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Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights

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BRIEF NOTE

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The Supreme Court of the United States has construed the fourteenth amendment of the Constitution to afford parents the right to raise and maintain custody of their children without unnecessary state interference.[1] Nevertheless, a parent's neglect or abuse of a child may force a state not only to interfere with this right, but also to seek a total and permanent severance of the parent-child relationship. In so doing, however, a state must act in accordance with due process mandates.[2] Recently, in *Santosky v. Kramer*,[3] the Supreme Court considered whether the Constitution requires a state to assume a specific burden of proof when it initiates an action to terminate parental rights. The Court held that due process requires a state to prove "its allegations by at least clear and convincing evidence."[4] *Santosky* illustrates the Court's continuing struggle to ensure an individual's right to due process while protecting the often conflicting requisites of federalism.

During 1973 and 1974, after incidents reflecting parental neglect, the Ulster County Department of Social Services obtained separate court orders granting the Department temporary custody of the Santoskys' three children.[5] In 1978 the Department peti-

1. *E.g.*, Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Prince v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* United States v. Orito, 413 U.S. 139, 142 (1973) (Constitution safeguards the privacy of the home); Roe v. Wade, 410 U.S. 113, 152-53 (1972) (woman's decision to terminate pregnancy is within constitutionally protected zone of privacy); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (a statute which forbids the use of contraceptives violates the right to marital privacy).

2. Stanley v. Illinois, 405 U.S. 645, 651 (1972); U.S. CONST. amend. XIV, § 1. *See generally* Board of Regents v. Roth, 408 U.S. 564, 569 (1972) (due process protects liberty and property interests).

3. 102 S. Ct. 1388 (1982).

4. *Id.* at 1391.

5. *Id.* at 1393. After the Department obtained temporary custody of the Santoskys' three oldest children, the Santoskys had two more children. The Department never initiated

tioned the court to terminate the Santoskys' parental rights.[6] At an initial "fact-finding hearing,"[7] the Santoskys challenged the constitutionality of section 622 of the New York Family Court Act, which required the Department to prove its allegations by only a "fair preponderance of the evidence."[8] The family court judge rejected this challenge and applied the statutory standard. After hearing the evidence, the judge ruled that the Santoskys were unfit to raise their children.[9] In a subsequent "dispositional hearing," the judge permanently terminated their parental rights, holding that this was necessary to protect the interests of the children.[10]

The Santoskys appealed and again asserted that a standard of proof requiring only a preponderance of the evidence violated the mandates of due process. The New York Supreme Court, Appellate Division, affirmed the termination and held that this standard was constitutional since it established a balance between the parents' and the child's rights in a termination proceeding.[11] The Supreme Court of the United States vacated the Appellate Division's judgment and remanded the case for further proceedings. The Court held that in a termination proceeding, due process demands that a state present at least clear and convincing evidence. The Court stressed, however, that state law should determine the "precise burden equal to or greater than that standard."[12]

Santosky is not the first Supreme Court decision defining the requirements of procedural due process in an action to terminate parental rights. In 1981 the Court, in *Lassiter v. Department of Social Services*,[13] considered an indigent parent's right to court-appointed counsel in a termination proceeding. In a five-to-four

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any action to obtain custody of the Santoskys' two younger children. *Id.* at 1393 n.5.

6. In 1976 the Department also had initiated an action to terminate the Santoskys' parental rights, but it was unsuccessful in that action. *Id.* at 1393 n.4.

7. New York employs a two-step termination procedure. At the initial "fact-finding" hearing, the state must prove parental fault or unfitness. If the state prevails in this hearing, the court then holds a "dispositional hearing" in which the court must determine whether terminating the parents' rights is in the child's best interest. *Id.* at 1391, 1398.

8. N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-1982).

9. The court concluded that the Santoskys had not maintained meaningful contact with their children and were incapable of planning for their children's future. 102 S. Ct. at 1393.

10. *See supra* note 7.

11. *In re* John AA, 75 A.D.2d 910, 427 N.Y.S.2d 319 (1980). The New York Court of Appeals subsequently denied review. 51 N.Y.2d 768, 432 N.Y.S.2d 1031 (1981).

12. 102 S. Ct. at 1403. The Court did not express any opinion as to the merits of the case, stating: "Unlike the dissent, we carefully refrain from accepting as the 'facts of this case' findings that are not part of the record and that have been found only to be more likely true than not." *Id.* at 1403 n.19.

13. 452 U.S. 18 (1981). For a discussion of *Lassiter*, see 36 U. MIAMI L. REV. 337 (1982).

decision, the *Lassiter* Court held that due process does not necessitate an absolute right to counsel, but instead requires courts to determine the need for appointing counsel on a case-by-case basis.[14] Justices Blackmun, Brennan, Marshall, and Stevens dissented, arguing that an absolute right to counsel is essential to protect a parent's interest in maintaining child custody.[15] Blackmun, Brennan, and Marshall added that an absolute right to counsel is more consistent with principles of federalism, since case-by-case analysis would require continual federal intervention and review of both the adequacy of state procedures and the decisions of individual state judges denying indigent parents the assistance of counsel.[16]

The four Justices who dissented in *Lassiter* and Justice Powell comprised the *Santosky* majority, which adopted a uniform burden of proof, despite the protests of four dissenters who argued that a case-by-case analysis was more appropriate.[17] Although *Lassiter* and *Santosky* reached divergent results in that *Santosky* required a strict burden of proof while *Lassiter* allowed a flexible case-by-case analysis, the issues in the two cases were quite similar. Both focused on the mandates of due process in termination proceedings, and only Justice Powell found a sufficient distinction between these cases to enable him to join both majorities. By so doing, he influenced the decision of an otherwise equally divided Court. The *Santosky* majority opinion and the dissent reveal the implications of this shift in the Court.

The *Santosky* majority, in an opinion authored by Justice Blackmun, adopted several aspects of the *Lassiter* Court's analysis.[18] For example, the *Lassiter* Court unanimously agreed that

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14. 452 U.S. at 32. Justice Stewart authored the majority opinion in which Chief Justice Burger and Justices White, Powell, and Rehnquist joined.

15. *Id.* at 35. (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting); *id.* at 59-60 (Stevens, J., dissenting).

16. *Id.* at 50-52 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). These dissenters argued that a case-by-case approach could result in a constitutional challenge every time a trial court denied counsel for an indigent parent.

17. The *Santosky* dissent observed that "not all situations calling for procedural safeguards call for the same kind of procedure." 102 S. Ct. at 1405 (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). The dissenting Justices argued that due process analysis cannot be achieved by considering only the effects of a specific burden of proof. Rather, a court must consider all of the procedural safeguards that a state employs and measure their cumulative effect. A court should also consider any nonprocedural restraints on official action. "Only through such a broad inquiry may courts determine whether a challenged government action satisfies the due process requirement of 'fundamental fairness.'" 102 S. Ct. at 1405 (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting).

18. 102 S. Ct. at 1393-94.

state intervention to terminate a parent-child relationship must afford the parent procedural due process.[19] The *Lassiter* majority and three dissenters[20] also believed that determining whether due process mandates a specific procedural safeguard requires the balancing of three factors that the Court had previously established in *Mathews v. Eldridge*:[21] 1) the private interest that the proceeding affects; 2) the risk of error in the state's procedures, and the value of additional or alternative safeguards; and 3) the government interest in maintaining the use of the challenged procedure.[22]

Despite these similarities, the *Santosky* majority asserted that *Lassiter* was distinguishable. The *Lassiter* majority reasoned that in determining whether due process requires the appointment of counsel in termination proceedings, the "*Eldridge* factors" must be weighed against a presumption that no right to counsel exists absent a "potential deprivation of physical liberty."[23] In contrast to the right-to-counsel decisions, the *Santosky* majority stated that the Court's previous decisions, which determined constitutionally prescribed burdens of proof, had not relied on any presumptions favoring one standard over another. Rather, the Court had engaged in a straightforward weighing of the *Eldridge* factors to determine the minimum standard of proof necessary to afford due process.[24]

The purpose of a constitutional standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[25] The minimum standard that due process requires also reflects society's judgment concerning the importance of the competing interests and allows society to allocate the risk of error accordingly between the litigants.[26] By ad-

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19. 452 U.S. at 37, 59.

20. In his dissent to the *Lassiter* decision, Justice Stevens argued that the right to counsel in termination proceedings was too essential to depend on a balancing test. Nevertheless, he agreed with the other dissenters that the factors enunciated in *Eldridge* favored requiring the appointment of counsel. *Id.* at 59-60. (Stevens, J., dissenting).

21. 424 U.S. 319 (1976).

22. *Id.* at 335.

23. 452 U.S. at 31. Justice Blackmun did not believe that this presumption existed. *Id.* at 40 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). This distinction may have been noted to induce Justice Powell to join the *Santosky* majority. *See* 102 S. Ct. at 1394.

24. 102 S. Ct. at 1394-95.

25. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). In *Winship* the Court held that due process requires a state to prove a criminal defendant's guilt beyond a reasonable doubt, and applied the same standard to juvenile delinquency proceedings.

26. Addington v. Texas, 441 U.S. 418, 423 (1979) (due process requires clear and convincing standard of proof in proceeding to commit an individual to a mental hospital); *see*

justing the burden of proof, society can protect one party from an erroneous judgment, but only at the expense of placing an increased risk on the other.[27]

Courts generally employ three standards of proof that form a continuum indicating society's concern about the outcome of a case. At one end of the spectrum is the "preponderance of the evidence" standard, which applies in most civil litigations involving money damages. Although the individual litigants may be intensely interested in the result, this standard reflects both society's minimal concern over the outcome and its conclusion that the litigants should bear the risk of error almost equally.[28]

At the other end of the spectrum is the "beyond a reasonable doubt" standard. Society has "historically and without any explicit constitutional requirement" afforded criminal defendants the protection of this burden of proof to ensure due process.[29] The strictness of this standard reflects society's desire to minimize the risk that an erroneous judgment may deprive a criminal defendant of life or liberty. By demanding this standard in criminal prosecutions, society has imposed "almost the entire risk of error upon itself."[30]

When the interests at stake are "more substantial than mere loss of money," courts employ an intermediate standard that includes "some combination of the words 'clear,' 'cogent,' 'unequivocal' and 'convincing.' "[31] In civil cases, therefore, courts often require a litigant to satisfy this standard when alleging fraud or other "quasi-criminal wrongdoing."[32] The Supreme Court has held that due process requires this burden of proof in proceedings that may stigmatize an individual or deprive him of a significant liberty interest.[33] The Court has adopted this standard in proceedings

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In re Winship, 397 U.S. 358, 363-64 (1970).

27. *See In re* Winship, 397 U.S. at 370-71 (Harlan, J., concurring).

28. Santosky v. Kramer, 102 S. Ct. 1388, 1395 (1982).

29. Addington v. Texas, 441 U.S. at 423. Before *Winship*, which involved the imposition of the "beyond a reasonable doubt" standard of proof to juvenile delinquency proceedings, the Court had frequently assumed that the Constitution required this standard of proof in criminal prosecutions. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Brinegar v. United States, 338 U.S. 160, 174 (1949); Holt v. United States, 218 U.S. 245, 253 (1910); *see also* Comisky, *The Likely Source: An Unexplored Weakness in the Net Worth Method of Proof*, 36 U. MIAMI L. REV. 1 (1981) (discussion of *Holland* and standard of proof in criminal tax evasion prosecutions).

30. Addington v. Texas, 441 U.S. at 424.

31. *Id.*

32. *Id.*

33. *Id.* at 425-26.

that threaten an individual with commitment to a mental hospital,[34] deportation,[35] or denaturalization.[36]

In determining the requisite burden of proof, the *Santosky* majority first concluded that, despite a state's good faith belief in the adequacy of its procedures, the establishment of minimum standards for due process is a matter of federal law.[37] The majority argued that the Court must establish this minimum standard in accordance with the risk of error that is usually inherent in a particular type of litigation: "Prospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."[38]

To determine the adequacy of New York's standard of proof, the *Santosky* Court evaluated the three *Eldridge* factors: the private interest affected, the risk of error in New York's procedure, and New York's interest in the procedure. Considering the first factor, the majority reasoned that, in termination proceedings, the parent has a "commanding" interest in a just decision.[39] Because termination proceedings may permanently and irrevocably sever a parent-child relationship, these actions may lead to a "unique kind of deprivation."[40] Moreover, a termination not only deprives parents of a liberty interest, it also stigmatizes the parents by labeling them unfit to raise their children.[41] The *Santosky* majority, therefore, reasoned that the private interest weighed heavily against using a preponderance of the evidence standard of proof.

Examining the second *Eldridge* factor, the majority concluded that termination hearings are likely to have a high risk of error. These actions typically involve imprecise measures of parental fitness that "leave determinations unusually open to the subjective

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34. Addington v. Texas, 441 U.S. 418 (1979).

35. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966).

36. Chaunt v. United States, 364 U.S. 350 (1960); Schneiderman v. United States, 320 U.S. 118 (1943).

37. 102 S. Ct. at 1395.

38. *Id.* at 1396 (footnote omitted).

39. *Id.* at 1397 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981)).

40. *Id.* The deprivation may be more severe than a temporary incarceration resulting from a criminal prosecution. Lassiter v. Department of Social Servs., 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting); Davis v. Page, 618 F.2d 374, 379 (5th Cir. 1980), *aff'd in part*, 640 F.2d 599 (5th Cir. 1981) (rehearing en banc).

41. 102 S. Ct. at 1397. The majority stated that a showing of parental unfitness is probably a constitutional requirement in parental rights terminations. A state would almost certainly violate due process if it attempted to terminate a parent's rights solely to protect the best interests of the child. *Id.* at 1397 n.10.

values of the judge."[42] Social and cultural bias also may affect a termination decision because the parents are often poor, uneducated people, who typically are members of a minority group.[43] The majority reasoned that a burden of proof requiring only a preponderance of the evidence may increase the risk of error by misdirecting the factfinder to consider the quantity rather than the quality of evidence.[44]

Finally, the majority reasoned that a higher standard of proof would not adversely affect any state interest.[45] Although the state has an interest in protecting the child's welfare, an erroneous termination of parental rights does not benefit the child: "[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds."[46] Furthermore, in contrast to requiring a hearing[47] or court-appointed counsel,[48] a stricter standard of proof would not impose any significant fiscal or administrative burdens on the state.

From this analysis, the *Santosky* majority concluded that a preponderance of the evidence standard of proof violated the requisites of due process: " 'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.' Thus, at a parental rights termination proceeding, a near-equal allocation of risk . . . is constitutionally intolerable."[49] The majority considered whether proof beyond a reasonable doubt was required as the minimum constitutional standard, but reasoned that the evidence in termination hearings was not susceptible to this level of certainty.[50] Accordingly, the majority held that

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42. *Id.* at 1399 (citing Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.36 (1977)).

43. *Id.* (citing Smith v. Organization of Foster Families, 431 U.S. 816, 833-35 (1977)).

44. *Id.* at 1400. The state has numerous resources from which it can accumulate large quantities of evidence. These resources may include the agency records concerning the family and experts in family relations, psychology, and medicine.

45. *Id.* at 1401.

46. *Id.*

47. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 347 (1976)). In *Eldridge* the Court held that due process did not require the state to conduct a hearing before terminating the disability benefits that an individual was receiving from Social Security.

48. *Id.; see* Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).

49. 102 S. Ct. at 1402 (citation omitted) (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).

50. Termination hearings often involve medical and psychiatric testimony that is not susceptible to absolute proof. *See* Addington v. Texas, 441 U.S. 418, 429 (1979). Nor is it usually possible to prove lack of parental affection, concern, or ability beyond a reasonable

in these hearings, due process mandates the intermediate standard of proof—clear and convincing evidence or its equivalent.[51]

Writing for the dissent, Justice Rehnquist argued that the Court's analysis and holding were inconsistent with principles of federalism. He began his analysis by stating: "[F]ew of us would care to live in a society where every aspect of life was regulated by a single source of law . . . . [Family relations have] been left to the States from time immemorial, and not without good reason."[52] Allowing the states to experiment with various solutions to family problems often has achieved new and effective results. The dissent argued that the ability of the states to initiate different problem-solving approaches is "one of the happy incidents of the federal system."[53] Accordingly, the dissent believed that the Court should give substantial weight to a state's good faith judgment that its procedures provide individuals with adequate protection.[54]

Although imposing a higher standard of proof may appear to be an unobtrusive measure for protecting private rights, the dissent argued that fixing a constitutional standard of proof will inevitably lead to further federal interference in state proceedings. The Court will have to determine whether other individual components of a state's procedural system satisfy due process.[55] Justice Rehnquist suggested that the Court should determine whether a termination proceeding violates due process by considering the state's entire procedural ststem and interfere only if its cumulative effect presents a clear constitutional violation.[56]

The dissent argued that New York had adopted a comprehen-

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doubt. *But see* Indian Child Welfare Act, 25 U.S.C. § 1912(f) (Supp. III 1979) (requiring proof beyond a reasonable doubt to terminate the rights of Indian parents).

51. Thirty-three states, the District of Columbia, and the Virgin Islands already required a higher standard of proof than the "fair preponderance of the evidence." 102 S. Ct. at 1392.

52. *Id.* at 1403 (Rehnquist, J., joined by Burger, C.J., White and O'Connor, JJ., dissenting).

53. *Id.* at 1404 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

54. *Id.*

55. *Id.* Rehnquist proceeded to argue:

> By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be acceptable to the majority if it provided no procedures other than one thirty-minute hearing.

Id.

56. *Id.* at 1403.

sive system to assist marginal parents in regaining custody of a child. The state seeks to reunite broken families, and provides for termination of parental rights only when restoration of the family becomes impossible. Even then, the dissenters noted, New York provides numerous procedural safeguards to ensure fundamental fairness.[57] The adoption of a standard of proof requiring a preponderance of the evidence reflected "New York's good faith effort to balance the interests of parents against the legitimate interests of the child and the State."[58] The dissenters therefore concluded that the Court should have deferred to the state's determination about which standard best protected these interests.

In effect, the dissent believed that the requisites of due process should depend on a case-by-case, or at most a state-by-state, review to determine whether the cumulative effect of an entire procedural system is fundamentally fair.[59] The *Santosky* majority, however, would establish uniform standards defining minimum constitutional requirements for a particular proceeding. Either approach arguably is consistent with due process and federalism, but the Court has produced incongruous results by shifting from an approach of flexibility to one of strict constraints.

Lassiter and *Santosky,* when considered together, produce a surprising result. A state can now provide due process by demanding clear and convincing evidence in termination proceedings, even if it does not appoint an attorney to represent an indigent parent.[60] But a state will violate due process, despite its appointment of an attorney for the parent, if it requires only a preponderance of the evidence as the standard of proof.[61] A higher standard of proof, however, may be irrelevant to an indigent, uneducated parent who lacks the ability, without the assistance of counsel, either to cross-examine the state's witnesses effectively or to present a meaningful defense.[62]

It is difficult to explain the incongruity between *Lassiter* and

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57. *Id.* at 1406-10.

58. *Id.* at 1404. The majority rejected this argument, stating that in the factfinding hearing, the parent and the child share an interest in maintaining the natural familial bonds against an erroneous termination. 102 S. Ct. at 1398; *see supra* note 7.

59. *See supra* note 17.

60. *See* Lassiter v. Department of Social Servs., 452 U.S. 18 (1981). Ms. Lassiter had the benefit of a standard of proof requiring "clear, cogent, and convincing evidence." N.C. GEN. STAT. § 7A-289.30(e) (1981).

61. *See* Santosky v. Kramer, 102 S. Ct. 1388 (1982). New York appointed an attorney to represent the Santoskys. *See* N.Y. FAM. CT. ACT § 262(a)(iii) (McKinney 1975).

62. 102 S. Ct. at 1399.

Santosky. Both cases involved similar termination proceedings, and both employed the *Eldridge* factors to assess the requirements of due process. Nevertheless, Justice Powell favored *Lassiter*'s case-by-case analysis, but in *Santosky* he opted for a uniform constitutional standard. Since Justice Powell did not write an opinion in either case, his reasoning remains unclear. The majority opinion in *Santosky* suggests two considerations that might have influenced him: 1) there is a presumption against requiring the appointment of counsel in cases that do not threaten a litigant's physical liberty; and 2) requiring appointed counsel imposes a fiscal burden on the state.[63]

The *Santosky* Court's ability to require a higher standard of proof without imposing a burden on the state, however, probably did not greatly influence Justice Powell, because, in denying an absolute right to counsel, the *Lassiter* majority indicated that the cost of an attorney was not a significant consideration.[64] Alternatively, after accepting the premise that due process does not demand that parents receive appointed counsel, Justice Powell could have reasoned that a higher standard of proof was necessary to ensure fundamental fairness in termination proceedings.

Although the *Santosky* Court established a constitutional minimum standard of proof, rather than adopting a case-by-case review, the Court's struggle between these approaches is far from resolved. In future decisions, the Court will continue to balance the various interests in determining the safeguards necessary to ensure due process. Minor distinctions between cases may influence the result, and both private rights and federalism will remain hanging on an unstable balance.

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63. *Id.* at 1401.
64. 452 U.S. at 28.