *598 that Congress has broad powers to convert 'moral' obligations into 'legal' ones enforceable by 'constitutional' courts. The truth is, I think, that the dimensions of Article III can be altered only by the amending process, not by legislation. Congress can create as respects certain claims a limited 'justiciability.' But if 'justiciability' in the 'constitutional' sense is involved, then there must be trial by jury assuming, as my Brother HARLAN does, that the claim is for recovery for torts or some other compensable injury. To repeat, it does not advance analysis by calling the function a 'judicial' one (see Pope v. United States, 323 U.S. 1, 12, 65 S.Ct. 16, 22, 89 L.Ed. 3), for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problems is the manner in which that judicial power is to be exercised.

As Mr. Justice Brandeis made clear in Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426, 70 L.Ed. 738, an administrative remedy may be 'judicial.' The question here is different; it is whether the procedures utilized by the tribunal must comport with those set forth in the Bill of Rights and in the body of the Constitution. Yet who would maintain that in an administrative action for damages a jury trial was necessary?

Judges of the Article III courts work by standards and procedures which are either specified in the Bill of Rights or supplied by well-known historic precedents. Article III courts are law courts, equity courts, and admiralty courts [FN5]--all specifically named in Article III. They sit *599 to determine 'cases' or 'controversies.' But Article I courts have no such restrictions. They need not be confined to 'cases' or 'controversies' but can dispense legislative largesse. See United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29; 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738. Their decisions may affect vital interests; yet like legislative bodies, zoning commissions, and other administrative bodies they need not observe the same standards of due process required in trials of Article III 'cases' or 'controversies.' See Bi-Metallic Inv. Co. v. State Board of Equalization of Colorado, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372. That is what Chief Justice Marshall meant when he said in American Ins. Co. v. Canter, 1 Pet. 511, 545--546, 7 L.Ed. 242 that an Article I court (in that case a territorial court) could make its adjudications without regard to the limitations of Article III. On the other hand, as the Court in O'Donoghue v. United States, supra, 289 U.S. at 546, 53 S.Ct. at 748, 77 L.Ed. 1356, observed, Article III courts could not be endowed with the administrative and legislative powers (or with the power to render advisory opinions) which Article I tribunals or agencies exercise.

FN5. As respects admiralty, Chief Justice Marshall said in American Ins. Co. v. Canter, 1 Pet. 511, 545, 7 L.Ed. 242:

'If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

'The Constitution certainly contemplates these as three distinct classes of cases * * *.'

In other words, the question, apart from the constitutional guarantee of tenure and the provision against diminution of salary, concerns the functions of the particular tribunal. Article III **1499 courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and ex post facto laws) are in the body of the Constitution itself. Article I courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article III courts of law must sit with a jury in suits where the value in controversy exceeds $20, the Court of Claims--an Article I court--is not so confined by the Seventh Amendment. The claims which *600 it hears are claims with respect to which the Government has agreed to be sued. As the Court said in McElrath v. United States, 102 U.S. 426, 440, 26 L.Ed. 189, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules

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and the procedures to be followed in pursuing claims against the Government. Likewise, the Court of Customs Appeals hears appeals that 'include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.' Ex parte Bakelite Corp., supra, 279 U.S. at 458, 49 S.Ct. at 416.

The judicial functions exercised by Article III courts cannot be performed by Congress nor delegated to agencies under its supervision and control. [FN6] The bill of ***601** attainder is banned by Art. I, s 9. If there is to be punishment, courts (in the constitutional sense) must administer it. As we stated in United States v. Lovett, 328 U.S. 303, 317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252:

> FN6. The limitations on Article III courts that distinguish them from Article I courts were stated by Chief Justice Vinson in National Mut. Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 629--630, 69 S.Ct. 1173, 1201, 93 L.Ed. 1556, in words that have, I think, general acceptance, though on the precise issue he wrote in dissent:
> 'In Keller v. Potomac Electric Power Co., 1923, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731, where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that 'Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution.' 261 U.S. at page 435, 43 S.Ct. 445, 67 L.Ed. 731. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to Hayburn's Case, 1792, 2 Dall. 409, 410, 1 L.Ed. 436; United States v. Ferreira, 1851, 13 How. 40, note 52, 14 L.Ed. 42 and Gordon v. United States, 1864, 117 U.S. 697. These and other decisions of this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, Marbury v. Madison, 1803, 1 Cranch 137, 2 L.Ed. 60, the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, Muskrat v. United States, 1910, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246; Gordon v. United States, supra, the absence of revisory or appellate power in any other branch of Government, Hayburn's Case, supra; United States v. Ferreira, supra, and the absence of administrative or legislative issues or controversies, Keller v. Potomac Electric Power Co., supra; Postum Cereal Co. v. California Fig Nut Co., 1927, 272 U.S. 693, 47 S.Ct. 284, 71 L.Ed. 478.'

> 'Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because ****1500** the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.'

Moreover, when an Article III court of law acts, there is a precise procedure that must be followed:

> 'An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him.' Id., 317--318, 66 S.Ct. at 1080.

***602** On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds $20 but there is also the mandate of the Seventh Amendment directing that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'

Neither of these limitations is germane to litigation in the Court of Claims or in the Court of Customs and Patent Appeals. Those courts, moreover, exercise no criminal jurisdiction, no admiralty jurisdiction, no equity jurisdiction.

As noted, the advisory opinion is beyond the capacity of Article III courts to render. Muskrat v.

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United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Yet it is part and parcel of the function of legislative tribunals. [FN7]

FN7. See 28 U.S.C. s 1492, 28 U.S.C.A. s 1492, giving the Court of Claims power 'to report to either House of Congress on any bill referred to the court by such House.' And see 28 U.S.C. ss 2509, 2510, 28 U.S.C.A. ss 2509, 2510. 28 U.S.C. s 1542, 28 U.S.C.A. s 1542, gave the Court of Customs and Patent Appeals a kind of administrative review over certain decisions of the patent office. And see note 2, supra.

Thus I cannot say, as some do, that the distinction between the two kinds of courts is a 'matter of language.' [FN8] The majority over and again emphasizes the declaration by Congress that each of the courts in question is an Article III court. It seems that the majority tries to gain momentum for its decision from those congressional declarations. This Court, however, is the expositor of the meaning of the Constitution, as Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60, held; and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas. The declarations by Congress that these legislative tribunals are Article III ***603** courts [FN9] would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.

FN8. See H.R.Rep.No.2348, 84th Cong., 2d Sess., p. 3, U.S. Code Congressional and Administrative Service, 1956, p. 3122.

FN9. See Act of July 28, 1953, 67 Stat. 226, 28 U.S.C.A. s 171 (Court of Claims); Act of July 14, 1956, 70 Stat. 532, 28 U.S.C.A. s 251 (Customs Court); Act of August 25, 1958, 72 Stat. 848, 28 U.S.C.A. s 211 (Court of Customs and Patent Appeals).

An appointment is made by the President and confirmed by the Senate in light of the duties of the particular office. Men eminently qualified to sit on Article I tribunals or agencies are not picked or confirmed in light of their qualifications ****1501** to preside at jury trials or to process on appeal the myriad of constitutional and procedural problems involved in Article III 'cases' or 'controversies.' A President who sent a name to the Senate for the Interstate Commerce Commission or Federal Trade Commission might never dream of entrusting the nominee with the powers of an Article III judge. The tasks are so different, the responsibilities and the qualifications so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.

In the Senate debate on the Court of Customs Appeals, Senator Cummins stated that the judges who were to man it were to become tariff 'experts' whose judicial business would be 'confined to the matter of the duties on imports.' 44 Cong.Rec. 4185. Senator McCumber, who spoke for the Committee, emphasized the technical nature of the work of those judges and the unique specialization of their work.

'The law governing the development of the human intellect is such that constant study of a particular question necessarily broadens and expands and intensifies and deepens the mind on that particular subject. ***604** Any man who has gone over even the cotton schedule will understand how delicate questions will arise; how complex those questions must necessarily be, and how necessary it will be to have judges who will possess technical knowledge upon that subject; and a technical knowledge can only be obtained by a constant daily study of those questions. For that second reason it was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject.' Id., at 4199.

Could there be any doubt that the late John J. Parker, rejected by the Senate for this Court, would have been confirmed for one of these Article I courts?

It is said that Congress could separate law and equity and create federal judges who, though Article III judges, sit entirely on the equity side. If Congress can do that, it is said that Congress can divide up all judicial power as it chooses and by making tenure permanent allow judges to be assigned from an Article I to an Article III court. The fact that Article III judicial power may be so divided as to produce judges with no experience in the trial of jury cases or in the review of them on appeal is no excuse for allowing legislative judges to be imported into the important fields that Article III preserves and that are partly safeguarded by the Bill

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of Rights and partly represented by ancient admiralty practice [FN10] and equity procedures. Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.

FN10. See The Lottawanna, 21 Wall. 558, 575, 22 L.Ed. 654; The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760.

My view is that we subtly undermine the constitutional system when we treat federal judges as fungible. If members of the Court of Claims and of the Court of Customs ***605** and Patent Appeals can sit on life-and-death cases in Article III courts, so can a member of any administrative agency who has a statutory tenure that future judges sitting on this Court by some mysterious manner may change to constitutional tenure. With all deference, this seems to me to be a light-hearted treatment of Article III functions. [FN11] Men of highest quality chosen as Article I judges might never pass muster for Article III courts when tested by their record of tolerance for minorities ****1502 *606** and for their respect of the Bill of Rights-- neither of which is as crucial to the performance of the duties of those who sit in Article I courts as it is to the duties of Article III judges.

FN11. The Court does great mischief in today's opinions. The opinion of my Brother HARLAN stirs a host of problems that need not be opened. What is done will, I fear, plague us for years.
First, that opinion cites with approval Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264, in which Congress withdrew jurisdiction of this Court to review a habeas corpus case that was sub judice, and then apparently draws a distinction between that case and United States v. Klein, 13 Wall. 128, 20 L.Ed. 519, where such withdrawal was not permitted in a property claim. There is a serious question whether the McCardle case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother HARLAN'S opinion) has no vitality even in terms of the Due Process Clause.
Second, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 47 S.Ct. 284, 71 L.Ed. 478, is apparently overruled. Why this is done is not apparent. That case ruled on the question whether a ruling on a Patent Office determination was 'judicial.' Whether it was or not is immaterial because, as already noted, Article I courts, like Article III courts, exercise 'judicial' power. The only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court.
Third, it is implied that Congress could vest the lower federal courts with the power to render advisory opinions. The character of the District Court in the District of Columbia has been differentiated from the other District Courts by O'Donoghue v. United States, supra, in that the former is, in part, an agency of Congress to perform Article I powers. How Congress could transform regular Article III courts into Article I courts is a mystery. Certainly we should not decide such an important issue so casually and so unnecessarily.

In sum, Judges who do not perform Article III functions, who do not enjoy constitutional tenure and whose salaries are not constitutionally protected against diminution during their term of office cannot be Article III judges.

Judges who perform 'judicial' functions on Article I courts do not adjudicate 'cases' or 'controversies' in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

For these reasons I would reverse the judgments below.

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