

CONSTITUTIONAL LAW

FIFTH EDITION

2015 Supplement

John B. Attanasio

*Judge William Hawley Atwell Chair of Constitutional Law
Dedman School of Law, Southern Methodist University*

Joel K. Goldstein

*Vincent C. Immel Professor Law
Saint Louis University School of Law*

Copyright © 2017
Carolina Academic Press, LLC
All Rights Reserved

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

PREFACE

This 2015 Supplement focuses on significant decisions of the most recent Supreme Court terms.

In editing cases, we have at times deleted footnotes, case citations and statutory references without so indicating.

We mourn the death on June 10, 2011, of our co-author and friend, Norman Redlich. Norman was a giant in the law who made enormous contributions as a lawyer, scholar, academic administrator, public servant and citizen. In all respects he modeled professional excellence and human decency. Although a man of strong convictions and principles, he invariably gave those with different views a fair and courteous hearing and addressed their positions in a rational and intellectually honest manner. Notwithstanding his impressive accomplishments, Norman displayed constant humility. We are grateful for the inspiration he provided and the opportunity to have been associated with him. His passing is a great loss and we miss him.

Joel K. Goldstein is principally responsible for the materials in chapters 1-6; John Attanasio for those in chapters 7-16.

The undersigned prepared this 2015 Supplement but, did so with the help of a number of people over the years to whom we wish to express appreciation. In particular, we would like to thank Kathleen Spartana for her administrative and editing work, research assistants Mark Anderson, Heather S. Bethancourt, Kristen Brown, Paul Brusati, Lacey Smith Cesarz, Alex Davis, John T. Davis, Christine Falgout, Grant Ford, Ilana Friedman, Jessie Gasch, Ryan Hardy, Eric Hoffmann, Sarah Honeycutt, Maxwell Huber, Sarah Jackson, Seth Jaskoviak, Sarah Lopano, Colin Luomo, Michael Lyons, Maria Camille Mangana, Bryan McKown, David Poell, Bennett Rawicki, Justin Reinus, Jonathan Skrabacz, Niel Smith, M a r k T i m m e r m a n , Phong Tran, Elizabeth Mills Viney, Ryan Yager and Sam Wallach for their contributions, and Brenda Aylesworth, Tina Brosseau, the late Mary Dougherty, Stephanie Haley and Leslie Jenkins for their help in typing the book. As always, we appreciate the continuing institutional support of the Dedman School of Law at Southern Methodist University, Saint Louis University School of Law and of Wachtell, Lipton, Rosen & Katz in the past.

John Attanasio
Joel K. Goldstein
July, 2015

Table of Contents

Chapter 1 -- JUDICIAL REVIEW: ESTABLISHMENT AND OPERATION

§ 1.03 SUPREME COURT ORGANIZATION AND JURISDICTION	
[1] Supreme Court Organization	1
§ 1.04 LOWER FEDERAL COURTS ORGANIZATION AND JURISDICTION	
BOUMEDIENE v. BUSH	1
§ 1.05 NON-ARTICLE III COURTS	29
§ 1.07 STANDING	
CLAPPER v. AMNESTY INT'L USA	31
§ 1.08 RIPENESS; MOOTNESS	44
§ 1.09 POLITICAL QUESTIONS	
ZIVOTOFSKY v. CLINTON	45

Chapter II – CONGRESSIONAL POWERS

§ 2.01 ENUMERATED AND IMPLIED POWERS	
UNITED STATES v. COMSTOCK	50
NOTE	61
NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES	62
NOTES	66
§ 2.05 THE COMMERCE CLAUSE: A NEW TURNING POINT?	66
§ 2.05.01 THE ROBERTS COURT AND THE COMMERCE CLAUSE	
NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES	67
NOTES	88
§ 2.06 TAXING POWER	
NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES	89
NOTES	96
§ 2.07 SPENDING POWER	
NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES	97
§ 2.08 TREATY POWER	111
MEDELLÍN v. TEXAS	112

Chapter III – LIMITS ON NATIONAL POWERS OVER THE STATES

§ 3.01 RESERVED POWERS	
ARIZONA STATE LEGISLATURE v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION	125
§ 3.04 IMMUNITY FROM SUIT	137

Chapter IV – FEDERALISM AND STATE REGULATORY POWER

§ 4.01 FEDERAL SUPREMACY	
HAYWOOD v. DROWN	141
§ 4.06 STATE REGULATION OF COMMERCE; THE DORMANT COMMERCE CLAUSE	
[3] Facially Neutral Statutes	146
[4] Market Participant Exception	
DEPARTMENT OF REVENUE OF KENTUCKY v. GEORGE W. DAVIS	147
NOTES	156
[5] Congressional Action	157

Chapter V – THE PRESIDENCY AND SEPARATION OF POWERS

§ 5.03 ADMINISTRATIVE CHIEF	161
FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD	163
§ 5.04 FOREIGN AFFAIRS	
[3] Recognition	
ZIVOTOFSKY v. KERRY	175

Chapter VII – LIBERTY AND PROPERTY RIGHTS IN THE DUE PROESS,

TAKING, AND CONTRACT CLAUSES

§ 7.02 THE RIGHT OF THE ACCUSED: THE “INCORPORATION CONTROVERSY”	192
§ 7.02A THE SECOND AMENDMENT	192
DISTRICT OF COLUMBIA v. HELLER	192
§ 7.03 REGULATION OF BUSINESS AND OTHER PROPERTY INTERESTS	230
[2] Limiting Punitive Damages Under the Due Process Clause	233
[4] Government Takings of Property Requiring Just Compensation	234
§ 7.04 LIBERTY IN PROCREATION AND OTHER PERSONAL MATTERS	
[3] Homosexuality	
UNITED STATES v. WINDSOR	239

NOTE	255
OBERGEFELL v. HODGES	256
[5] Other Autonomy Issues	279

Chapter VIII – RACIAL EQUALITY

§ 8.03 OTHER FORMS OF RACIAL DISCRIMINATION

[5] The Criminal Justice System	283
---------------------------------------	-----

Chapter X – AFFIRMATIVE ACTION

§ 10.01 EDUCATION	284
-------------------------	-----

§ 10.02 EMPLOYMENT	295
--------------------------	-----

Chapter XI – EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS

§ 11.01 DISCRETE AND INSULAR MINORITIES

[1] Aliens	301
------------------	-----

[2] Illegitimate Children	301
---------------------------------	-----

§ 11.03 EQUALITY IN THE POLITICAL PROCESS

[2] Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties,

Gerrymandering	301
----------------------	-----

SHELBY COUNTY v. HOLDER	308
--------------------------------------	-----

NOTE	318
-------------------	-----

§ 11.05 “ECONOMIC AND SOCIAL LEGISLATION”	321
---	-----

Chapter XII – POLITICAL SPEECH AND ASSOCIATION

§ 12.02 ADVOCACY OF UNLAWFUL OBJECTIVES	323
---	-----

§ 12.04.A ASSOCIATION RIGHTS TO ASSIST OTHER ORGANIZATIONS	325
--	-----

HOLDER v. HUMANITARIAN LAW PROJECT	325
---	-----

§ 12.05 ASSOCIATIONAL RIGHTS IN OTHER CONTEXTS	338
--	-----

[5] Judicial Electioneering	340
-----------------------------------	-----

§ 12.06 FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES

NOTES	350
--------------------	-----

[3] Employee’s Right to Criticize Government	351
--	-----

NOTE	353
-------------------	-----

Chapter XIII – GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONICS

§ 13.03 ACCESS BY THE MEDIA TO GOVERNMENT ACTIVITY	356
--	-----

§ 13.08 PUBLIC FIGURES VERSUS PRIVATE INDIVIDUALS	
(1) Public Figures versus Private Individuals	357
Chapter XIV – SPEECH IN PUBLIC PLACES	
§ 14.01 OFFENSIVE SPEECH IN PUBLIC PLACES	
[1] Defamation: General Principles	359
[2] Sexually Offensive Speech	362
§ 14.02 SPEECH IN TRADITIONAL PUBLIC FORUMS, STREETS, SIDEWALKS, PARKS	
SNYDER v. PHELPS	363
§ 14.04 THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY	
[1] Public Property	376
[4] Religious Speech in Public Places	
CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW v. MARTINEZ	386
Chapter XV – SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION	
§ 15.01 EXPRESSIVE CONDUCT	400
§ 15.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA	401
CITIZENS UNITED v. FEDERAL ELECTION COMMISSION	404
§ 15.04 COMMERCIAL SPEECH	
[1] Protection for Commercial Speech: General Principles	441
§ 15.05 OBSCENITY	
[1] The Constitutional Standard	444
Chapter XVI – RELIGIOUS FREEDOM	
§ 16.03 GOVERNMENT SUPPORT FOR RELIGIOUS PRACTICES	
[1] Prayer in Public Schools	453
[2] Religious Displays	461
§ 16.05 FREE EXERCISE OF RELIGION	466
BURWELL v. HOBBY LOBBY STORES, INC. AND CONESTOGA WOOD SPECIALTIES CORPORATION v. BURWELL	471
NOTE	489

Chapter I

JUDICIAL REVIEW: ESTABLISHMENT AND OPERATION

§ 1.03 SUPREME COURT ORGANIZATION AND JURISDICTION

[1] Supreme Court Organization

Page 20: Insert the following after Note (4):

(5) Could Congress constitutionally pass a law restricting membership on the Supreme Court to those licensed as lawyers? A non-lawyer has never served on the Court but that pattern is due to practice, not constitutional requirement or statute. For a lively new novel which presents a thoughtful discussion of these issues, *see* EDWIN M. YODER, JR., *VACANCY: A JUDICIAL MISADVENTURE* (PublishAmerica, 2010).

§ 1.04 LOWER FEDERAL COURTS ORGANIZATION AND JURISDICTION

Page 26: Insert the following after Note (6):

BOUMEDIENE v. BUSH

553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. . . .

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005(DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006(MCA), 28 U.S.C.A. § 2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

. . . After *Hamdi v. Rumsfeld* (casebook, p. 295)] the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were “enemy combatants,” as the Department defines that term. . . . [T]he Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. . . . All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

After [the Court held in *Rasul v. Bush*, 542 U.S. 466, 473 (2004) that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo] petitioners’ cases were consolidated and entertained in two separate proceedings [which produced conflicting results, one granting] the Government’s motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action, [the other reaching] the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” 119 Stat. 2742. Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have “exclusive” jurisdiction to review decisions of the CSRTs.

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–577, (2006), the Court held this provision did not apply to cases (like petitioners’) pending when the DTA was enacted. Congress responded by passing the MCA, 10 U.S.C.A. § 948a *et seq.* (Supp.2007), which again amended § 2241. . . . The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners’ habeas corpus applications, that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause, and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA. We granted certiorari.

II

[Editor’s Note: The Court held that MCA § 7 clearly stated its intent to deny federal courts jurisdiction to hear habeas actions pending when it was enacted.]

. . . .

III

. . . The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no constitutional

rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

[Editor’s Note: Lengthy discussion omitted discussing development of writ of habeas corpus in England and tracing it to Magna Carta.]

. . . .

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, § 9, cl. 2; . . . Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. . . .

In our own system the Suspension Clause is designed to protect against . . . cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. The Clause

protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. Petitioners argue that jurisdiction followed the King's officers. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control. . . .

We find the evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive. Petitioners argue the site of their detention is analogous to two territories outside of England to which the writ did run: the so-called "exempt jurisdictions," like the Channel Islands; and (in former times) India. There are critical differences between these places and Guantanamo, however. . . .

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. *Cf. Brown v. Board of Education*, 347 U.S. 483, 489 (1954) (noting evidence concerning the circumstances surrounding the adoption of the

Fourteenth Amendment, discussed in the parties' briefs and uncovered through the Court's own investigation, "convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive"); *Reid v. Covert*, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring in result) (arguing constitutional adjudication should not be based upon evidence that is "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution").

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect.

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, "[s]overeignty" is a term used in many senses and is much abused." When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power. Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. . . . Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be

inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution’s extraterritorial application on many occasions. These decisions undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends. The Framers foresaw that the United States would expand and acquire new territories. . . . In a series of opinions later known as the *Insular Cases*, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position. . . .

Practical considerations likewise influenced the Court’s analysis a half-century later in *Reid* [*v. Covert*, (casebook, p. 146)]. The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury.

Justice Black, writing for the plurality, contrasted the cases before him with the *Insular Cases*, which involved territories “with wholly dissimilar traditions and institutions” that Congress intended to govern only “temporarily.” Justice Frankfurter argued that the “specific circumstances of each particular case” are relevant in determining the geographic scope of the Constitution. And Justice Harlan, was most explicit in rejecting a “rigid and abstract rule” for determining where constitutional guarantees extend. He read the *Insular Cases* to teach that whether a constitutional provision has extraterritorial effect depends upon the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” and, in particular, whether judicial enforcement of the provision would be “impracticable and anomalous.”

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality’s conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners’ citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court’s disposition) these considerations were the decisive factors in the case. . . .

Practical considerations weighed heavily as well in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers’ postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It “would require allocation of shipping space, guarding

personnel, billeting and rations” and would damage the prestige of military commanders at a sensitive time. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities.

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners “at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. . . . Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. . . . Third, if the Government’s reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases’ (and later *Reid*’s) functional approach to questions of extraterritoriality. We cannot accept the Government’s view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the Insular Cases and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government’s formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. . . . Yet the Government’s view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches

have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

As we recognized in *Rasul*, the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

"(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U.S., at 777.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. . . .

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But

there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. The United States was therefore answerable to its Allies for all activities occurring there. The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. The Court's holding in *Eisentrager* was thus consistent with the *Insular Cases*, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy . . . Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. . . . There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. . . . To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us,

Congress must act in accordance with the requirements of the Suspension Clause. . . . The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals, see DTA § 1005(e), provides an adequate substitute. Congress has granted that court jurisdiction to consider

“(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” § 1005(e)(2)(C), 119 Stat. 2742. . . .

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation’s history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ’s protection but to expand it or to hasten resolution of prisoners’ claims. . . .

[Discussion of cases and legislative history omitted.]

To the extent any doubt remains about Congress’ intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure. It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. The present cases thus test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation”

of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained — though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. *See Ex parte Bollman*, 4 Cranch 75 (1807) (where imprisonment is unlawful, the court “can only direct [the prisoner] to be discharged”). These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required. Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. . . .

There is evidence from 19th-century American sources indicating that, even in States that accorded strong *res judicata* effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. . . . The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. . . .

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners’ designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive’s battlefield determination that the detainee is an enemy combatant — as the parties have and as we do — or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What

matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral. . . .

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. . . .

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, *In re Yamashita*, 327 U.S. 1 (1946), and *Ex parte Quirin*, 317 U.S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. For on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

[Editor's Note: The Court held the DTA review process an inadequate substitute for habeas corpus and found MCA § 7 an unconstitutional suspension of the writ.]

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances. . . .

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law

we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp.2007). Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. *Felker*, *Swain*, and *Hayman* stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. . . .

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. *See United States v. Curtiss-Wright Export Corp.*, (casebook, p. 283). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal

doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

[Editor's Note: Concurring opinion of JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER joined, omitted.]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural

protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect?

The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus — its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. . . . The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right — one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat — precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

I

The Court's opinion makes plain that certiorari to review these cases should never have been granted.

. . . Given the posture in which these cases came to us, the Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case.

The political branches created a two-part, collateral review procedure for testing the legality of the prisoners' detention: It begins with a hearing before a Combatant Status Review Tribunal (CSRT) followed by review in the D. C. Circuit. As part of that review, Congress authorized the D. C. Circuit to decide whether the CSRT proceedings are consistent with "the Constitution and laws of the United States." No petitioner, however, has invoked the D. C. Circuit review the statute specifies. As a consequence, that court has had no occasion to decide whether the CSRT hearings, followed by review in the Court of Appeals, vindicate whatever constitutional and statutory rights petitioners may possess.

Remarkably, this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect petitioners' rights. . . .

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi v. Rumsfeld*, explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon potential to burden the Executive at a time of ongoing military conflict." This point is directly pertinent here, for surely the Due Process Clause does not afford *non-citizens* in such circumstances greater protection than citizens are due.

If the CSRT Procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed. This is why the Court should have required petitioners to exhaust their remedies under the statute. . . . Mandating that the petitioners exhaust their statutory remedies "is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile." Respect for the judgments of Congress — whose Members take the same oath we do to uphold the Constitution — requires no less. . . .

The Court acknowledges that "the ordinary course" would be not to decide the constitutionality of the DTA at this stage, but abandons that "ordinary course" in light of the "gravity" of the constitutional issues presented and the prospect of additional delay. It

is, however, precisely when the issues presented are grave that adherence to the ordinary course is most important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices. . . .

II

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. . . . The use of a military tribunal such as CSRT's to review the aliens' detention should be familiar to this Court in light of the *Hamdi* plurality, which said that the due process rights enjoyed by *American citizens* detained as enemy combatants could be vindicated "by an appropriately authorized and properly constituted military tribunal." The DTA represents Congress' considered attempt to provide the accused alien combatants detained at Guantanamo a constitutionally adequate opportunity to contest their detentions before just such a tribunal.

In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Hamdi merits scant attention from the Court — a remarkable omission, as *Hamdi* bears directly on the issues before us. The majority attempts to dismiss *Hamdi*'s relevance by arguing that because the availability of § 2241 federal habeas was never in doubt in that case, "the Court had no occasion to define the necessary scope of habeas review . . . in the context of enemy combatant detentions." Hardly. *Hamdi* was all about the scope of habeas review in the context of enemy combatant detentions. The petitioner, an American citizen held within the United States as an enemy combatant, invoked the writ to challenge his detention. After "a careful examination both of the writ . . . and of

the Due Process Clause,” this Court enunciated the “basic process” the Constitution entitled Hamdi to expect from a habeas court under § 2241. That process consisted of the right to “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” In light of the Government’s national security responsibilities, the plurality found the process could be “tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict.” For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence.

Hamdi further suggested that this “basic process” on collateral review could be provided by a military tribunal. It pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution’s requirements. Only “[i]n the *absence* of such process” before a military tribunal, the Court held, would Article III courts need to conduct full-dress habeas proceedings to “ensure that the minimum requirements of due process are achieved.” *Ibid.* (emphasis added). And even then, the petitioner would be entitled to no more process than he would have received from a properly constituted military review panel, given his limited due process rights and the Government’s weighty interests.

Contrary to the majority, *Hamdi* is of pressing relevance because it establishes the procedures American *citizens* detained as enemy combatants can expect from a habeas court proceeding under § 2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation’s military leaders have made a good-faith effort to follow our precedent. The Court, however, will not take “yes” for an answer. . . .

B

Given the statutory scheme the political branches adopted, and given *Hamdi*, it simply will not do for the majority to dismiss the CSRT procedures as “far more limited” than those used in military trials, and therefore beneath the level of process “that would eliminate the need for habeas corpus review.” The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures — coupled with the judicial review specified by the DTA — provide the “basic process” *Hamdi* said the Constitution affords American citizens detained as enemy combatants.

By virtue of its refusal to allow the D. C. Circuit to assess petitioners’ statutory remedies, and by virtue of its own refusal to consider, at the outset, the fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect. . . . The scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert. . . .

Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a means for vindicating petitioners’

rights, it is necessarily an adequate substitute for habeas corpus.

For my part, I will assume that any due process rights petitioners may possess are no greater than those of American citizens detained as enemy combatants. It is worth noting again that the *Hamdi* controlling opinion said the Constitution guarantees citizen detainees only “basic” procedural rights, and that the process for securing those rights can “be tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict.” 542 U.S., at 533. The majority, however, objects that “the procedural protections afforded to the detainees in the CSRT hearings are . . . limited.” *Ante*, at 37. But the evidentiary and other limitations the Court complains of reflect the nature of the issue in contest, namely, the status of aliens captured by our Armed Forces abroad and alleged to be enemy combatants. Contrary to the repeated suggestions of the majority, DTA review need not parallel the habeas privileges enjoyed by noncombatant American citizens, as set out in 28 U.S.C. § 2241. It need only provide process adequate for noncitizens detained as alleged combatants.

To what basic process are these detainees due as habeas petitioners? We have said that “at the absolute minimum,” the Suspension Clause protects the writ “‘as it existed in 1789.’” The majority admits that a number of historical authorities suggest that at the time of the Constitution’s ratification, “common-law courts abstained altogether from matters involving prisoners of war.” If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient — it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority’s own standards. Today’s Court opines that the Suspension Clause guarantees prisoners such as the detainees “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.” Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees’ cases “must have the power to order the conditional release of an individual unlawfully detained.” The DTA system — CSRT review of the Executive’s determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process — meets these criteria.

C

....

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. . . . If this is the most the Court can muster, the ice beneath its feet is thin indeed. . . .

The Court’s hand wringing over the DTA’s treatment of later-discovered exculpatory evidence is the most it has to show after a roving search for constitutionally

problematic scenarios. But “[t]he delicate power of pronouncing an Act of Congress unconstitutional,” we have said, “is not to be exercised with reference to hypothetical cases thus imagined.” *United States v. Raines*, 362 U.S. 17, 22 (1960). The Court today invents a sort of reverse facial challenge and applies it with gusto: If there is *any* scenario in which the statute *might* be constitutionally infirm, the law must be struck down. The Court’s new method of constitutional adjudication only underscores its failure to follow our usual procedures and require petitioners to demonstrate that *they* have been harmed by the statute they challenge. In the absence of such a concrete showing, the Court is unable to imagine a plausible hypothetical in which the DTA is unconstitutional.

E

The Court’s second criterion for an adequate substitute is the “power to order the conditional release of an individual unlawfully detained.” As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible. . . . Because Congress substituted DTA review for habeas corpus and because the “unique purpose” of the writ is “to release the applicant . . . from unlawful confinement,” *Allen v. McCurry*, 449 U.S. 90, 98, n. 12 (1980), DTA § 1005(e)(2) can and should be read to confer on the Court of Appeals the authority to order release in appropriate circumstances. . . .

In sum, the DTA satisfies the majority’s own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees — whether citizens or aliens — in our national history.

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit — where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine — through democratic means — how best” to balance the security of the American people with the detainees’ liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

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

Today, for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. The Chief Justice’s dissent, which I join, shows that the

procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

I

America is at war with radical Islamists. . . . The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), when he established the prison at Guantanamo Bay for enemy aliens. Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. . . .

These, mind you, were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. . . .

Turns out they were just kidding. [I]n response [to the *Hamdan* plurality], Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive — *both* political branches — have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. . . .

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."

What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

II

A

The Suspension Clause of the Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, § 9, cl. 2. As a court of law operating under a written Constitution, our role is to determine whether there is a conflict between that Clause and the Military Commissions Act. A conflict arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.

We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. That is especially so in the area of foreign and military affairs; “perhaps in no other area has the Court accorded Congress greater deference.” Indeed, we accord great deference even when the President acts alone in this area.

In light of those principles of deference, the Court's conclusion that “the common law [does not] yiel[d] a definite answer to the questions before us,” leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.

How, then, does the Court weave a clear constitutional prohibition out of pure interpretive equipoise? The Court resorts to “fundamental separation-of-powers principles” to interpret the Suspension Clause. According to the Court, because “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers,” the test of its extraterritorial reach “must not be subject to manipulation by those whose power it is designed to restrain.”

That approach distorts the nature of the separation of powers and its role in the constitutional structure. The “fundamental separation-of-powers principles” that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general “separation-of-powers principles” dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when

the people ratified them. And if the understood scope of the writ of habeas corpus was “designed to restrain” (as the Court says) the actions of the Executive, the understood *limits* upon that scope were (as the Court seems not to grasp) just as much “designed to restrain” the incursions of the Third Branch. “Manipulation” of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as “manipulation” by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.

B

The Court purports to derive from our precedents a “functional” test for the extraterritorial reach of the writ, which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson v. Eisentrager*, 339 U.S. 763, conclusively establishes the opposite.

“We are cited to [*sic*] no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.” *Id.*, at 768.

Justice Jackson then elaborated on the historical scope of the writ:

“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society . . .

“But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.” *Id.*, at 770–771.

Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States. *Eisentrager* thus held — *held* beyond any doubt — that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.

The Court would have us believe that *Eisentrager* rested on “[p]ractical considerations,” such as the “difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding.” Formal sovereignty, says the Court, is merely one consideration “that bears upon which constitutional guarantees apply” in a given location. This is a sheer rewriting of the case. *Eisentrager* mentioned practical concerns, to be sure — but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its*

holding that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*. As Justice Black accurately said in dissent, “the Court’s opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.”

The Court also tries to change *Eisentrager* into a “functional” test by quoting a paragraph that lists the characteristics of the German petitioners:

“To support [the] assumption [of a constitutional right to habeas corpus] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” *Id.*, at 777 (quoted in part, *ante*, at 36).

But that paragraph is introduced by a sentence stating that “[t]he foregoing demonstrates *how much further we must go* if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.” How much further than *what*? Further than the rule set forth in the prior section of the opinion, which said that “in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.” In other words, the characteristics of the German prisoners were set forth, not in application of some “functional” test, but to show that the case before the Court represented an *a fortiori* application of the ordinary rule. That is reaffirmed by the sentences that immediately follow the listing of the Germans’ characteristics:

“We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”

Eisentrager nowhere mentions a “functional” test, and the notion that it is based upon such a principle is patently false.

....

The Court also relies on the “[p]ractical considerations” that influenced our decision in *Reid v. Covert, supra*. But all the Justices in the majority except Justice Frankfurter limited their analysis to the rights of *citizens* abroad. . . .

The Court tries to reconcile *Eisentrager* with its holding today by pointing out that in postwar Germany, the United States was “answerable to its Allies” and did not “pla[n] a long-term occupation.” Those factors were not mentioned in *Eisentrager*.

Worse still, it is impossible to see how they relate to the Court's asserted purpose in creating this "functional" test — namely, to ensure a judicial inquiry into detention and prevent the political branches from acting with impunity. Can it possibly be that the Court trusts the political branches more when they are beholden to foreign powers than when they act alone?

After transforming the *a fortiori* elements discussed above into a "functional" test, the Court is still left with the difficulty that most of those elements exist here as well with regard to all the detainees. To make the application of the newly crafted "functional" test produce a different result in the present cases, the Court must rely upon factors (d) and (e): The Germans had been tried by a military commission for violations of the laws of war; the present petitioners, by contrast, have been tried by a Combatant Status Review Tribunal (CSRT) whose procedural protections, according to the Court's *ipse dixit*, "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Ante*, at 37. But no one looking for "functional" equivalents would put *Eisentrager* and the present cases in the same category, much less place the present cases in a preferred category. The difference between them cries out for lesser procedures in the present cases. The prisoners in *Eisentrager* were *prosecuted* for crimes after the cessation of hostilities; the prisoners here are enemy combatants *detained* during an ongoing conflict.

The category of prisoner comparable to these detainees are not the *Eisentrager* criminal defendants, but the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court — and that despite the fact that they were present on U.S. soil. The Court's analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises "absolute and indefinite" control, may seek a writ of habeas corpus in federal court. And, as an even more bizarre implication from the Court's reasoning, those prisoners whom the military plans to try by full-dress Commission at a future date may file habeas petitions and secure release before their trials take place.

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory, could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting *Eisentrager*, the Court avoids the difficulty of explaining why it should be overruled. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854–855 (1992) (identifying *stare decisis* factors). The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's "functional" test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed. It has engendered considerable reliance on the part of our military. And, as the Court acknowledges, text and history do not clearly compel a contrary ruling. It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.

C

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, "it would be possible for the political branches to govern without legal constraint" in areas beyond the sovereign territory of the United States. That cannot be, the Court says, because it is the duty of this Court to say what the law is. It would be difficult to imagine a more question-begging analysis. "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies *properly before them*." Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

But so long as there are *some* places to which habeas does not run — so long as the Court's new "functional" test will not be satisfied *in every case* — then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the *other* branches will be (shudder!) *supreme*. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

III

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad, as Judge Randolph's thorough opinion for the court below detailed. The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people. That course is especially demanded when (as here) the Constitution limits the power of Congress to infringe upon a pre-existing common-law right. The nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding. It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. . . . But prerogative writs could not issue to foreign countries, even for British subjects; they were confined to the King's dominions — those areas over which the Crown was sovereign. . . .

In sum, *all* available historical evidence points to the conclusion that the writ

would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. . . .

What history teaches is confirmed by the nature of the limitations that the Constitution places upon suspension of the common-law writ. It can be suspended only “in Cases of Rebellion or Invasion.” Art. I, § 9, cl. 2. The latter case (invasion) is plainly limited to the territory of the United States; and while it is conceivable that a rebellion could be mounted by American citizens abroad, surely the overwhelming majority of its occurrences would be domestic. If the extraterritorial scope of habeas turned on flexible, “functional” considerations, as the Court holds, why would the Constitution limit its suspension almost entirely to instances of domestic crisis? Surely there is an even greater justification for suspension in foreign lands where the United States might hold prisoners of war during an ongoing conflict. And correspondingly, there is less threat to liberty when the Government suspends the writ’s (supposed) application in foreign lands, where even on the most extreme view prisoners are entitled to fewer constitutional rights. It makes no sense, therefore, for the Constitution generally to forbid suspension of the writ abroad if indeed the writ has application there.

It may be objected that the foregoing analysis proves too much, since this Court has already suggested that the writ of habeas corpus *does* run abroad for the benefit of United States citizens. “[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights . . . is precisely the position that this Court adopted in *Eisentrager* even while holding that aliens abroad did not have habeas corpus rights.” The reason for that divergence is not difficult to discern. The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not “subjects”) are afforded defined protections against the Government. . . .

In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable “functional” test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson’s opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

§ 1.05 NON-ARTICLE III COURTS

Page 30 Insert the following after Note (4):

(5) In a 5-4 opinion in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) the Court held that the public rights exception was not broad enough to allow Congress to empower a non-Article III court to enter final judgment on a common law tort claim

This somewhat arcane issue of constitutional law arose from a bankruptcy proceeding filed by the late Vickie Marshall who had achieved celebrity as the actress-model, Anna Nicole Smith. Pierce Marshall had filed a complaint in Ms. Smith's bankruptcy proceeding in which he claimed that Ms. Smith had defamed him by having her lawyers make unflattering allegations about him to the press. Ms. Smith had answered Pierce Marshall's claim and counterclaimed for tortious interference with the gift she expected from his father and her husband, octogenarian billionaire J. Howard Marshall. The Bankruptcy Court had entered final judgment in Ms. Smith's favor which the Court of Appeals reversed. The matter had followed a complicated litigation course before the Supreme Court granted certiorari. Although the Court concluded that Congress had, in 28 U.S.C. 157(b)(2)(C) authorized the bankruptcy court to grant final judgment on claims like Ms. Smith's tort counterclaim it held that such a grant was inconsistent with Article III of the Constitution and accordingly unconstitutional.

Writing for the Court, Chief Justice Roberts said that Article III's provisions, including those granting federal judges life tenure and salary protection, were intended both to protect the federal judiciary from incursions by the other branches and to protect individual liberty, functions which would be compromised if the political branches of the federal government could allocate "judicial power" to non-Article III bodies. If the Constitution placed a particular mundane common law dispute between two private parties within the subject matter jurisdiction of the federal judiciary, Congress could not assign it to the Bankruptcy Court.

The Court recognized that its delineation of the public rights exception had not been "entirely consistent," but found the legislative grant at issue beyond any prior formulation which the Court had allowed. The classic definition of the exception in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856) simply provided that Congress could "set the terms of adjudicating a suit when the suit could not otherwise proceed at all." In order for a case to involve a public, rather than a private right, the right at issue must be "integrally related to particular federal government action."

Ms. Smith's tort counterclaim was a dispute between two private parties arising under state common law, not one "that can be pursued only by grace of the other branches," or one that historically only could have been determined by the political branches. It did not "flow from a federal statutory scheme," (*cf. Thomas*), and was not "'completely dependent upon'" adjudication of a federal law claim (*cf. Schor*). Nor did Pierce "truly consent" to resolution of his claim in the bankruptcy court proceedings since he had no other venue where he could recover from Ms. Smith's estate. Unlike some prior public rights cases, the statutory grant of authority to the bankruptcy court which was exercised here was not one confined to a particular area of the law where the expertise of a specialized administrative agency was engaged. Instead, the jurisdiction

given the bankruptcy court by the statute was a broad substantive jurisdiction and one in which Article III courts had expertise.

Justice Scalia joined the Chief Justice's opinion and accordingly provided the crucial fifth vote for it. He thought, however, that the opinion did not confine the public rights exception sufficiently. He would limit it to disputes between the government and individuals. An Article III judge is required, he argued, absent some "firmly established historical practice to the contrary" as with territorial courts, courts-martial proceedings or public rights.

Justice Breyer, who was a leading scholar on administrative law before joining the federal bench in 1981, wrote a dissent for himself and Justices Ginsburg, Sotomayor and Kagan. In particular, Justice Breyer argued that the majority gave insufficient weight to *Crowell v. Benson*, 285 U.S. 22 (1932) which itself had involved a dispute between private parties before an administrative agency. Precedents committed the Court to apply a multi-factor balancing test rather than conclude, as the majority did, that the presence of private rights was fatal to Congress's ability to vest authority outside of Article III.

(6) In a 6-3 decision in *Wellness Int'l Network Ltd. V. Sharif*, 135 S. Ct. 1932 (2015), the Court held that bankruptcy judges, who, of course, lack Article III characteristics, may, with the parties' consent, decide certain claims for which litigants are entitled to an Article III adjudication, namely those which seek only to augment the bankruptcy estate and which would exist without regard to a bankruptcy proceeding. Six justices (all but Chief Justice Roberts and Justices Scalia and Thomas) rejected Chief Justice Roberts's suggestion that the case be narrowly decided without reaching what he called "the serious constitutional question whether private parties may consent to an Article III violation." The Chief Justice urged concluding that under the facts presented the Bankruptcy Court's adjudication stemmed from the bankruptcy itself, and did not involve a common law action, and accordingly was within *Stern v. Marshall*. The majority did not reach that issue. Instead, in an opinion by Justice Sotomayor, the Court concluded that the entitlement to an Article III adjudication is a "personal right" that ordinarily can be waived. Allowing Article I adjudicators to decide such claims submitted by consent does not offend separation of powers principles provided that Article III courts retain supervisory authority of the process.

In resolving the question, the Court rejected recourse to "formalistic and unbending rules" and instead looked to the "practical effect" a practice would have on the judiciary. Allowing the Bankruptcy Court to resolve such a case by consent did not impair the institutional integrity of the judiciary or usurp the constitutional prerogatives of Article III courts, especially since bankruptcy courts hear matters on a district court's reference.

The majority distinguished *Stern* on the grounds that it was premised on the parties' lack of consent, a characterization *Stern's* author, Chief Justice Roberts, strenuously denied.

The dissenters took issue with the Court's functional approach and argued for use of bright-lines in order to preserve "the high ground of principle" to resist future encroachments of Article III power. Just as a branch of the government cannot consent to a separation of powers violation, so too, a private party may not, argued Chief Justice Roberts.

§ 1.07 STANDING

Page 32: Insert the following before Massachusetts v. Environmental Protection Agency:

CLAPPER v. AMNESTY INT'L USA
133 S. Ct. 1138 (2013)

JUSTICE ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1881a (2006 ed., Supp. V) allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under §1881a. Respondents seek a declaration that §1881a is unconstitutional, as well as an injunction against §1881a-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief....

I

A

In 1978, after years of debate, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. ... In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and that each of the specific “facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” Additionally, Congress vested the Foreign Intelligence Surveillance Court of Review with jurisdiction to review any denials by the FISC of applications for electronic surveillance. ...When Congress enacted the FISA Amendments Act of 2008 (FISA Amendments Act), it left much of FISA intact, but it “established a new and independent source of intelligence collection authority, beyond that granted in traditional FISA.” As relevant here, §1881a, which was enacted as part of the FISA Amendments Act, supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISC's authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, §1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is

a foreign power or agent of a foreign power. And, unlike traditional FISA, §1881a does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.

The present case involves a constitutional challenge to §1881a. Surveillance under §1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Section 1881a provides that, upon the issuance of an order from the Foreign Intelligence Surveillance Court, “the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year . . . , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” Surveillance under §1881a may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad. Additionally, acquisitions under §1881a must comport with the Fourth Amendment. Moreover, surveillance under §1881a is subject to congressional oversight and several types of Executive Branch review. Section 1881a mandates that the Government obtain the Foreign Intelligence Surveillance Court's approval of “targeting” procedures, “minimization” procedures, and a governmental certification regarding proposed surveillance....

B

Respondents are attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad. Respondents believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under §1881a. Specifically, respondents claim that they communicate by telephone and e-mail with people the Government “believes or believed to be associated with terrorist organizations,” “people located in geographic areas that are a special focus” of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government. Respondents claim that §1881a compromises their ability to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients. Respondents also assert that they “have ceased engaging” in certain telephone and e-mail conversations. According to respondents, the threat of surveillance will compel them to travel abroad in order to have in-person conversations. In addition, respondents declare that they have undertaken “costly and burdensome measures” to protect the confidentiality of sensitive communications.

C

On the day when the FISA Amendments Act was enacted, respondents filed this action seeking (1) a declaration that §1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles and (2) a permanent injunction against the use of §1881a. Respondents assert what they characterize as two separate theories of Article III standing. First, they claim that there is an objectively reasonable likelihood that their communications will be acquired under §1881a at some point in the future, thus causing them injury. Second, respondents

maintain that the risk of surveillance under §1881a is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to §1881a. [The District Court held respondents lacked standing but the court of appeals for the second circuit reversed.]...

II

Article III of the Constitution limits federal courts' jurisdiction to certain “Cases” and “Controversies.” As we have explained, “[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” “One element of the case-or-controversy requirement” is that plaintiffs “must establish that they have standing to sue.”

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, “[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” “Relaxation of standing requirements is directly related to the expansion of judicial power,” and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs[.]To establish Article III standing, an injury must be “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” “Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is certainly impending.” Thus, we have repeatedly reiterated that “threatened injury must be *certainly impending* to constitute injury in fact,” and that “[a]llegations of *possible* future injury” are not sufficient. ...

III

A

Respondents assert that they can establish injury in fact that is fairly traceable to §1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under §1881a at some point in the future. This argument fails. As an initial matter, the Second Circuit's “objectively reasonable likelihood” standard is inconsistent with our requirement that “threatened injury must be certainly impending to constitute injury in fact.” Furthermore, respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under §1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy §1881a's many safeguards and are consistent with the Fourth Amendment; (4) the

Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. As discussed below, respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending. Moreover, even if respondents could demonstrate injury in fact, the second link in the above-described chain of contingencies--which amounts to mere speculation about whether surveillance would be under §1881a or some other authority--shows that respondents cannot satisfy the requirement that any injury in fact must be fairly traceable to §1881a.

First, it is speculative whether the Government will imminently target communications to which respondents are parties. Section 1881a expressly provides that respondents, who are U.S. persons, cannot be targeted for surveillance under §1881a. ...Accordingly, respondents' theory necessarily rests on their assertion that the Government will target *other individuals*--namely, their foreign contacts. Yet respondents have no actual knowledge of the Government's §1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under §1881a. ... Respondents, however, have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted. ...

Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the Government will seek to use §1881a-authorized surveillance (rather than other methods) to do so. The Government has numerous other methods of conducting surveillance, none of which is challenged here. ...Even if respondents could demonstrate that their foreign contacts will imminently be targeted--indeed, even if they could show that interception of their own communications will imminently occur--they would still need to show that their injury is fairly traceable to §1881a. But, because respondents can only speculate as to whether any (asserted) interception would be under §1881a or some other authority, they cannot satisfy the "fairly traceable" requirement.

Third, even if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorization to acquire the communications of respondents' foreign contacts under §1881a, respondents can only speculate as to whether that court will authorize such surveillance. In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment. ...

Fourth, even if the Government were to obtain the Foreign Intelligence Surveillance Court's approval to target respondents' foreign contacts under §1881a, it is unclear whether the Government would succeed in acquiring the communications of respondents' foreign contacts. And fifth, even if the Government were to conduct surveillance of respondents' foreign contacts, respondents can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired.

In sum, respondents' speculative chain of possibilities does not establish that

injury based on potential future surveillance is certainly impending or is fairly traceable to §1881a.

B

Respondents' alternative argument--namely, that they can establish standing based on the measures that they have undertaken to avoid §1881a-authorized surveillance--fares no better. Respondents assert that they are suffering ongoing injuries that are fairly traceable to §1881a because the risk of surveillance under §1881a requires them to take costly and burdensome measures to protect the confidentiality of their communications. Respondents claim, for instance, that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to “tal[k] in generalities rather than specifics,” or to travel so that they can have in-person conversations. ...Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing--because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. Any ongoing injuries that respondents are suffering are not fairly traceable to §1881a. If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear. ...Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.

Another reason that respondents' present injuries are not fairly traceable to §1881a is that even before §1881a was enacted, they had a similar incentive to engage in many of the countermeasures that they are now taking. ...[B]ecause the Government was allegedly conducting surveillance of [plaintiff's] client before Congress enacted §1881a, it is difficult to see how the safeguards [plaintiff] now claims to have implemented can be traced to §1881a.

Because respondents do not face a threat of certainly impending interception under §1881a, the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance[.] For the reasons discussed above, respondents' self-inflicted injuries are not fairly traceable to the Government's purported activities under §1881a, and their subjective fear of surveillance does not give rise to standing.

IV [Section A omitted]

B

Respondents also suggest that they should be held to have standing because otherwise the constitutionality of §1881a could not be challenged. It would be wrong, they maintain, to “insulate the government's surveillance activities from meaningful judicial review.” Respondents' suggestion is both legally and factually incorrect. First, “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.’ ”

Second, our holding today by no means insulates §1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures--including assessing whether the targeting and minimization procedures comport with the Fourth Amendment. Any dissatisfaction that respondents may have about the Foreign Intelligence Surveillance Court's rulings--or the congressional delineation of that court's role--is irrelevant to our standing analysis.

Additionally, if the Government intends to use or disclose information obtained or derived from a §1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition. Thus, if the Government were to prosecute one of respondent-attorney's foreign clients using §1881a-authorized surveillance, the Government would be required to make a disclosure. Although the foreign client might not have a viable Fourth Amendment claim, it is possible that the monitoring of the target's conversations with his or her attorney would provide grounds for a claim of standing on the part of the attorney. Such an attorney would certainly have a stronger evidentiary basis for establishing standing than do respondents in the present case. In such a situation, unlike in the present case, it would at least be clear that the Government had acquired the foreign client's communications using §1881a-authorized surveillance.

Finally, any electronic communications service provider that the Government directs to assist in §1881a surveillance may challenge the lawfulness of that directive before the FISC. Indeed, at the behest of a service provider, the Foreign Intelligence Surveillance Court of Review previously analyzed the constitutionality of electronic surveillance directives issued pursuant to a now-expired set of FISA amendments.

We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm. ...

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of §1881a will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not "speculative." Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. This Court has often found the occurrence of similar future events sufficiently certain to support standing. I dissent from the Court's contrary conclusion.

I

Article III specifies that the "judicial Power" of the United States extends only to actual "Cases" and "Controversies." ...The Court has recognized that the precise

boundaries of the “case or controversy” requirement are matters of “degree . . . not discernible by any precise test.” At the same time, the Court has developed a subsidiary set of legal rules that help to determine when the Constitution’s requirement is met. Thus, a plaintiff must have “standing” to bring a legal claim. And a plaintiff has that standing, the Court has said, only if the action or omission that the plaintiff challenges has caused, or will cause, the plaintiff to suffer an injury that is “concrete and particularized,” “actual or imminent,” and “redress[able] by a favorable decision.”

No one here denies that the Government’s interception of a private telephone or e-mail conversation amounts to an injury that is “concrete and particularized.” Moreover, the plaintiffs, respondents here, seek as relief a judgment declaring unconstitutional (and enjoining enforcement of) a statutory provision authorizing those interceptions; and, such a judgment would redress the injury by preventing it. Thus, the basic question is whether the injury, i.e., the interception, is “actual or imminent.”

II

A

Since the plaintiffs fear interceptions of a kind authorized by §1881a, it is important to understand just what kind of surveillance that section authorizes. . . . The addition of §1881a in 2008 changed . . . prior law in three important ways. First, it eliminated the requirement that the Government describe to the court each specific target and identify each facility at which its surveillance would be directed, thus permitting surveillance on a programmatic, not necessarily individualized, basis. Second, it eliminated the requirement that a target be a “foreign power or an agent of a foreign power.” Third, it diminished the court’s authority to insist upon, and eliminated its authority to supervise, instance-specific privacy-intrusion minimization procedures (though the Government still must use court-approved general minimization procedures). Thus, using the authority of §1881a, the Government can obtain court approval for its surveillance of electronic communications between places within the United States and targets in foreign territories by showing the court (1) that “a significant purpose of the acquisition is to obtain foreign intelligence information,” and (2) that it will use general targeting and privacy-intrusion minimization procedures of a kind that the court had previously approved. . . .

III

Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, acting under the authority of §1881a, will intercept at least some of the communications just described. First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept. These communications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activities. These persons are foreigners located outside the United States. They are not “foreign power[s]” or “agent[s] of . . . foreign power[s].” And the plaintiffs state that they exchange with these persons “foreign intelligence information,” defined to include

information that “relates to” “international terrorism” and “the national defense or the security of the United States.” Second, the plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described. A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or the civil wrong) of which the client is accused. ...Journalists and human rights workers have strong similar motives to conduct conversations of this kind.

At the same time, the Government has a strong motive to conduct surveillance of conversations that contain material of this kind. The Government, after all, seeks to learn as much as it can reasonably learn about suspected terrorists (such as those detained at Guantanamo), as well as about their contacts and activities, along with those of friends and family members. And the Government is motivated to do so, not simply by the desire to help convict those whom the Government believes guilty, but also by the critical, overriding need to protect America from terrorism.

Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications. ...

Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. To some degree this capacity rests upon technology available to the Government. This capacity also includes the Government's authority to obtain the kind of information here at issue from private carriers such as AT&T and Verizon. We are further told by *amici* that the Government is expanding that capacity.

Of course, to exercise this capacity the Government must have intelligence court authorization. But the Government rarely files requests that fail to meet the statutory criteria. There is no reason to believe that the communications described would all fail to meet the conditions necessary for approval. Moreover, compared with prior law, §1881a simplifies and thus expedites the approval process, making it more likely that the Government will use §1881a to obtain the necessary approval.

The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs' communications, including some that the 2008 amendment, §1881a, but not the pre-2008 Act, authorizes the Government to intercept.

At the same time, nothing suggests the presence of some special factor here that might support a contrary conclusion. The Government does not deny that it has both the motive and the capacity to listen to communications of the kind described by plaintiffs. ...Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as “speculative.”

IV

A

The majority more plausibly says that the plaintiffs have failed to show that the threatened harm is “*certainly impending*.” But, as the majority appears to concede, *certainty* is not, and never has been, the touchstone of standing. The future is inherently uncertain. Yet federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here....

B

1

More important, the Court's holdings in standing cases show that standing exists here. The Court has often *found* standing where the occurrence of the relevant injury was far *less* certain than here. [Multiple examples omitted]...

Moreover, courts have often found *probabilistic* injuries sufficient to support standing. In *Duke Power Co. v. Environmental Study Group, Inc.*, 438 U.S. 59, 98 (1978), for example, the plaintiffs, a group of individuals living near a proposed nuclear power plant, challenged the constitutionality of the Price-Anderson Act, a statute that limited the plant's liability in the case of a nuclear accident. The plaintiffs said that, without the Act, the defendants would not build a nuclear plant. And the building of the plant would harm them, in part, by emitting “non-natural radiation into [their] environment.” The Court found standing in part due to “our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions.”

How could the law be otherwise? Suppose that a federal court faced a claim by homeowners that (allegedly) unlawful dam-building practices created a high risk that their homes would be flooded. Would the court deny them standing on the ground that the risk of flood was only 60, rather than 90, percent?

Would federal courts deny standing to a plaintiff in a diversity action who claims an anticipatory breach of contract where the future breach depends on probabilities? ...Would federal courts deny standing to a plaintiff who seeks to enjoin as a nuisance the building of a nearby pond which, the plaintiff believes, will very likely, but not inevitably, overflow his land? ...Neither do ordinary declaratory judgment actions always involve the degree of certainty upon which the Court insists here.

2

In some standing cases, the Court has found that a reasonable probability of *future*

injury comes accompanied with *present* injury that takes the form of reasonable efforts to mitigate the threatened effects of the future injury or to prevent it from occurring. Thus, in *Monsanto Co.*, 561 U.S., at , 130 S. Ct. 2743, 488 plaintiffs, a group of conventional alfalfa growers, challenged an agency decision to deregulate genetically engineered alfalfa. They claimed that deregulation would harm them because their neighbors would plant the genetically engineered seed, bees would obtain pollen from the neighbors' plants, and the bees would then (harmfully) contaminate their own conventional alfalfa with the genetically modified gene. The lower courts had found a "reasonable probability" that this injury would occur. Without expressing views about that probability, we found standing because the plaintiffs would suffer present harm by trying to combat the threat. The plaintiffs, for example, "would have to conduct testing to find out whether and to what extent their crops have been contaminated." And they would have to take "measures to minimize the likelihood of potential contamination and to ensure an adequate supply of non-genetically-engineered alfalfa." We held that these "harms, which [the plaintiffs] will suffer even if their crops are not actually infected with" the genetically modified gene, "are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis."

Virtually identical circumstances are present here. Plaintiff McKay, for example, points out that, when he communicates abroad about, or in the interests of, a client (*e.g.*, a client accused of terrorism), he must "make an assessment" whether his "client's interests would be compromised" should the Government "acquire the communications." If so, he must either forgo the communication or travel abroad. Since travel is expensive, since forgoing communication can compromise the client's interests, since McKay's assessment itself takes time and effort, this case does not differ significantly from *Monsanto*. And that is so whether we consider the plaintiffs' present necessary expenditure of time and effort as a separate concrete, particularized, imminent harm, or consider it as additional evidence that the future harm (an interception) is likely to occur.

The majority cannot find support in cases that use the words "certainly impending" to *deny* standing. While I do not claim to have read every standing case, I have examined quite a few, and not yet found any such case. ... By way of contrast, the ongoing threat of terrorism means that here the relevant interceptions will likely take place imminently, if not now....

In sum, as the Court concedes, the word "certainly" in the phrase "certainly impending" does not refer to absolute certainty. As our case law demonstrates, what the Constitution requires is something more akin to "reasonable probability" or "high probability." The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands. [T]he standard is readily met in this case. While I express no view on the merits of the plaintiffs' constitutional claims, I do believe that at least some of the plaintiffs have standing to make those claims. I dissent, with respect, from the majority's contrary conclusion.

Page 39: Insert the following after Note (5):

(5.1) *Standing on Appeal: The October 2012 Term:* On the final day of its 2012 Term, the Court divided regarding justiciability issues as they arose in two cases which, in different respects, involved the issue of same sex marriage. In *United States v. Windsor*, 133 S. Ct. 2675 (2013) the Court, in a 5-4 decision, held that the federal government had standing to appeal a lower court decision holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Court, also in a 5-4 decision, dismissed an appeal of the lower court decision holding California’s Proposition 8 unconstitutional for lack of standing. In *Windsor*, the presence of standing allowed the Court to strike down section 3 of DOMA. By denying standing in *Hollingsworth* the Court avoided an opportunity to consider whether California’s prohibition of same sex marriage was constitutional.

By excluding same sex partners from the definition of “spouse,” section 3 of DOMA had prevented Edith Windsor, a surviving widow, from claiming the estate tax exemption for surviving spouses following the death of her wife. After the surviving spouse challenged the constitutionality of DOMA in litigation to secure the tax exemption, the Department of Justice, pursuant to law, advised the House of Representatives that it would not defend the constitutionality of the statute. The executive branch continued to enforce Section 3, however, in order to recognize the federal judiciary as the final arbiter of constitutional claims. The Bipartisan Legal Advisory Group (BLAG) of the House intervened to defend the constitutionality of Section 3.

Although Windsor clearly presented a justiciable claim since she was harmed due to section 3 and her harm would have been redressed by the relief sought, the case presented the question whether either the government and/or BLAG were entitled to appeal the district court’s decision striking down section 3 or to seek certiorari from the Court. The executive branch’s position created a somewhat anomalous situation since it agreed with, but refused to enforce, Windsor’s position.

The Court (5-4), in an opinion by Justice Kennedy, held that the government had constitutional standing to pursue the appeal because an order that it refund Windsor the money value of the tax exemption was an economic harm. “That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court’s order.” *Windsor*, 133 S. Ct. at 2686. Any issue arose simply from flexible prudential standing considerations designed to avoid deciding abstract questions better left to other branches which the Court could choose to disregard. The Court had faced a similar situation in *INS v. Chadha*, 462 U.S. 919 (1983) where the government had refused to defend the constitutionality of a statute which allowed it to deport Chadha even while continuing to enforce it. The prudential considerations could present a situation in which the parties’ positions lacked the “concrete adverseness” upon which the Court depends but the participation of BLAG met that concern. Moreover, the Court’s failure to resolve the question of section 3’s constitutionality would impact

numerous individuals and spawn widespread litigation. Although the Court suggested that difficulties would ensue if the executive branch routinely refused to defend statutes it enforced, the “unusual and urgent circumstances” in the case counseled for the Court to decide the matter.

Justice Scalia, for Chief Justice Roberts and Justice Thomas, dissented regarding the Court’s disposition of the standing issue. In an unusually sarcastic and pointed opinion he accused the Court of being so “eager—*hungry*” to reach the merits that it aggrandized the Court’s power by asserting judicial supremacy in a “jaw-dropping” way. Contrary to the Court’s assertion that it is the “province and duty of the judicial department to say what the law is” Justice Scalia argued that “declaring the compatibility of state or federal laws with the Constitution is not only not the “primary role” of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally — by accident, as it were — when that is necessary to resolve the dispute before us.” *Windsor*, 133 S. Ct. at 2699. Here the government’s agreement with Windsor’s claim that section 3 was unconstitutional ended any need for the Court to adjudicate the interests of an injured party. And the government’s injury—having to refund the amount of the exemption—would not be redressed by the relief it sought, i.e. declaring section 3 unconstitutional, but “carve[d]...into stone.” Accordingly, no controversy existed between Windsor and the government. *Chadha* presented a different situation since the challenge to the constitutionality of the one-house veto presented a potential harm to the House and the Senate in affecting something they claimed was an institutional power. The adverseness requirement which the Court labeled as a prudential consideration was part of the constitutional requirement of standing.

Justice Scalia suggested that the executive should have either defended and enforced the law (in which case it would have had standing) or neither defended nor enforced the law in which case Windsor’s injury would be remedied and the executive would be subject to retaliatory action by Congress in the political, not judicial, venue.

Justice Alito agreed with Justice Scalia that the government lacked standing to appeal but thought that the House of Representatives had suffered an injury which would be redressed by the relief (upholding section 3) it sought. He reasoned that a house of Congress suffered injury whenever legislation it passed was declared unconstitutional. The decision in *Raines v. Byrd*, 521 U.S. 811 (1997) was distinguishable since a) it held that individual congressmen lacked standing, not a body of Congress and b) it involved members who were not pivotal figures in the decision as were those granted standing in *Coleman v. Miller*, 307 U.S. 433 (1939).

Hollingsworth arose after California voters, through Proposition 8, amended that state’s constitution to limit marriage to unions of heterosexual couples. Two same sex couples brought suit challenging Proposition 8 in federal court and naming various state officials as defendants. After those officials declined to defend Proposition 8, although enforcing it, the district court allowed the proponents of Proposition 8 (Hollingsworths et al) to intervene to defend it, held that Proposition 8 violated the Constitution and directed the named officials not to enforce it. When state officials elected not to appeal, the Court of Appeals for the Ninth Circuit directed *Hollingsworth et al* to address whether they had standing. In response to a certified question, the California Supreme

Court concluded that, under California law, in a post-election challenge to a voter-approved initiative the proponents of the initiative could appear and assert the state's interest if the state officials declined to do so. The Ninth Circuit held that Hollingsworth et al had standing and held that Proposition 8 violated the Constitution. When Hollingsworth et al appealed, the Court granted certiorari and directed the parties brief and argue the issue of standing. The Court, 5-4, held Hollingsworth et al lacked standing.

Although Perry et al clearly had standing to bring the suit, once they prevailed, Hollingsworth et al had only a generalized grievance like other citizens which was insufficient to confer standing to appeal. Their special role under California law related only to the conduct of the initiative vote but once it was adopted they lacked any ongoing personal stake which distinguished them from other California citizens. Neither the depth of their commitment nor the zeal of their advocacy conferred standing. Nor could Hollingsworth et al claim standing to assert the interests of third parties since they lacked the essential predicate of individual standing. Having “never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to,” the Court decline[d] to do so for the first time here.” *Hollingsworth*, 133 S. Ct. at 2668.

In his dissent, for himself and Justices Thomas, Alito and Sotomayor, Justice Kennedy argued that the California Supreme Court's unanimous opinion, that the proponents of an initiative had power under California law to defend a measure when state officials declined to do so, established standing and adversity to satisfy justiciability requirements of Article III. The Court should have deferred to California's highest court in defining the powers and responsibilities of various parties to defend California law. Justice Kennedy thought it ironic that the Court insisted that standing would have existed had state officials litigated the dispute even though their preference would have been to lose the case, an approach inconsistent with “[a] prime purpose of justiciability [which] is to ensure vigorous advocacy.” *Id.* at 52.

Although the two cases raised somewhat different issues, the voting configurations produced some interesting results. Whereas two justices (Kennedy and Sotomayor) thought standing existed in both cases and two (Roberts and Scalia) thought standing absent in each, the other five justices thought standing existed in either *Windsor* (Ginsburg, Breyer, Kagan) or *Hollingsworth* (Thomas, Alito) but not both.

Page 40: Insert the following at the end of Note (8):

The Court further narrowed the *Flast* taxpayer standing exception in a 5-4 decision in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011). In an opinion by Justice Kennedy, the Court held that the *Flast* exception to the normal rule against general taxpayer standing did not apply where a taxpayer challenged as unconstitutional under the First Amendment an Arizona tax credit (as opposed to a tax expenditure) given to support religious study. Although tax credits and governmental expenditures could have “similar economic consequences” for beneficiaries they did not implicate the objecting taxpayer in the same fashion. *Flast*, the Court said, required that

the objecting taxpayer's money was “ ‘extracted and spent’ ” in violation of the Constitution. Whereas an expenditure uses the dissenting taxpayer's funds in some non-speculative, though trivial, way, the tax credit given another taxpayer does not extract and spend from the objector's taxes to support the alleged establishment of religion.

The Court, wrote Justice Kennedy, was empowered to address “cases’ or “controversies,” not to resolve “questions and issues.” Adherence to this Article III requirement maintained public confidence in the federal judiciary. The other branches of the federal government were also obliged to “defend the constitution,” a duty which presumably imposed a requirement not to violate it. The judiciary must “be more careful to insist on the formal rules of standing” particularly in an era when citizens are petitioning courts for relief frequently and for class, prospective injunctive, and continuing relief.

Writing for the dissenters, Justice Kagan criticized the Court for drawing a “novel distinction” with no support in principle or precedent. *Flast* applied to exercises of the taxing and spending power and the effect of the conduct under review was equivalent to that of an-expenditure. Moreover, the Court's ruling gave legislatures a vehicle to circumvent constitutional challenge by using tax credits instead of expenditures. In five prior cases, the Court had reached the merits of Establishment Clause challenges to cases involving tax expenditures without any justice questioning the taxpayer's standing. Those five cases would have been dismissed on jurisdictional grounds under the Court's new decision, the dissenters argued.

§ 1.08 RIPENESS; MOOTNESS

Page 46: Insert the following at the end of Note (10):

The Court provided further guidance regarding the operation of the “voluntary cessation” doctrine in *Already, LLC v. Nike*, 133 S. Ct. 721 (2013). In a unanimous opinion, the Court held that Nike, which had alleged that Already, a rival athletic footwear vendor, had violated a Nike trademark. had satisfied its “formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* at 727 (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)). The broad, unconditional and irrevocable “Covenant Not to Sue” which Nike issued after litigation began satisfied its “formidable burden.” Already had opposed dismissal of its counterclaim, even without prejudice, contending that investors would not invest in Already unless Nike's trademark was invalidated. But the Court found that once Nike had met its burden, Already had failed to assert that it planned to market a shoe which would infringe Nike's trademark. The breadth of Nike's Covenant coupled with Already's failure to assert “concrete plans” to engage in conduct outside of it rendered the case moot. Although all nine justices joined Chief Justice Roberts's majority opinion, a separate concurrence of four justices suggested that future cases might consider the range of consequences of using a covenant not to sue as a basis for seeking dismissal on mootness grounds.

Page 47: Insert the following after Note (11):

(12) *Camreta v. Greene*, 131 S. Ct. 2020 (2011), provided an application of mootness doctrine in a somewhat unusual procedural context. In a section 1983 suit on behalf of a minor for money damages against Oregon officials for violations of constitutional rights, the lower federal courts collectively held that officials had violated the minor’s Fourth Amendment rights by interviewing her without first obtaining a warrant but further held that the officials were protected from financial liability by the doctrine of qualified immunity since the constitutional right at issue was not clearly established under prevailing law. The officials sought to appeal the Fourth Amendment ruling. Although the prevailing officials could normally appeal the adverse ruling on the Fourth Amendment, the Court held that the case was moot. The child had grown up and moved from Oregon so could never again be exposed to the state’s interviewing practices. Since she no longer had any interest in protecting the Fourth Amendment holding the case was moot.

§ 1.09 POLITICAL QUESTIONS

Page 53: Insert the following after Note (5)

ZIVOTOFSKY v. CLINTON
132 S. Ct. 1421 (2012)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted a statute providing that Americans born in Jerusalem may elect to have “Israel” listed as the place of birth on their passports. The State Department declined to follow that law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by an American [Menachem Binyamin Zivotofsky] who invoked the statute, the Secretary of State argued that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals so held.

We disagree. The courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution. . . .

In general, the Judiciary has a responsibility to decide cases properly before it, even those it “would gladly avoid.” *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). Our precedents have identified a narrow exception to that rule, known as the “political question” doctrine. . . . We have explained that a controversy “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’ ” *Nixon v. United States* . . . quoting *Baker v. Carr*. . . . In such a case, we have held that a court lacks the authority to decide the dispute before it. . . .

The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood Zivotofsky to ask the courts to "decide the political status of Jerusalem." 511 F. Supp. 2d, at 103. This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under §214(d), to choose to have Israel recorded on his passport as his place of birth. . . .

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of §214(d), the only real question for the courts is whether the statute is constitutional. At least since *Marbury v. Madison*, 1 Cranch 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983).

In this case, determining the constitutionality of §214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with §214(d). Either way, the political question doctrine is not implicated. "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *Id.*, at 941–942.

The Secretary contends that "there is 'a textually demonstrable constitutional commitment' " to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch." *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991) . . .

Our precedents have also found the political question doctrine implicated when there is " 'a lack of judicially discoverable and manageable standards for resolving' " the question before the court. *Nixon, supra*, at 228 (quoting *Baker, supra*, at 217). Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however,

when the issue is recognized to be the more focused one of the constitutionality of §214(d). . . .

[T]he Secretary reprises on the merits her argument on the political question issue, claiming that the Constitution gives the Executive the exclusive power to formulate recognition policy. She roots her claim in the Constitution’s declaration that the President shall “receive Ambassadors and other public Ministers.” U.S. Const., Art. II, §3. According to the Secretary, “[c]enturies-long Executive Branch practice, congressional acquiescence, and decisions by this Court” confirm that the “receive Ambassadors” clause confers upon the Executive the exclusive power of recognition. . . . The Secretary further contends that §214(d) constitutes an impermissible exercise of the recognition power because “the decision as to how to describe the place of birth . . . operates as an official statement of whether the United States recognizes a state’s sovereignty over a territorial area.” . . .

For his part, Zivotofsky argues that, far from being an exercise of the recognition power, §214(d) is instead a “legitimate and permissible” exercise of Congress’s “authority to legislate on the form and content of a passport.” . . . Zivotofsky suggests that Congress’s authority to enact §214(d) derives specifically from its powers over naturalization, U.S. Const., Art. I, §8, cl. 4, and foreign commerce, *id.*, §8, cl. 3. . . .

Further, Zivotofsky claims that even if §214(d) does implicate the recognition power, that is not a power the Constitution commits exclusively to the Executive. Zivotofsky argues that the Secretary is overreading the authority granted to the President in the “receive Ambassadors” clause. He observes that in the Federalist Papers, Alexander Hamilton described the power conferred by this clause as “more a matter of dignity than of authority,” and called it “a circumstance, which will be without consequence in the administration of the government.” The Federalist No. 69, p. 468 (J. Cooke ed. 1961). Zivotofsky also points to other clauses in the Constitution, such as Congress’s power to declare war, that suggest some congressional role in recognition. . . .

Zivotofsky argues that language from this Court’s precedents suggesting the recognition power belongs exclusively to the President is inapplicable to his claim, because that language appeared in cases where the Court was asked to alter recognition policy developed by the Executive in the absence of congressional opposition. . . .

Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not “turn on standards that defy judicial application.” *Baker*, 369 U.S., at 211. Resolution of Zivotofsky’s claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case.

III

To say that Zivotofsky’s claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple. Because the District Court and the D. C. Circuit believed that review was barred by the political question doctrine, we are without the benefit of thorough lower court opinions to guide our analysis of the merits. Ours is “a court of final review and not first view.” . . . Having determined that this case is justiciable, we leave it to the lower courts to consider the

merits in the first instance.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins as to Part I, concurring in part and concurring in the judgment.

As this case illustrates, the proper application of *Baker*'s six factors has generated substantial confusion in the lower courts. I concur in the Court's conclusion that this case does not present a political question. I write separately, however, because I understand the inquiry required by the political question doctrine to be more demanding than that suggested by the Court.

The political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable—that is, whether the dispute is appropriate for resolution by courts. The doctrine is “essentially a function of the separation of powers,” *Baker v. Carr*, 369 U.S. 186, 217 (1962), which recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers.

In *Baker*, this Court identified six circumstances in which an issue might present a political question. . . [identifying six factors]

In my view, the *Baker* factors reflect three distinct justifications for withholding judgment on the merits of a dispute. When a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department, as envisioned by *Baker*'s first factor, abstention is warranted because the court lacks authority to resolve that issue. . . . The second and third *Baker* factors reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence. . . . The final three *Baker* factors address circumstances in which prudence may counsel against a court's resolution of an issue presented. . . . Rare occasions implicating *Baker*'s final factors, however, may present an “ ‘unusual case’ ” unfit for judicial disposition. . . . When such unusual cases arise, abstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases. . . . To be sure, it will be the rare case in which *Baker*'s final factors alone render a case nonjusticiable. . . . But our long historical tradition recognizes that such exceptional cases arise, and due regard for the separation of powers and the judicial role envisioned by Article III confirms that abstention may be an appropriate response.

[Section II omitted] [Justice Alito's concurrence omitted]

JUSTICE BREYER, dissenting.

I join Part I of Justice Sotomayor's opinion. As she points out, *Baker v. Carr*, 369 U.S. 186 (1962), set forth several categories of legal questions that the Court had previously held to be “political questions” inappropriate for judicial determination. . . .

As Justice Sotomayor also points out, these categories (and in my view particularly the last four) embody “circumstances in which prudence may counsel against a court’s resolution of an issue presented.” Ante, at 3. . . .

Justice Sotomayor adds that the circumstances in which these prudential considerations lead the Court not to decide a case otherwise properly before it are rare. Ante, at 7. I agree. But in my view we nonetheless have before us such a case. Four sets of prudential considerations, taken together, lead me to that conclusion.

First, the issue before us arises in the field of foreign affairs. . . . Second, if the courts must answer the constitutional question before us, they may well have to evaluate the foreign policy implications of foreign policy decisions.... Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones. . . . Fourth, insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences.

Chapter II

CONGRESSIONAL POWERS

§ 2.01 ENUMERATED AND IMPLIED POWERS

Page 69: Insert the following after Note (9):

UNITED STATES v. COMSTOCK
560 U.S. 126, 130 S. Ct. 1949 (2010)

JUSTICE BREYER delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U.S.C. §4248. We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government “of enumerated powers.” *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). We conclude that the Constitution grants Congress the authority to enact §4248 as “necessary and proper for carrying into Execution” the powers “vested by” the “Constitution in the Government of the United States.” Art. I, §8, cl. 18.

I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently “in the custody of the [Federal] Bureau of Prisons,” §4248, if that individual (1) has previously “engaged or attempted to engage in sexually violent conduct or child molestation,” (2) currently “suffers from a serious mental illness, abnormality, or disorder,” and (3) “as a result of” that mental illness, abnormality, or disorder is “sexually dangerous to others,” in that “he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” §§4247(a)(5)–(6).

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described When such a certification is filed, the statute automatically stays the individual’s release from prison, thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence, §§4247(b)–(c), 4248(b). . .

If the Government proves its claims by “clear and convincing evidence,” the court will order the prisoner’s continued commitment in “the custody of the Attorney General,” who must “make all reasonable efforts to cause” the State where that person was tried, or the State where he is domiciled, to “assume responsibility for his custody, care, and treatment.” If either State is willing to assume that responsibility, the Attorney General “shall release” the individual “to the appropriate official” of that State. But if,

“notwithstanding such efforts, neither such State will assume such responsibility,” then “the Attorney General shall place the person for treatment in a suitable [federal] facility.”

Confinement in the federal facility will last until either (1) the person’s mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. . . .

[Editors’ Note: The Government brought proceedings against five respondents who it claimed fell within the statute’s provision. Each moved to dismiss on multiple constitutional ground including that the statute exceeded Congress’s powers under the Commerce and Necessary and Proper Clauses. After the District Court and Court of Appeals granted the motions to dismiss on the ground that Congress had exceeded its legislative powers. The Court granted certiorari on the Art. I § 8 grounds.]

II

The question presented is whether the Necessary and Proper Clause, Art. I, §8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact §4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal “[G]overnment is acknowledged by all to be one of enumerated powers,” *McCulloch*, 4 Wheat., at 405, which means that “[e]very law enacted by Congress must be based on one or more of” those powers, *United States v. Morrison*, 529 U.S. 598, 607 (2000). But, at the same time, “a government, entrusted with such” powers “must also be entrusted with ample means for their execution.” *McCulloch*, 4 Wheat., at 408. Accordingly, the Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are “convenient, or useful” or “conducive” to the authority’s “beneficial exercise.” Chief Justice Marshall emphasized that the word “necessary” does not mean “absolutely necessary.” . . . In language that has come to define the scope of the Necessary and Proper Clause, he wrote:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch*, *supra*, at 421.

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.

Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, §8, must also “not [be] prohibited” by the Constitution. *McCulloch*,

supra, at 421. But as we have already stated, the present statute’s validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. Under the question presented, the relevant inquiry is simply “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power” or under other powers that the Constitution grants Congress the authority to implement.

We have also recognized that the Constitution “addresse[s]” the “choice of means” “primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” *Burroughs v. United States*, 290 U.S. 534, 547–548 (1934).

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to “counterfeiting,” “treason,” or “Piracies and Felonies committed on the high Seas” or “against the Law of Nations,” Art. I, §8, cls. 6, 10; Art. III, §3, nonetheless grants Congress broad authority to create such crimes. See *McCulloch*, 4 Wheat., at 416 (“All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress”). And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, §8, cls. 1, 3, 4, 7, 9; Amdts. 13–15. . .

Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted in furtherance of its enumerated powers, “can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there.” Moreover, Congress, having established a prison system, can enact laws that seek to ensure that system’s safe and responsible administration by, for example, requiring prisoners to receive medical care and educational training, and can also ensure the safety of the prisoners, prison workers and visitors, and those in surrounding communities by, for example, creating further criminal laws governing entry, exit, and smuggling, and by employing prison guards to ensure discipline and security.

Neither Congress’ power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of “carrying into Execution” the enumerated powers “vested by” the “Constitution in the Government of the United States,” Art. I, §8, cl. 18—authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute’s constitutionality. . . A history of involvement, however, can

nonetheless be “helpful in reviewing the substance of a congressional statutory scheme,” and, in particular, the reasonableness of the relation between the new statute and preexisting federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. [Editor’s Note: Discussion omitted tracing involvement to 1855.]

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. . . Indeed, at common law, one “who takes charge of a third person” is “under a duty to exercise reasonable care to control” that person to prevent him from causing reasonably foreseeable “bodily harm to others.”

Moreover, §4248 is “reasonably adapted,” *Darby*, 312 U.S., at 121, to Congress’ power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority. Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to “have serious difficulty in refraining from sexually violent conduct,” §4247(a)(6), would pose an especially high danger to the public if released. And Congress could also have reasonably concluded (as detailed in the Judicial Conference’s report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to “legal residence in any State” by incarcerating them in remote federal prisons. . .

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that §4248 violates the Tenth Amendment because it “invades the province of state sovereignty” in an area typically left to state control. . . But the Tenth Amendment’s text is clear: “The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (Emphasis added.) The powers “delegated to the United States by the Constitution” include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution “reserved to the States.”

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of “powers that remain with the States.” To the contrary, it requires *accommodation* of state interests: . . .

Fifth, the links between §4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not “pile inference upon inference” in order to sustain congressional action under Article I, *Lopez*, 514 U.S., at 567, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress’ authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents. . .

Nor need we fear that our holding today confers on Congress a general “police power, which the Founders denied the National Government and reposed in the States.” *Morrison*, 529 U.S., at 618. As the Solicitor General repeatedly confirmed at oral argument, §4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. . .

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” *McCulloch*, 4 Wheat, at 415 (emphasis deleted).

* * *

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute’s accommodation of state interests, and (5) the statute’s narrow scope. Taken together, these considerations lead us to conclude that the statute is a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute. . .

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress’ power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY concurring in judgment.

This separate writing serves two purposes. The first is to withhold assent from certain statements and propositions of the Court’s opinion. The second is to caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.

I

The Court concludes that, when determining whether Congress has the authority to enact a specific law under the Necessary and Proper Clause, we look “to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” . . .

The terms “rationally related” and “rational basis” must be employed with care, particularly if either is to be used as a stand-alone test. The phrase “rational basis” most often is employed to describe the standard for determining whether legislation that does

not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court's precedents, the Court has said: "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–488 (1955). . . .

The operative constitutional provision in this case is the Necessary and Proper Clause. This Court has not held that the *Lee Optical* test, asking if "it might be thought that the particular legislative measure was a rational way to correct" an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a "rational basis" test should be at least as exacting as it has been in the Commerce Clause cases, if not more so. Indeed, the cases the Court cites in the portion of its opinion referring to "rational basis" are predominantly Commerce Clause cases, and none are due process cases. . . .

Those precedents require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical*. . . . The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it. . . .

A separate concern stems from the Court's explanation of the Tenth Amendment. I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government. The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around, as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.

It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely. . . .

II

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act. . . .

I would note, as the Court’s opinion does, that §4248 does not supersede the right and responsibility of the States to identify persons who ought to be subject to civil confinement. The federal program in question applies only to those in federal custody and thus involves little intrusion upon the ordinary processes and powers of the States. . . .

[T]his is a discrete and narrow exercise of authority over a small class of persons already subject to the federal power. Importantly, §4248(d) requires the Attorney General to release any civil detainee “to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment,” providing a strong assurance that the proffered reason for the legislation’s necessity is not a mere artifice.

With these observations, I concur in the judgment of the Court.

JUSTICE ALITO, concurring in the judgment.

I am concerned about the breadth of the Court’s language, and the ambiguity of the standard that the Court applies, but I am persuaded, on narrow grounds, that it was “necessary and proper” for Congress to enact the statute at issue in this case, 18 U. S. C. §4248, in order to “carr[y] into Execution” powers specifically conferred on Congress by the Constitution, see Art. I, §8, cl. 18. . . .

I entirely agree with the dissent that “[t]he Necessary and Proper Clause empowers Congress to enact only those laws that ‘carr[y] into Execution’ one or more of the federal powers enumerated in the Constitution,” but §4248 satisfies that requirement because it is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted. The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. In other words, most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system.

All of this has been recognized since the beginning of our country. The First Congress enacted federal criminal laws, created federal law enforcement and prosecutorial positions, established a federal court system, provided for the imprisonment of persons convicted of federal crimes, and gave United States marshals the responsibility of securing federal prisoners.

The only additional question presented here is whether, in order to carry into execution the enumerated powers on which the federal criminal laws rest, it is also necessary and proper for Congress to protect the public from dangers created by the

federal criminal justice and prison systems. In my view, the answer to that question is “yes.” Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment. . . .

This is not a case in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision. Here, there is a substantial link to Congress’ constitutional powers.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins in all but Part III–A–1–b, dissenting.

The Court holds today that Congress has power under the Necessary and Proper Clause to enact a law authorizing the Federal Government to civilly commit “sexually dangerous person[s]” beyond the date it lawfully could hold them on a charge or conviction for a federal crime. 18 U. S. C. §4248(a). I disagree. The Necessary and Proper Clause empowers Congress to enact only those laws that “carr[y] into Execution” one or more of the federal powers enumerated in the Constitution. Art. I, §8, cl. 18. Because §4248 “Execut[es]” no enumerated power, I must respectfully dissent.

I

“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). In our system, the Federal Government’s powers are enumerated, and hence limited. . . . Thus, Congress has no power to act unless the Constitution authorizes it to do so. . . . The States, in turn, are free to exercise all powers that the Constitution does not withhold from them. . . .

The Constitution plainly sets forth the “few and defined” “powers that Congress may exercise. Article I “vest[s]” in Congress “[a]ll legislative Powers herein granted,” §1, and carefully enumerates those powers in §8. The final clause of §8, the Necessary and Proper Clause, authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, §8, cl. 18. As the Clause’s placement at the end of §8 indicates, the “foregoing Powers” are those granted to Congress in the preceding clauses of that section. The “other Powers” to which the Clause refers are those “vested” in Congress and the other branches by other specific provisions of the Constitution.

Chief Justice Marshall famously summarized Congress’ authority under the Necessary and Proper Clause in *McCulloch*, which has stood for nearly 200 years as this Court’s definitive interpretation of that text:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 4 Wheat., at 421.

McCulloch's summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress' authority under the Clause if it satisfies a two-part test: First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve. *McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

Critically, however, *McCulloch* underscores the linear relationship the Clause establishes between the two inquiries: Unless the end itself is "legitimate," the fit between means and end is irrelevant. In other words, no matter how "necessary" or "proper" an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than "carrying into Execution" one or more of the Federal Government's enumerated powers. Art. I, §8, cl. 18.

This limitation was of utmost importance to the Framers. During the State ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. . . . Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. . . .

Roughly 30 years after the Constitution's ratification, *McCulloch* firmly established this understanding in our constitutional jurisprudence. 4 Wheat., at 421, 423. Since then, our precedents uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather "a *caveat* that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of §8 'and all other Powers vested by this Constitution.' "

II

. . . No enumerated power in Article I, §8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, §4248 can be a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers actually enumerated in the Constitution.

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for §4248, and none are readily discernable. . . . This Court, moreover, consistently has recognized that the power to care for the mentally ill and, where necessary, the power "to protect the community from the dangerous tendencies of some" mentally ill persons, are among the numerous powers that remain with the States. . . .

To be sure, protecting society from violent sexual offenders is certainly an important end. . . . But the constitution does not vest in Congress the authority to protect society from every bad act that might befall it. . . .

In my view, this should decide the question. Section 4248 runs afoul of our settled understanding of Congress' power under the Necessary and Proper Clause. Congress may act under that Clause only when its legislation "carr[ies] into Execution" one of the Federal Government's enumerated powers. Art. I, §8, cl. 18. Section 4248 does not execute *any* enumerated power. Section 4248 is therefore unconstitutional.

III

The Court perfunctorily genuflects to *McCulloch*'s framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that §4248 is a " 'necessary and proper' " adjunct to a jumble of *unenumerated* "authorit[ies]." The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.

A

I begin with the first and last "considerations" in the Court's inquiry. The Court concludes that §4248 is a valid exercise of Congress' Necessary and Proper Clause authority because that authority is "broad," and because "the links between §4248 and an enumerated Article I power are not too attenuated". In so doing, the Court first inverts, then misapplies, *McCulloch*'s straightforward two-part test.

1

a

First, the Court describes Congress' lawmaking power under the Necessary and Proper Clause as "broad," relying on precedents that have upheld federal laws under the Clause after finding a " 'rationa[l]' " fit between the law and an enumerated power. . . . It is true that this Court's precedents allow Congress a certain degree of latitude in selecting the means for "carrying into Execution" an end that is "legitimate." . . . But in citing these cases, the Court puts the cart before the horse: The fit between means and ends matters only if the end is in fact legitimate—*i.e.*, only if it is one of the Federal Government's enumerated powers.

By starting its inquiry with the degree of deference owed to Congress in selecting means to further a legitimate end, the Court bypasses *McCulloch*'s first step and fails carefully to examine whether the end served by §4248 is actually one of those powers.

b

Second, instead of asking the simple question of what enumerated power §4248 “carr[ies] into Execution” at *McCulloch*’s first step, the Court surveys other laws Congress has enacted and concludes that, because §4248 is related to those laws, the “links” between §4248 and an enumerated power are not “too attenuated”; hence, §4248 is a valid exercise of Congress’ Necessary and Proper Clause authority. This unnecessarily confuses the analysis and, if followed to its logical extreme, would result in an unwarranted expansion of federal power. . . . The Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority; the Clause plainly requires a showing that every federal statute “carr[ies] into Execution” one or more of the Federal Government’s *enumerated* powers. . . .

Civil detention under §4248, . . . lacks any such connection to an enumerated power.

2

After focusing on the relationship between §4248 and several of Congress’ implied powers, the Court finally concludes that the civil detention of a “sexually dangerous person” under §4248 carries into execution the enumerated power that justified that person’s arrest or conviction in the first place. In other words, the Court analogizes §4248 to federal laws that authorize prison officials to care for federal inmates while they serve sentences or await trial. But while those laws help to “carr[y] into Execution” the enumerated power that justifies the imposition of criminal sanctions on the inmate, §4248 does not bear that essential characteristic. . . .

B

The remaining “considerations” in the Court’s five-part inquiry do not alter this conclusion.

2

[T]he Court describes §4248 as a “modest” expansion on a statutory framework with a long historical pedigree. Yet even if the antiquity of a practice could serve as a substitute for its constitutionality—and the Court admits that it cannot—the Court overstates the relevant history. . . .

3

Finally, the Court offers two arguments regarding §4248’s impact on the relationship between the Federal Government and the States. First, the Court and both concurrences suggest that Congress must have had the power to enact §4248 because a long period of federal incarceration might “seve[r]” a sexually dangerous prisoner’s “claim to ‘legal residence’ ” in any particular State, . . . thus leaving the prisoner without any “home State to take charge” of him upon release, . . . I disagree with the premise of that argument. As an initial matter, States plainly have the constitutional authority to “take charge” of a federal prisoner released within their jurisdiction. . . . In addition, the assumption that a State knowingly would fail to exercise that authority is, in my view,

implausible. . . . But even in the event a State made such a decision, the Constitution assigns the responsibility for that decision, and its consequences, to the state government alone.

Next, the Court submits that §4248 does not upset the balance of federalism or invade the States’ reserved powers because it “requires accommodation of state interests” by instructing the Attorney General to release a committed person to the State in which he was domiciled or tried if that State wishes to “‘assume . . . responsibility’ ” for him. . . . More importantly, it is an altogether hollow assurance that §4248 preserves the principle of dual sovereignty—the “letter and spirit” of the Constitution—as the Necessary and Proper Clause requires. . . . For once it is determined that Congress has the authority to provide for the civil detention of sexually dangerous persons, Congress “is acting within the powers granted it under the Constitution,” and “may impose its will on the States.” *Gregory*, 501 U.S., at 460; *see* Art. VI, cl. 2. Section 4248’s right of first refusal is thus not a matter of constitutional necessity, but an act of legislative grace.

Nevertheless, 29 States appear as *amici* and argue that §4248 is constitutional. They tell us that they do not object to Congress retaining custody of “sexually dangerous persons” after their criminal sentences expire. . . .

Congress’ power, however, is fixed by the Constitution; it does not expand merely to suit the States’ policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds. . . . The purpose of this design is to preserve the “balance of power between the States and the Federal Government . . . [that] protect[s] our fundamental liberties.” *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting); *New York v. United States*, 505 U.S., at 181. It is the States’ duty to act as the “mediate and visible guardian” of those liberties because federal powers extend no further than those enumerated in the Constitution. . . . The Constitution gives States no more power to decline this responsibility than it gives them to infringe upon those liberties in the first instance. . . .

Not long ago, this Court described the Necessary and Proper Clause as “the last, best hope of those who defend ultra vires congressional action.” Regrettably, today’s opinion breathes new life into that Clause, and—the Court’s protestations to the contrary notwithstanding, comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that “we *always* have rejected,” In so doing, the Court endorses the precise abuse of power Article I is designed to prevent—the use of a limited grant of authority as a “pretext . . . for the accomplishment of objects not intrusted to the government.” *McCulloch, supra*, at 423.

I respectfully dissent.

NOTE

The Court’s 2012 term provided another opportunity to explore the relationship an act of Congress predicated on the Necessary and Proper Clause must have to some enumerated power in order to be Constitutional. In *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013) held, 7-2, that the Sexual Offender Registration and Notification Act

(SORNA), as applied to defendant Kebodeaux, was within Congress's power under the Necessary and Proper Clause.

Kebodeaux, a member of the United States Air Force, having been convicted of a federal sex offense by a special court martial in 1999, later was prosecuted for failing to comply with SORNA, which Congress adopted in 2006 after he had served his sentence but which applied to federal sex offenders who had served their sentences. Justice Breyer's majority opinion for five justices held that SORNA could constitutionally apply to Kebodeaux. Contrary to the conclusion of a divided court of appeals, the Court held that Kebodeaux's release was not unconditional because he then remained subject to the provisions of the federal Wetterling Act which mandated registration requirements similar to those SORNA later imposed. SORNA in effect modified requirements to which Kebodeaux was previously subject. Since the Constitution gave Congress power to "make Rules for the ...Regulation of the land and Naval forces" (Art. I, sec. 8, cl, 14), the Necessary and Proper Clause empowered Congress to punish violations and to impose conditions on his release including those set forth in the Wetterling Act, and to modify them through SORNA. Chief Justice Roberts largely agreed with the majority's reasoning but wrote separately to distance himself from the majority's discussion of the benefits of the federal registration system which he viewed as irrelevant and worrisome to the extent it implied the existence of a federal police power.

Justice Thomas, joined largely but not entirely by Justice Scalia, dissented, arguing that SORNA went beyond Congress's power and intruded on the states' police power. SORNA did not give effect to Congress's power to regulate and make rules for the military.

**NATIONAL FEDERATION OF INDEPENDENT
BUSINESS v. KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES**
132 S. Ct. 2566 (2012)

[Excerpts from Beginning of Opinion of CHIEF JUSTICE ROBERTS]

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually

granted” to the Federal Government “is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *McCulloch v. Maryland*, (casebook, p. 59) In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government “is acknowledged by all to be one of enumerated powers.” *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, “coin Money,” “establish Post Offices,” and “raise and support Armies.” Art. I, §8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” *Gibbons v. Ogden*, (casebook, p. 70). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.” *McCulloch*.

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, “the Constitution is itself, in every rational sense, and to every useful purpose, a Bill Of Rights.” The Federalist No. 84. And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: “The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.” U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. *See, e.g., United States v. Comstock*, (*supra*, at 44).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments--as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government--punishing street crime, running public schools, and zoning property for development, to name but a few--even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.”

“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by

smaller governments closer to the governed. . . . The independent power of the States also serves as a check on the power of the Federal Government: . . .

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, §8, cl. 3. Our precedents read that to mean that Congress may regulate “the channels of interstate commerce,” “persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” The power over activities that substantially affect interstate commerce can be expansive. . . .

Congress may also “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U. S. Const., Art. I, §8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Art. I, §8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch*.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. “Proper respect for a coordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.” *United States v. Harris*, (casebook, p. 334). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, (casebook, p. 1). Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . . And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury v. Madison*, (casebook, p. 1).

The questions before us must be considered against the background of these basic principles. . . .

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people. . . .

[Excerpts from end of Joint Opinion of JUSTICES SCALIA, KENNEDY, THOMAS and ALITO, dissenting]

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections-notably, the restraints imposed by federalism and separation of powers-are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil

War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

NOTES

- 1) Do the five justices whose views are represented in these excerpts disagree on the basic constitutional values they articulate or simply on their application to this case which is presented in greater detail later in this chapter?
- 2) Chief Justice Roberts cites Chief Justice Marshall frequently here and elsewhere in his opinion. Are there similarities in their values and approaches? Differences?
- 3) The case, including its discussion of the Necessary and Proper Clause, continues in the 2013 Supplement in Section 2.05.1.

§ 2.05 THE COMMERCE CLAUSE: A NEW TURNING POINT?

Page 120: Insert the following after Note (4):

(4.1) In *United States v. Windsor*, 133 S. Ct. 2675 (2013), Justice Kennedy, in his majority opinion striking down section 3 of the Defense of Marriage Act, suggested that Congress might have less leeway to legislate in areas of traditional state concern than elsewhere, a theme which resonated in his concurring opinion in *United States v. Lopez* [Casebook, 109, 114]. Although Congress can legislate in ways which affect “marital rights and privileges,” Justice Kennedy observed that “[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States.” While citing examples which “establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations” directed to a class which 12 states protected. Subject to their consistency with constitutional rights, history and tradition marked domestic relations as a “virtually exclusive province of the States.” The federal government had accordingly generally deferred to state law determinations regarding domestic relations.

Although the majority sketched in some detail these federalism considerations, the Court found it ‘unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance’ since section 3 of DOMA violated the Constitution by affronting the dignity of same sex married couples which some states had recognized. In his dissent, for himself and Justice Thomas, Justice Scalia observed that the Court’s seven pages regarding the traditional powers of the States regarding domestic relations “initially fool[ed] many readers, I am sure, into thinking that this is a federalism opinion.” Apparently, among those fooled was Chief Justice Roberts, who, in a separate dissent, argued that it was “undeniable that [the Court’s] judgment is based on federalism.”

§ 2.05.01 THE ROBERTS COURT AND THE COMMERCE CLAUSE

Page 135: Insert the following after Note (2):

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN
SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES**
132 S. Ct. 2566 (2012)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III-C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III-A, III-B, and III-D

...

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119 The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act’s 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain “minimum essential” health insurance coverage. . . . [F]or individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a “[s]hared responsibility payment” to the Federal Government. §5000A(b)(1). That payment, which the Act describes as a “penalty,” is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. §5000A(c). . . . The Act provides that the penalty will be paid to the Internal Revenue Service with an individual’s taxes, and “shall be assessed and collected in the same manner” as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U. S. C. §5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. §5000A(g)(2). And some individuals who are subject to

the mandate are nonetheless exempt from the penalty--for example, those with income below a certain threshold and members of Indian tribes. §5000A(e).

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs . . . were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. . . .

[The Court held that the Anti-Injunction Act did not preclude consideration of the lawsuit and accordingly proceeded to the merits.]

III ...

A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy

individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." *United States v. Darby*, (casebook, p. 96) Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard [v. Filburn]*, (casebook, p. 101)].

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. . . .

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, §8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." *Id.*, cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." *Id.*, cls. 12-14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. . . .

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. See, e.g., [*United States v. Lopez*, (casebook, p. 109) [Editors' Note: Other case citations omitted]]. . . .

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring

countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him. . . .

Wickard has long been regarded as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” but the Government’s theory in this case would go much further. Under *Wickard* it is within Congress’s power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. . . . The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” The Federalist No. 45. While Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have “always recognized that the power to regulate commerce, though broad indeed, has limits.” The Government’s theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” The Federalist No. 48 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing

something and doing nothing would not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers. . . . The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, “the uninsured as a class are active in the market for health care, which they regularly seek and obtain.” The individual mandate “merely regulates how individuals finance and pay for that active participation--requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others.”

The Government repeats the phrase “active in the market for health care” throughout its brief, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not “active in the car market” in any pertinent sense. The phrase “active in the market” cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government’s effort to “regulate the uninsured as a class.” . . .

The individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress’s authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that “[t]here is no temporal limitation in the Commerce Clause,” the Government argues that because “[e]veryone subject to this regulation is in or will be in the health care market,” they can be “regulated in advance.” The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the *effects* on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. . . .

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, “[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks.” But cars and broccoli are no more purchased for their “own sake” than health insurance. They are purchased to cover the need for transportation and food.

The Government says that health insurance and health care financing are “inherently integrated.” But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how “inherently integrated” health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation”—the guaranteed-issue and community-rating insurance reforms. Under this argument, it is not necessary to consider the effect that an individual’s inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution, Art. I, §8, cl. 18, vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise,” *McCulloch [v. Maryland]*, (casebook, p. 59) Although the Clause gives Congress authority to “legislate on that vast mass of incidental powers which must be involved in the constitution,” it does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated. Instead, the Clause is “ ‘merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.’ ”

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.” We have thus upheld laws that are “ ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’ ” [*United States v. Comstock*, (*supra*, at 44)]. But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” *McCulloch*, are not

“*proper* [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, “in the words of *The Federalist*, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’ ”

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, (casebook, p. 143); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U.S. 456, 459, 462, (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is “narrow in scope,” *Comstock*, or “incidental” to the exercise of the commerce power, *McCulloch*. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich* (casebook, p. 121). In *Raich*, we considered “comprehensive legislation to regulate the interstate market” in marijuana. ...We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress’s attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. Accordingly, we recognized that “Congress was acting well within its authority” under the Necessary and Proper Clause even though its “regulation ensnare[d] some purely intrastate activity.” *Raich* thus did not involve the exercise of any “great substantive and independent power,” *McCulloch*, of the sort at issue here. Instead, it concerned only the constitutionality of “individual *applications* of a concededly valid statutory scheme.”

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

. . . Unlike The Chief Justice, however, I would hold . . . that the Commerce Clause authorizes Congress to enact the minimum coverage provision. . . .

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby*, (casebook, p. 96) and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"; *NLRB v. Jones & Laughlin Steel Corp.*, (casebook, p. 90). The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for healthcare products and services. By any measure, that market is immense. Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. . . .

The healthcare market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. . . . [I]ndividuals . . . face another reality of the current market for medical care: its high cost. . . .

To manage the risks associated with medical care--its high cost, its unpredictability, and its inevitability--most people in the United States obtain health insurance. . . . Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. Over 60% of those without insurance visit a doctor's office or emergency room in a given year.

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. . . . Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. . . . In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for \$43 billion worth of the

\$116 billion in care they administered to those without insurance. Health-care providers . . . raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. . . . The size of this subsidy is considerable. Congress found that the cost-shifting just described “increases family [insurance] premiums by on average over \$1,000 a year.” . . .

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions- like hypertension and diabetes-that can be successfully and affordably treated if diagnosed early on. When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. The extra time and resources providers spend serving the uninsured lessens the providers’ ability to care for those who do have insurance.

C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health -care system, if adopted by an individual State, would be “bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.” An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State. . . . Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests. Congress’ intervention was needed to overcome this collective-action impasse.

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U.S. residents. The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty. . . . Congress knew that encouraging individuals to purchase insurance would

not suffice to solve the problem, because most of the uninsured are not uninsured by choice. Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness.

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. Second, Congress required insurers to use "community rating" to price their insurance policies. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. . . . When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care-*i.e.*, those who cost insurers the most-become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. . . .

* * *

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II

A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States . . . often failed to take actions critical to the success of the Nation as a whole. . . . The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent."

The Framers understood that the “general Interests of the Union” would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a “great outlin[e],” not a detailed blueprint, *see McCulloch v. Maryland*, and that its provisions included broad concepts, to be “explained by the context or by the facts of the case[.]” “Nothing . . . can be more fallacious,” Alexander Hamilton emphasized, “than to infer the extent of any power, proper to be lodged in the national government, from . . . its immediate necessities. There ought to be a capacity to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.” The Federalist No. 34.

B

Consistent with the Framers’ intent, we have repeatedly emphasized that Congress’ authority under the Commerce Clause is dependent upon “practical” considerations, including “actual experience.” . . . Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” *Gonzales v. Raich*. This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. *See Raich*. When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected and the asserted ends.”

C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing,”; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. The minimum coverage provision, furthermore, bears a “reasonable connection” to Congress’ goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would

reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. . . . “[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.” Congress’ enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, The Chief Justice relies on a newly minted constitutional doctrine. The commerce power does not, The Chief Justice announces, permit Congress to “compe[1] individuals to become active in commerce by purchasing a product.”

1

a

The Chief Justice’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to “compel individuals not engaged in commerce to purchase an unwanted product,” such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if The Chief Justice is correct that an insurance-purchase requirement can be applied only to those who “actively” consume health care, the minimum coverage provision fits the bill.

The Chief Justice does not dispute that all U.S. residents participate in the market for health services over the course of their lives. But, The Chief Justice insists, the uninsured cannot be considered active in the market for health care, because “[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking.”

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor’s office each year. Nearly 90% will within five years. An uninsured’s consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. . . . To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide.

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. . . . Congress could reasonably have viewed the market from a long- term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.

Third, contrary to The Chief Justice's contention, our precedent does indeed support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). . . . Wheat intended for home consumption, the Court noted, "overhangs the market, and if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA]." Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. Home-grown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market." Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

Maintaining that the uninsured are not active in the health-care market, The Chief Justice draws an analogy to the car market. An individual "is not 'active in the car market,' " The Chief Justice observes, simply because he or she may someday buy a car. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. . . .

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," or "suite of products," (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). . . . Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, . . . Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain. . . .

b

In any event, The Chief Justice’s limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions. Article I, §8, of the Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.” Nothing in this language implies that Congress’ commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D. C. Circuit observed, “[a]t the time the Constitution was [framed], to ‘regulate’ meant,” among other things, “to require action.” . . . In separating the power to regulate from the power to bring the subject of the regulation into existence, The Chief Justice asserts, “[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.” This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. Thus, the “something to be regulated” was surely there when Congress created the minimum coverage provision.

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. “[F]orcing some farmers into the market to buy what they could provide for themselves” was, the Court held, a valid means of regulating commerce. In another context, this Court similarly upheld Congress’ authority under the commerce power to compel an “inactive” land-holder to submit to an unwanted sale. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893) (“[U]pon the [great] power to regulate commerce[,]” Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway (emphasis added)); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 657-659(1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

In concluding that the Commerce Clause does not permit Congress to regulate commercial “inactivity,” and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, The Chief Justice views the Clause as a “technical legal conception,” precisely what our case law tells us not to do. This Court’s former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress’ Commerce Clause authority by distinguishing “commerce” from activity once conceived to be noncommercial, notably, “production,” “mining,” and “manufacturing.” The Court also sought to distinguish activities having a “direct” effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an “indirect” effect, and therefore not amenable to federal control. These line-drawing exercises were untenable, and the Court long ago abandoned them. . . . Failing to learn from this history, The Chief Justice plows ahead with his formalistic distinction between those who are “active in commerce,” and those who are not.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate “activity” from those that regulate “inactivity.” . . .

An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.

...

2

Underlying The Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. The joint dissenters express a similar apprehension. This concern is unfounded.

First, The Chief Justice could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. [T]he unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent The Chief Justice's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. . . .

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. Other choices individuals make are unlikely to fit the same or similar description. . . .

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such "pil[ing of] inference upon inference" is just what the Court refused to do in *Lopez* and [*United States v.*] *Morrison*, 529 U.S. 598 (2000).

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.

When contemplated in its extreme, almost any power looks dangerous.... *Cf.* R. Bork, *The Tempting of America* 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). But *see* (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (asserting, outlandishly, that if the minimum

coverage provision is sustained, then Congress could make “breathing in and out the basis for federal prescription”).

3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, The Chief Justice emphasizes the provision’s novelty. . . . For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing “economic and financial realities.” Hindering Congress’ ability to do so is shortsighted; if history is any guide, today’s constriction of the Commerce Clause will not endure.

III

A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. When viewed as a component of the entire ACA, the provision’s constitutionality becomes even plainer.

The Necessary and Proper Clause “empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation.” Hence, “[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal.” “It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.” Recall that one of Congress’ goals in enacting the Affordable Care Act was to eliminate the insurance industry’s practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes. Congress knew, however, that simply barring insurance companies from relying on an applicant’s medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an “essential par[t] of a larger regulation of economic activity”; without the provision, “the regulatory scheme [w]ould be undercut.” . . .

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, The Chief Justice focuses on the word “proper.” A mandate to purchase health insurance is not “proper” legislation, The Chief Justice urges, because the command “undermine[s] the structure of government established by the Constitution.” If long on rhetoric, The Chief Justice’s argument is short on substance.

The Chief Justice cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution’s boundary between state and federal

authority: *Printz [v. United States]*, (casebook, p. 179) and *New York v. United States*, (casebook, p.57). The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government’s behalf. The minimum coverage provision, in contrast, acts “directly upon individuals, without employing the States as intermediaries.” . . .

Nor does The Chief Justice pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. . . .

In failing to explain why the individual mandate threatens our constitutional order, The Chief Justice disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an “independent power,” or merely a “derivative” one[.] Whether the power used is “substantive,” or just “incidental”? The instruction The Chief Justice, in effect, provides lower courts: You will know it when you see it.

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on “essential attributes of state sovereignty.” First, the Affordable Care Act does not operate “in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign.” . . . Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. . . . Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. . . .

IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples’ representatives in both the States and the Federal Government. The Chief Justice’s Commerce Clause opinion, and even more so the joint dissenters’ reasoning, bear a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress’ power to tax and spend “for the . . . general Welfare of the United States.” Art. I, §8, cl. 1; I concur in that determination, which makes The Chief Justice’s Commerce Clause essay all the more puzzling. Why should The Chief Justice strive so mightily to hem in Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion. . . .

JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. . . .

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power-upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity. . . .

I

The Individual Mandate

Article I, §8, of the Constitution gives Congress the power to "regulate Commerce . . . among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure-that abstention from commerce-is not "Commerce." To be sure, *purchasing* insurance *is* "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

In *Gibbons v. Ogden*, Chief Justice Marshall wrote that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." That understanding is consistent with the original meaning of "regulate" at the time of the Constitution's ratification, when "to regulate" meant "[t]o adjust by rule, method or established mode," 2 N. Webster, *An American Dictionary of the English Language* (1828); "[t]o adjust by rule or method," 2 S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); "[t]o adjust, to direct according to rule," 2 J. Ash, *New and Complete Dictionary of the English Language* (1775); "to put in order, set to rights, govern or keep in order," T. Dyche & W. Pardon, *A New General English Dictionary* (16th ed. 1777). It can mean to direct the manner of something but not to direct that

something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used “regulate” in that peculiar fashion. If the word bore that meaning, Congress’ authority “[t]o make Rules for the Government and Regulation of the land and naval Forces,” U.S. Const., Art. I, §8, cl. 14, would have made superfluous the later provision for authority “[t]o raise and support Armies,” *id.*, §8, cl. 12, and “[t]o provide and maintain a Navy,” *id.*, §8, cl. 13.

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond “adjust[ing] by rule or method,” or “direct[ing] according to rule,” it directs the creation of commerce.

In response, the Government offers two theories as to why the Individual Mandate is nevertheless constitutional. Neither theory suffices to sustain its validity.

A

. . . The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be carefully balanced. Congress has imposed an extensive set of regulations on the health insurance industry, and compliance with those regulations will likely cost the industry a great deal. If the industry does not respond by increasing premiums, it is not likely to survive. And if the industry does increase premiums, then there is a serious risk that its products-insurance plans-will become economically undesirable for many and prohibitively expensive for the rest.

This is not a dilemma unique to regulation of the health-insurance industry. . . . Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress’ desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, “the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.” The Federalist No. 33,

At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. **[Editors’ Note:** References to *New York v. United States*, *Printz*, *Lopez*, and *Morrison* omitted] The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich*. That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing and of possession did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*.

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards—which made it necessary and proper to prohibit the sale of all such trophies.

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept. Section 5000A is defeated by that proposition.

B

The Government's second theory in support of the Individual Mandate is that §5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, . . . *i.e.*, . . . activities that substantially affect interstate commerce." . . .

The primary problem with this argument is that §5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. . . . [T]he decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to

regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

Wickard v. Filburn has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez v. United States*, (casebook, p. 100) which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial *activity*. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the “market” for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

C

A few respectful responses to Justice Ginsburg’s dissent on the issue of the Mandate are in order. That dissent duly recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a “ ‘rational basis’ for concluding that the *regulated activity* substantially affects interstate commerce”. But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. . . .

The dissent claims that we “fai[l] to explain why the individual mandate threatens our constitutional order.” But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution’s division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include “the power to enact criminal laws, . . . the power to imprison, . . . and the power to create a national bank[.]” Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

The dissent’s exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as “the provision of old-age and survivors’ benefits” in the Social Security Act is quite beside the point. The issue here is whether the federal government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce. The dissent treats the Constitution as though it is an enumeration of those problems that the Federal Government can address-among which, it finds, is “the Nation’s course in the economic

and social welfare realm,” and more specifically “the problem of the uninsured[.]” The Constitution is not that. It enumerates not federally soluble *problems*, but federally available *powers*. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, “will be obliged to pay at the counter before receiving the vehicle or nourishment,” whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others’ expense. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can “regulate.” . . .

NOTES

(1) Relying on the text of the Constitution, Chief Justice Roberts reasoned that Congress’s power to “regulate” presupposes an activity in existence. How persuasive is this argument? In a footnote not included above, Justice Ginsburg responded: “The Chief Justice’s reliance on the quoted passages of the Constitution, *see ante*, at 18-19, is also dubious on other grounds. The power to “regulate the Value” of the national currency presumably includes the power to increase the currency’s worth-*i.e.*, to create value where none previously existed. And if the power to “[r]egulat[e] . . . the land and naval Forces” presupposes “there is already [in existence] some- thing to be regulated,” *i.e.*, an Army and a Navy, does Congress lack authority to create an Air Force?”

(2) Why does the Joint Opinion of Justices Kennedy et al refer to Justice Ginsburg’s “dissent”? She joined portions of Chief Justice Roberts’s opinion, particularly upholding ACA under Congress’s Tax Power and upholding the conditions imposed on the Medicaid expansion to the extent they only affected new federal funds. She disagreed with the Chief Justice’s treatment of the Commerce Clause, Necessary and Proper Clause and much of the Spending Power but those portions of his opinion spoke only for the Chief Justice (except that Justices Breyer and Kagan joined him regarding the Spending Power).

(3) How much difference is there in the approach of Chief Justice Roberts as opposed to that of the Joint Dissent?

(4) Does this case change Commerce Clause doctrine? Necessary and Proper Clause doctrine?

(5) Although joining the Joint Dissent, Justice Thomas wrote a short, separate dissent to reiterate that “I adhere to my view that ‘the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.’ ”

§ 2.06 TAXING POWER

Page 137: Insert the following after Note (6)

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSS v. KATHLEEN
SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES**

132 S. Ct. 2566 (2012)

[Excerpts from Opinion of CHIEF JUSTICE ROBERTS] ...

B

. . . Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government’s second argument: that the mandate may be upheld as within Congress’s enumerated power to “lay and collect Taxes.” Art. I, §8, cl. 1.

The Government’s tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads “no vehicles in the park” might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. . . .

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals “shall” maintain health insurance. Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government’s alternative reading of the statute--that it only imposes a tax on those without insurance--is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition-not owning health insurance--that triggers a tax--the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a “fairly possible” one. As we have explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

[Opinion of the Court]

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which--as we previously explained--must assess and collect it “in the same manner as taxes.” This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about \$4 billion per year by 2017.

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax. Our precedent reflects this[.]. . . We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress’s power to tax. . . .

We thus ask whether the shared responsibility payment falls within Congress’s taxing power, “[d]isregarding the designation of the exaction, and viewing its substance and application.” Our cases confirm this functional approach. . . . The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance. . . . Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation--except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. . . .

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise

more money, but to encourage people to quit smoking. . . . Indeed, “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance. . . .

The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not “frame” it as such. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay \$50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer’s income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a “tax,” a “penalty,” or anything else. No one would doubt that this law imposed a tax, and was within Congress’s power to tax. That conclusion should not change simply because Congress used the word “penalty” to describe the payment. Interpreting such a law to be a tax would hardly “[i]mpos[e] a tax through judicial legislation.” Rather, it would give practical effect to the Legislature’s enactment.

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, §9, clause 4. That clause provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” This requirement means that any “direct Tax” must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than

a capitation (also known as a “head tax” or a “poll tax”), might be a direct tax. Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison’s objection that it was an unapportioned direct tax. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. That narrow view of what a direct tax might be persisted for a century. . . . In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or *any other circumstance*.” The whole point of the shared responsibility payment is that it is triggered by specific circumstances--earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under §5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. *See* Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) (“Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes”).

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress’s use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. . . . We have . . . maintained that " 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.' "

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the " 'power to tax is not the power to destroy while this Court sits.' "

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes. By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. . . .

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

D

Justice Ginsburg questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax. . . .

JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO,
dissenting. . . .

II

The Taxing Power

[After stating its conclusion that the Commerce and Necessary and Proper Clauses did not authorize the Individual Mandate, the Joint Dissent continued to discuss the Government’s contention that the Mandate was “independently authorized” by the Taxing Clause.]

The phrase “independently authorized” suggests the existence of a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is *also* a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive. Thus, what the Government’s caption should have read was “Alternatively, the Minimum Coverage Provision Is Not A Mandate-With-Penalty But A Tax.” It is important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.

In answering that question we must, if “fairly possible,” *Crowell v. Benson*, 285 U.S. 22, 62, (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional (*ut res magis valeat quam pereat*). But we cannot rewrite the statute to be what it is not. . . . In this case, there is simply no way, “without doing violence to the fair meaning of the words used,” to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: “ ‘[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.’ ” In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held- *never*-that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress’ taxing power-even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act “adopt[s] the criteria of wrongdoing” and then imposes a monetary penalty as the “principal consequence on those who transgress its standard,” it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, 259 U.S. 20, 38, (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. . . .

Quite separately, the fact that Congress (in its own words) “imposed . . . a penalty,” for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: “[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act.”

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty-such as “license.” But we have never- *never*-treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a “penalty.” Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a “penalty.”

That §5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate-a distinction that would make no sense if the mandate were not a mandate. . . . If §5000A were a tax, these two classes of exemption would make no sense; there being no requirement, *all* the exemptions would attach to the penalty (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that “neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,” and that “[i]f [those subject to the Act] pay the tax penalty, they’re in compliance with the law[.]” These self-serving litigating positions are entitled to no weight. What counts is what the statute says, and that is entirely clear. It is worth noting, moreover, that these assurances contradict the Government’s position in related litigation.

Against the mountain of evidence that the minimum coverage requirement is what the statute calls it-a requirement-and that the penalty for its violation is what the statute calls it-a penalty-the Government brings forward the flimsiest of indications to the contrary. . . .

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The *presence* of such a requirement suggests a penalty-though one can imagine a tax imposed only on willful action; but the *absence* of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. And where a statute is silent as to scienter, we traditionally presume a *mens rea* requirement if the statute imposes a “severe penalty.” Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found-in Title IX, containing

the Act’s “Revenue Provisions.” In sum, “the terms of [the] act rende[r] it unavoidable,” that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. . . . We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, §9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government’s opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that §5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. At oral argument, the most prolonged statement about the issue was just over 50 words. One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression. . . .

NOTES

In a portion of its opinion omitted above, the Joint Dissent concluded that the Anti-Injunction Act did not bar the Court from considering the case. As it acknowledged, normally the question of subject matter jurisdiction would be the first matter addressed. The Joint Dissent justified deferring this discussion since it argued that the decision that the minimum coverage provision was not a tax for constitutional purposes resolved the statutory issue, too. The Joint Dissent referred to the “remarkable argument” of the Government “and those who support its position on this point” (which included Chief Justice Roberts and the other four justices) and argue that their approach “carries verbal wizardry too far, deep into the forbidden land of the sophists.”

§ 2.07 SPENDING POWER

Page 143: Insert the following after Note (6):

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. KATHLEEN
SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES**
132 S. Ct. 2566 (2012)

[Excerpts from Opinion of CHIEF JUSTICE ROBERTS]. . .

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. . . .

IV

(Joined by Justices Breyer and Kagan)

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

There is no doubt that the Act dramatically increases state obligations under Medicaid. . . . The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering . . . newly eligible individuals through 2016. In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.

The Spending Clause grants Congress the power “to pay the Debts and provide for the . . . general Welfare of the United States.” U.S. Const., Art. I, §8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ “taking certain actions that Congress could not require them to take.” Such measures “encourage a State to regulate in a particular way, [and] influenc[e] a State’s policy choices.” The conditions imposed by Congress ensure that the funds are used by the States to “provide for the . . . general Welfare” in the manner Congress intended.

At the same time, our cases have recognized limits on Congress’s power under the Spending Clause to secure state compliance with federal objectives. “We have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a *contract*.’ ” The legitimacy of Congress’s exercise of the spending power “thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ ” Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system “rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’ ” For this reason, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes. It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a “power akin to undue influence.” *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when “pressure turns into compulsion” the legislation runs contrary to our system of federalism. “[T]he Constitution simply does not give Congress the authority to require the States to regulate.” That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. . . . Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York [v. United States]*, (casebook, p. 57) and *Printz [v. United States]*, (casebook, 179). Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers. . . .

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do

not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has “crossed the line distinguishing encouragement from coercion” in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, (casebook, p 140) we considered a challenge to a federal law that threatened to withhold five percent of a State’s federal highway funds if the State did not raise its drinking age to 21. . . . We observed that “all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%” of her highway funds. In fact, the federal funds at stake constituted less than half of one percent of South Dakota’s budget at the time. In consequence, “we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power.”

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head. . . . A State that opts out of the Affordable Care Act’s expansion in health care coverage . . . stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs. . . . The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Justice Ginsburg claims that *Dole* is distinguishable because here “Congress has not threatened to withhold funds earmarked for any other program.[.]” But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because “Congress styled” them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress’s decision to so title it is irrelevant.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid

provisions, contains a clause expressly reserving “[t]he right to alter, amend, or repeal any provision” of that statute. So it does. But “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” A State confronted with statutory language reserving the right to “alter” or “amend” the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage. . . . A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically.

Justice Ginsburg claims that in fact this expansion is no different from the previous changes to Medicaid, such that “a State would be hard put to complain that it lacked fair notice.” . . . Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to “fix the outermost line” where persuasion gives way to coercion. . . . We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply “conscript state [agencies] into the national bureaucratic army,” and that is what it is attempting to do with the Medicaid expansion.

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* “further [Medicaid] payments . . . to the State” if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. In light of the Court’s holding, the Secretary cannot apply §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains §1396c includes a severability clause confirming that we need go no further. That clause specifies that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” §1303. Today’s holding does not affect the continued

application of §1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

This is not to say, as the joint dissent suggests, that we are “rewriting the Medicaid Expansion.” Instead, we determine, first, that §1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected “the remainder of the chapter, and the application of [the challenged] provision to other persons or circumstances.” §1303. When we invalidate an application of a statute because that application is unconstitutional, we are not “rewriting” the statute; we are merely enforcing the Constitution.

The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, “[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding.” . . . The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is “evident” that the answer is no, we must leave the rest of the Act intact. . . . We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. . . .

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

. . . I would . . . hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it. . . .

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. . . . The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a

uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the “right to alter, amend, or repeal” any provision of the Medicaid Act. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. And from 1965 to the present, States have regularly conformed to Congress’ alterations of the Medicaid Act.

The Chief Justice acknowledges that Congress may “condition the receipt of [federal] funds on the States’ complying with restrictions on the use of those funds,” but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in The Chief Justice’s view, a new grant program, not an addition to the Medicaid program existing before the ACA’s enactment. Congress, The Chief Justice maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore *for the first time ever* finds an exercise of Congress’ spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress’ terms. Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as The Chief Justice charges, threatening States with the loss of “existing” funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress’ spending power. Given that holding, I entirely agree with The Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether. The dissenters’ view that the ACA must fall in its entirety is a radical departure from the Court’s normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. That course is plainly in order where, as in this case, Congress has expressly instructed courts to leave untouched every provision not found invalid. Because The Chief Justice finds the withholding—not the granting-of federal funds incompatible with the Spending Clause, Congress’ extension of Medicaid remains available to any State that affirms its willingness to participate.

A

Expansion has been characteristic of the Medicaid program. . . . Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. . . . Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. . . . Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. . . .

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from “conscript[ing] state agencies into the national bureaucratic army,” Medicaid “is designed to advance cooperative federalism.”. . . The ACA does not jettison this approach. . . .

B

The Spending Clause authorizes Congress “to pay the Debts and provide for the . . . general Welfare of the United States.” Art. I, §8, cl. 1. To ensure that federal funds granted to the States are spent “to ‘provide for the . . . general Welfare’ in the manner Congress intended,” Congress must of course have authority to impose limitations on the States’ use of the federal dollars. This Court, time and again, has respected Congress’ prescription of spending conditions, and has required States to abide by them. In particular, we have recognized Congress’ prerogative to condition a State’s receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. Congress’ authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

Yes, there are federalism-based limits on the use of Congress’ conditional spending power. In the leading decision in this area, *South Dakota v. Dole*, the Court identified four criteria. The conditions placed on federal grants to States must (a) promote the “general welfare,” (b) “unambiguously” inform States what is demanded of them, (c) be germane “to the federal interest in particular national projects or programs,” and (d) not “induce the States to engage in activities that would themselves be unconstitutional.”

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In “some circumstances,” Congress might be prohibited from offering a “financial inducement . . . so coercive as to pass the point at which ‘pressure turns into compulsion.’ ” Prior to today’s decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

This case does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. . . . The ACA . . . relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons,

just as it operates Medicare for seniors' health care. That is what makes this such a simple case, and the Court's decision so unsettling. . . .

C ...

1

The starting premise on which The Chief Justice's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to co-exist with the old. The Chief Justice calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.

Medicaid was created to enable States to provide medical assistance to "needy persons." By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim. . . . Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program.

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. . . .

2

The Chief Justice finds the Medicaid expansion vulnerable because it took participating States by surprise. . . . For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, The Chief Justice cites only one case: *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), . . . [which] instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." That requirement is met in this case. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line.

The Chief Justice appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement. . . . [As our] decisions show, *Pennhurst's* rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money-not at the time, perhaps years earlier, when Congress passed the law establishing the program.

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." . . . By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain . . . full and complete power to make such alterations and amendments . . . as come within the just scope of legislative power."

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51-52, (1986), is guiding here. As enacted in 1935, the Social Security Act did not cover state employees. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. The statutory provision giving States this option expressly permitted them to withdraw from the program.

Beginning in the late 1970's, States increasingly exercised the option to withdraw. Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. California objected, arguing that the change impermissibly deprived it of a right to withdraw from Social Security. We unanimously rejected California's argument. By including in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change. . . .

The Chief Justice insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. In short, given §1304, this Court's construction of §1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965, a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

3

The Chief Justice ultimately asks whether "the financial inducement offered by Congress . . . pass[ed] the point at which pressure turns into compulsion." The financial inducement Congress employed here, he concludes, crosses that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce. The Chief Justice sees no need to "fix the outermost line" "where persuasion gives way to coercion,". Neither do the joint dissenters. Notably, the decision on which they rely, *Steward Machine*, found the statute at issue inside the line, "wherever the line may be."

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's-or States'-budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to

replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. . . . At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

D

Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. The Chief Justice, however, holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on States' refusal to comply with the expanded Medicaid program. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. . . .

But in view of The Chief Justice's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. That clause provides that "[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."

The Court does not strike down any provision of the ACA. It prohibits only the "application" of the Secretary's authority to withhold Medicaid funds from States that decline to conform their Medicaid plans to the ACA's requirements. Thus the ACA's authorization of funds to finance the expansion remains intact, and the Secretary's authority to withhold funds for reasons other than noncompliance with the expansion remains unaffected. . . . I therefore concur in the judgment with respect to Part IV-B of The Chief Justice's opinion. . . .

JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO,
dissenting . . .

IV

The Medicaid Expansion

We now consider respondents' second challenge to the constitutionality of the ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding. For the average State, the

annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures. A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all. . . . In light of the ACA's goal of near-universal coverage, petitioners argue, if Congress had thought that anything less than 100% state participation was a realistic possibility, Congress would have provided a backup scheme. But no such scheme is to be found anywhere in the more than 900 pages of the Act. This shows, they maintain, that Congress was certain that the ACA's Medicaid offer was one that no State could refuse. . . .

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted to the States.

A

No one has ever doubted that the Constitution authorizes the Federal Government to spend money, but for many years the scope of this power was unsettled. The Constitution grants Congress the power to collect taxes "to . . . provide for the . . . general Welfare of the United States," Art. I, §8, cl. 1, and from "the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase" "the general welfare." Madison, it has been said, thought that the phrase "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," while Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them."

The Court resolved this dispute in [*United States v.*] *Butler*, (casebook, p. 13). Writing for the Court, Justice Roberts opined that the Madisonian view would make Article I's grant of the spending power a "mere tautology." To avoid that, he adopted Hamilton's approach and found that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Instead, he wrote, the spending power's "confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress." The power to make any expenditure that furthers "the general welfare" is obviously very broad, and shortly after *Butler* was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies. "The discretion belongs to Congress," the Court wrote, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Since that time, the Court has never held that a federal expenditure was not for "the general welfare."

B

One way in which Congress may spend to promote the general welfare is by making grants to the States. When Congress makes grants to the States, it customarily attaches conditions, and this Court has long held that the Constitution generally permits Congress to do this.

C

This practice of attaching conditions to federal funds greatly increases federal power. “[O]bjectives not thought to be within Article I’s enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” *Dole*. This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. If Congress’ “Spending Clause power to pursue objectives outside of Article I’s enumerated legislative fields” is “limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives ‘power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,’ ” *Dole*, (O’Connor, J., dissenting) (quoting *Butler*). . . .

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. Conditions must also be related “to the federal interest in particular national projects or programs,” and the conditional grant of federal funds may not “induce the States to engage in activities that would themselves be unconstitutional[.]” Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the “point at which pressure turns into compulsion, and ceases to be inducement.”

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. And just as a contract is voidable if coerced, “[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the ‘contract.’ ” (emphasis added). If a federal spending program coerces participation the States have not “exercise[d] their choice” -- let alone made an “informed choice.”

Coercing States to accept conditions risks the destruction of the “unique role of the States in our system.” “[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” . . . Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States’ choice whether to enact or administer a federal regulatory program is rendered illusory.

Where all Congress has done is to “encourag[e] [state regulation rather than compe[l] it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.” . . .

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

D

1

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. . . . The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly “crossed the line distinguishing encouragement from coercion,” a federal program that coopts the States' political processes must be declared unconstitutional. “[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene.”

2

The Federal Government's argument in this case at best pays lip service to the anticoercion principle. The Federal Government suggests that it is sufficient if States are “free, *as a matter of law*, to turn down” federal funds. . . . This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. . . .

E

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.

1

The dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing to accede to the conditions set out in the ACA is not a realistic option. . . . Medicaid has long been the largest federal program of grants to the States. . . .

The States devote a larger percentage of their budgets to Medicaid than to any other item. Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures[.]. . . [T]he sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue. . . .The States are far less reliant on federal funding for any other program. . . .

For these reasons, the offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite

unlike anything that we have seen in a prior spending- power case. In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately \$614 million-or about 0.19% of all state expenditures combined. . . . Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately \$233 billion. . . .

2

What the statistics suggest is confirmed by the goal and structure of the ACA. In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends.

The stated goal of the ACA is near- universal health care coverage. . . .This design was intended to provide at least a specified minimum level of coverage for all Americans, but the achievement of that goal obviously depends on participation by every single State. If any State-not to mention all of the 26 States that brought this suit- chose to decline the federal offer, there would be a gaping hole in the ACA's coverage. . . . [T]he new federal subsidies are not available to those whose income is below the federal poverty level, and the ACA provides no means, other than Medicaid, for these individuals to obtain coverage and comply with the Mandate. . . .Without Medicaid, these individuals will not have coverage and the ACA's goal of near-universal coverage will be severely frustrated.

If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold. But nowhere in the over 900-page Act is such a scheme to be found. . . . Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option.

The Federal Government does not dispute the inference that Congress anticipated 100% state participation, but it argues that this assumption was based on the fact that ACA's offer was an "exceedingly generous" gift. . . .This characterization of the ACA's offer raises obvious questions. If that offer is "exceedingly generous," as the Federal Government maintains, why have more than half the States brought this lawsuit, contending that the offer is coercive? And why did Congress find it necessary to threaten that any State refusing to accept this "exceedingly generous" gift would risk losing all Medicaid funds? . . .

In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.

F

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes-in two cursory sentences at the very end

of its brief-preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government’s suggestion. . . . To make the Medicaid Expansion optional despite the ACA’s structure and design “ ‘would be to make a new law, not to enforce an old one. This is no part of our duty.’ ” . . . We should not accept the Government’s invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government’s remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

[**Editors’ Note:** The portion of the Joint Dissent discussing Severability is omitted. It concludes that the portions of ACA it deems unconstitutional cannot be severed from the remainder of the law and that accordingly the entire law should fail.]

§ 2.08 TREATY POWER

Page 147: Insert the following after Note (8):

(9) In *Bond v. United States*, 134 S. Ct. 2077 (2014), the Supreme Court avoided an opportunity to reconsider *Missouri v. Holland*, by narrowly construing a federal statute implementing an international convention on chemical weapons in a criminal case in which a betrayed wife allegedly tried to poison the “other woman.” Although six justices agreed with that disposition, three others concurred in the judgment but would have reached the constitutional issues raised.

In 1998, Congress passed the Chemical Weapons Convention Implementation Act, thereby giving domestic effect to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. In section 229, the Act, in part, made it a federal criminal offense for any person knowingly to “own, possess, or use” a chemical weapon.

Thereafter, Carol Anne Bond, a microbiologist in Pennsylvania, repeatedly applied some toxic chemicals to the car door, mailbox and door knob of her closest friend after discovering that the friend had sexual relations with Bond’s husband. Bond was charged with mail fraud and with possessing and using a chemical weapon in violation of the Act. After the federal district court denied her motion to dismiss the chemical weapons charge on the grounds that section 229 exceeded Congress’s power and violated the Tenth Amendment, Bond entered a conditional guilty plea while reserving her right to appeal. The Court of Appeals for the Third Circuit rejected Bond’s constitutional challenge to her conviction on the grounds that under *Missouri v. Holland* if the treaty was valid the implementing statute was a necessary and proper means to execute the power of the federal government.

In a unanimous decision, the Supreme Court reversed. Consistent with the Court's practice of avoiding constitutional decisions when a case can be resolved on some other basis, six justices, speaking through Chief Justice Roberts, considered whether Congress intended section 229 to apply to "purely local crimes" like those involved here contrary to the usual federal-state balance. It concluded that, absent a clear statement to that effect, it would not presume that Congress authorized "such a stark intrusion into traditional state authority." The Court noted the "unusual" nature of the case and the "appropriately limited" nature of its analysis.

Justices Scalia, Thomas and Alito concurred in the judgment but rejected the majority's approach. They thought that the Act covered Bond's conduct and thus the constitutional question was necessarily reached. Justice Scalia, joined by Justice Thomas, took issue with the proposition from *Missouri v. Holland* that the validity of the treaty (which here was not contested) made the statute "a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. The Necessary and Proper Clause, he argued, empowered Congress to take actions to help make a treaty but not to help implement a treaty already made. For that purpose, Justice Scalia argued, Congress must rely on its other powers. In this case, however, the government had disavowed reliance on the Commerce Clause. The Court should have considered and rejected that assertion from *Missouri v. Holland*.

Justice Thomas, joined by Justice Scalia and Justice Alito in significant part, argued that the original understanding of the Treaty Power limited it to matters of international intercourse, not for regulating "purely domestic affairs." Justice Alito wrote a short opinion to note that he shared Justice Scalia's conclusion that the Act covered Bond's conduct and that he joined Justice Thomas's argument that the original understanding of the treaty power limited it "to agreements that address matters of legitimate international concern," including the Convention regulating chemical weapons.

MEDELLÍN v. TEXAS

552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[**Editor's Note:** In the *Case Concerning Avena and Other Mexican Nationals* (Avena), the International Court of Justice (ICJ) held that 51 Mexican nationals were entitled to review state-court convictions and sentences in the United States based on violations of the Vienna Convention. The ICJ held that their failure to comply with generally applicable state rules governing challenges to criminal convictions did not forfeit rights under the Vienna Convention.]

After *Avena*, the Supreme Court, in a case involving individuals not named in *Avena*, held that, contrary to *Avena*, the Vienna Convention did not preclude the application of state default rules. *Sanchez-Llamas v. Oregon*, 548 U.S. 331. After *Avena*, President George W. Bush determined that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the

decision.” Memorandum to the Attorney General (Feb. 28, 2005).

One of the 51 Mexican nationals, José Ernesto Medellín, had been convicted and sentenced in Texas state court for murder. He applied for a writ of habeas corpus in state court based on *Avena* and President Bush’s memorandum. The Texas Court of Criminal Appeals dismissed Medellín’s application due to his failure to assert in a timely manner his Vienna Convention rights under state law. The court granted certiorari to decide if the ICJ’s judgment in *Avena* was directly enforceable as domestic law in a state court in the United States and the impact of the President’s Memorandum on the States.

Medellín contended that state and federal courts of the United States were bound by *Avena* since under the Supremacy Clause, the treaties which required compliance with it were the ‘Law of the Land’ thereby overruling contrary state limitations on habeas petitions.

No one disputes that the *Avena* decision . . . constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. . . .

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that — while they constitute international law commitments — do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall’s opinion in *Foster v. Neilson*, 2 Pet. 253, 315, 7 L.Ed. 415 (1829), overruled on other grounds, *United States v. Percheman*, 7 Pet. 51, 8 L.Ed. 604 (1833), which held that a treaty is “equivalent to an act of the legislature,” and hence self-executing, when it “operates of itself without the aid of any legislative provision.” When, in contrast, “[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). . . .

A treaty is, of course, “primarily a compact between independent nations.” *Head Money Cases*, 112 U.S. 580, 598, (1884). It ordinarily “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” . . . Only “[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.”

Medellín and his *amici* nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the “relevant obligation” to give the *Avena* judgment binding effect in the domestic courts of the United States. Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law. [Court’s analysis of texts is omitted]

The dissent faults our analysis because it “looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language).” Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is

after all what the Senate looks to in deciding whether to approve the treaty.

The interpretive approach employed by the Court today — resorting to the text — is hardly novel. In two early cases involving an 1819 land-grant treaty between Spain and the United States, Chief Justice Marshall found the language of the treaty dispositive. . . .

As against this time-honored textual approach, the dissent proposes a multifactor, judgment-by-judgment analysis that would “jettiso[n] relative predictability for the open-ended rough-and-tumble of factors.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547, (1995). The dissent’s novel approach to deciding which (or, more accurately, when) treaties give rise to directly enforceable federal law is arrestingly indeterminate. Treaty language is barely probative. Determining whether treaties themselves create federal law is sometimes committed to the political branches and sometimes to the judiciary. Of those committed to the judiciary, the courts pick and choose which shall be binding United States law — trumping not only state but other federal law as well — and which shall not. They do this on the basis of a multifactor, “context-specific” inquiry. Even then, the same treaty sometimes gives rise to United States law and sometimes does not, again depending on an ad hoc judicial assessment.

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution — vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, § 2. The dissent’s understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language — the very language negotiated by the President and approved by the Senate — cannot readily be ascribed to those same Framers.

The dissent’s approach risks the United States’ involvement in international agreements. It is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States’ efforts to negotiate and sign international agreements.

In this case, the dissent — for a grab bag of no less than seven reasons — would tell us that this particular ICJ judgment is federal law. That is no sort of guidance. Nor is it any answer to say that the federal courts will diligently police international agreements and enforce the decisions of international tribunals only when they should be enforced. The point of a non-self-executing treaty is that it “addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” The dissent’s contrary approach would assign to the courts — not the political branches — the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law. . . .

In sum, while the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law

that pre-empts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by “many of our most fundamental constitutional protections.”

III

Medellín next argues that the ICJ’s judgment in *Avena* is binding on state courts by virtue of the President’s February 28, 2005 Memorandum. The United States contends that while the *Avena* judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President’s Memorandum and his power “to establish binding rules of decision that preempt contrary state law.” Accordingly, we must decide whether the President’s declaration alters our conclusion that the *Avena* judgment is not a rule of domestic law binding in state and federal courts.

The United States maintains that the President’s constitutional role “uniquely qualifies” him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and “to do so expeditiously.” We do not question these propositions. In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Such considerations, however, do not allow us to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, “must stem either from an act of Congress or from the Constitution itself.” *Youngstown* (casebook, p. 239); *Dames & Moore v. Regan* (casebook, p. 287). Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. . . .

The United States marshals two principal arguments in favor of the President’s authority “to establish binding rules of decision that preempt contrary state law.” The Solicitor General first argues that the relevant treaties give the President the authority to implement the *Avena* judgment and that Congress has acquiesced in the exercise of such authority. The United States also relies upon an “independent” international dispute-resolution power wholly apart from the asserted authority based on the pertinent treaties. Medellín adds the additional argument that the President’s Memorandum is a valid exercise of his power to take care that the laws be faithfully executed. . . .

We disagree. The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. . . .

The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-

making power between the President and the Senate. The Constitution vests the President with the authority to “make” a treaty. Art. II, § 2. If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented “in mak[ing]” the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, consistent with all other constitutional restraints.

Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that “ ‘[t]he power to make the necessary laws is in Congress; the power to execute in the President.’ ” Indeed, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Youngstown*, 343 U.S., at 587, 72 S. Ct. 863. . . .

A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President — acting on his own — to achieve precisely the same result. We therefore conclude, given the absence of congressional legislation, that the non-self-executing treaties at issue here did not “express[ly] or implied[ly]” vest the President with the unilateral authority to make them self-executing. Accordingly, the President’s Memorandum does not fall within the first category of the *Youngstown* framework.

Indeed, the preceding discussion should make clear that the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to “enforce” a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson’s third category, not the first or even the second.

Each of the two means described above for giving domestic effect to an international treaty obligation under the Constitution — for making law—requires joint action by the Executive and Legislative Branches: The Senate can ratify a self-executing treaty “ma[de]” by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President. It should not be surprising that our Constitution does not contemplate vesting such power in the Executive alone. . . .

The United States nonetheless maintains that the President’s Memorandum should be given effect as domestic law because “this case involves a valid Presidential action in the context of Congressional ‘acquiescence.’” Under the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President’s action falls within the second category — that is, when he “acts in absence of either a congressional grant or denial of authority.” Here, however, as we have explained, the President’s effort to accord domestic effect to the *Avena* judgment does not meet that prerequisite. In any event, even if we were persuaded that congressional acquiescence could support the

President’s asserted authority to create domestic law pursuant to a non-self-executing treaty, such acquiescence does not exist here. . . .

The United States also directs us to the President’s “related” statutory responsibilities and to his “established role” in litigating foreign policy concerns as support for the President’s asserted authority to give the ICJ’s decision in *Avena* the force of domestic law. Congress has indeed authorized the President to represent the United States before the United Nations, the ICJ, and the Security Council, but the authority of the President to represent the United States before such bodies speaks to the President’s international responsibilities, not any unilateral authority to create domestic law. . . .

None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty’s obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to “establish binding rules of decision that preempt contrary state law.”

We thus turn to the United States’ claim that — independent of the United States’ treaty obligations — the Memorandum is a valid exercise of the President’s foreign affairs authority to resolve claims disputes with foreign nations. The United States relies on a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement. In these cases this Court has explained that, if pervasive enough, a history of congressional acquiescence can be treated as a “gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.” *Dames & Moore, supra*.

This argument is of a different nature than the one rejected above. Rather than relying on the United States’ treaty obligations, the President relies on an independent source of authority in ordering Texas to put aside its procedural bar to successive habeas petitions. Nevertheless, we find that our claims-settlement cases do not support the authority that the President asserts in this case.

The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals. They are based on the view that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,” can “raise a presumption that the [action] had been [taken] in pursuance of its consent.” *Dames & Moore, supra*. . . .

Even still, the limitations on this source of executive power are clearly set forth and the Court has been careful to note that “[p]ast practice does not, by itself, create power.” *Dames & Moore, supra*.

The President’s Memorandum is not supported by a “particularly longstanding practice” of congressional acquiescence, but rather is what the United States itself has described as “unprecedented action.” Indeed, the Government has not identified a single

instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws. The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum. . . .

The judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Constitution's Supremacy Clause provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Art. VI, cl. 2. The Clause means that the "courts" must regard "a treaty . . . as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster v. Neilson*, . . . The question here is whether the ICJ's Avena judgment is enforceable now as a matter of domestic law, *i.e.*, whether it "operates of itself without the aid" of any further legislation.

The United States has signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. . . . To understand the issue before us, the reader must keep in mind three separate ratified United States treaties and one ICJ judgment against the United States. . . .

[Discussion of treaties omitted]

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

A

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." Art. VI, cl. 2. In 1796, for example, the Court decided the case of *Ware v. Hylton*, 3 Dall. 199. A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that

required debtors to repay money owed to British creditors into a Virginia state fund. *Id.* The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that “ ‘the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts, theretofore contracted’ ”; and that provision, the creditor argued, effectively nullified the state law. The Court, with each Justice writing separately, agreed with the British creditor, held the Virginia statute invalid, and found that the American debtor remained liable for the debt.

The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) “self-executing.” Justice Iredell, a member of North Carolina’s Ratifying Convention, addressed the matter specifically, setting forth views on which Justice Story later relied to explain the Founders’ reasons for drafting the Supremacy Clause.

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were “executed,” taking effect automatically upon ratification. Other provisions were “executory,” in the sense that they were “to be carried into execution” by each signatory nation “in the manner which the Constitution of that nation prescribes.” Before adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law only if Congress on the American side, or Parliament on the British side, had written them into domestic law.

But, Justice Iredell adds, *after* the Constitution’s adoption, while further parliamentary action remained necessary in Britain (where the “practice” of the need for an “act of parliament” in respect to “any thing of a legislative nature” had “been constantly observed,” further legislative action in respect to the treaty’s debt-collection provision was no longer necessary in the United States. The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well.

“Under this Constitution,” Justice Iredell concluded, “so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for.” Justice Iredell gave examples of provisions that would no longer require further legislative action, such as those requiring the release of prisoners, those forbidding war-related “future confiscations” and “ ‘prosecutions,’ ” and, of course, the specific debt-collection provision at issue in the Ware case itself. . . .

Some 30 years later, the Court returned to the “self-execution” problem. In *Foster*, the Court examined a provision in an 1819 treaty with Spain ceding Florida to the United States; the provision said that “ ‘grants of land made’ ” by Spain before January 24, 1818, “ ‘shall be ratified and confirmed’ ” to the grantee. Chief Justice Marshall, writing for the Court, noted that, as a general matter, one might expect a signatory nation to execute a treaty through a formal exercise of its domestic sovereign authority (e.g., through an act of the legislature). *Id.*, at 314. But in the United States “*a different*

principle” applies. The Supremacy Clause means that, here, a treaty is “the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature” and “operates of itself without the aid of any legislative provision” unless it specifically contemplates execution by the legislature and thereby “addresses itself to the political, not the judicial department.” *Ibid.* (emphasis added). The Court decided that the treaty provision in question was not self-executing; in its view, the words “shall be ratified” demonstrated that the provision foresaw further legislative action.

The Court, however, changed its mind about the result in *Foster* four years later, after being shown a less legislatively oriented, less tentative, but equally authentic Spanish-language version of the treaty. *See United States v. Percheman*. And by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that “it would be a bold proposition” to assert “that an act of Congress must be first passed” in order to give a treaty effect as “a supreme law of the land.” *Lessee of Pollard’s Heirs v. Kibbe*, 14 Pet. 353, 388 (1840) (Baldwin, J., concurring).

Since *Foster* and *Pollard*, this Court has frequently held or assumed that particular treaty provisions are self-executing, automatically binding the States without more.

B

1

In a word, for present purposes, the absence or presence of language in a treaty about a provision’s self-execution proves nothing at all. At best the Court is hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.

2

The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. The provision’s text matters very much. But that is not because it contains language that explicitly refers to self-execution. For reasons I have already explained, one should not expect that kind of textual statement. Drafting history is also relevant. But, again, that is not because it will explicitly address the relevant question. Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision “addresses itself to the political . . . department[s]” for further action or to “the judicial department” for direct enforcement.

In making this determination, this Court has found the provision’s subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts.

One might also ask whether the treaty provision confers specific, detailed individual legal rights. Does it set forth definite standards that judges can readily enforce? Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely “addresses” the judiciary.

Alternatively, would direct enforcement require the courts to create a new cause of action? Would such enforcement engender constitutional controversy? Would it create constitutionally undesirable conflict with the other branches? In such circumstances, it is not likely that the provision contemplates direct judicial enforcement.

Such questions, drawn from case law stretching back 200 years, do not create a simple test, let alone a magic formula. But they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado. And such an approach is all that we need to find an answer to the legal question now before us.

C

Applying the approach just described, I would find the relevant treaty provisions self-executing as applied to the ICJ judgment before us (giving that judgment domestic legal effect) for the following reasons, taken together.

First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. . . .

The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts at least sometimes. And for purposes of this argument, that conclusion is all that I need. The remainder of the discussion will explain why, if ICJ judgments sometimes bind domestic courts, then they have that effect here.

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual’s “rights,” namely, his right upon being arrested to be informed of his separate right to contact his nation’s consul. The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. . . .

Third, logic suggests that a treaty provision providing for “final” and “binding” judgments that “settl[e]” treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing. . . .

To put the same point differently: What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.*,

that Congress must enact specific legislation to enforce it)? . . .

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions similar to those this Court has previously found self-executing-provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth. And the consequence is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions. I thus doubt that the majority is right when it says, "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments." In respect to the 70 treaties that currently refer disputes to the ICJ's binding adjudicatory authority, some multilateral, some bilateral, that is just what the majority has done. . . .

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement. Courts frequently work with criminal procedure and related prejudice. Legislatures do not. Judicial standards are readily available for working in this technical area. Legislative standards are not readily available. Judges typically determine such matters, deciding, for example, whether further hearings are necessary, after reviewing a record in an individual case. Congress does not normally legislate in respect to individual cases. Indeed, to repeat what I said above, what kind of special legislation does the majority believe Congress ought to consider?

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require us to create a new cause of action. . . .

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision. To the contrary, the President favors enforcement of this judgment. Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors favor, rather than militate against, enforcement of the judgment before us.

For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction.

Were the Court for a moment to shift the direction of its legal gaze, looking instead to the Supremacy Clause and to the extensive case law interpreting that Clause as applied to treaties, I believe it would reach a better supported, more felicitous conclusion. That approach, well embedded in Court case law, leads to the conclusion that the ICJ judgment before us is judicially enforceable without further legislative action. . . .

III

Because the majority concludes that the Nation's international legal obligation to enforce the ICJ's decision is not automatically a domestic legal obligation, it must then determine whether the President has the constitutional authority to enforce it. And the majority finds that he does not.

In my view, that second conclusion has broader implications than the majority suggests. The President here seeks to implement treaty provisions in which the United States agrees that the ICJ judgment is binding with respect to the Avena parties. Consequently, his actions draw upon his constitutional authority in the area of foreign affairs. In this case, his exercise of that power falls within that middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question. See *Youngstown* (Jackson, J., concurring). At the same time, if the President were to have the authority he asserts here, it would require setting aside a state procedural law.

It is difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can never take action that would result in setting aside state law. . . . Does the Constitution require the President in each and every such instance to obtain a special statute authorizing his action? On the other hand, the Constitution must impose significant restrictions upon the President's ability, by invoking Article II treaty-implementation authority, to circumvent ordinary legislative processes and to pre-empt state law as he does so.

Previously this Court has said little about this question. It has held that the President has a fair amount of authority to make and to implement executive agreements, at least in respect to international claims settlement, and that this authority can require contrary state law to be set aside.

Given the Court's comparative lack of expertise in foreign affairs; given the importance of the Nation's foreign relations; given the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters; and given the likely future importance of this Court's efforts to do so, I would very much hesitate before concluding that the Constitution implicitly sets forth broad prohibitions (or permissions) in this area.

I would thus be content to leave the matter in the constitutional shade from which it has emerged. Given my view of this case, I need not answer the question. And I shall not try to do so. That silence, however, cannot be taken as agreement with the majority's Part III conclusion.

V

In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court

of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary.

For the reasons set forth, I respectfully dissent.

Chapter III

LIMITS ON NATIONAL POWERS OVER THE STATES

§ 3.01 RESERVED POWERS

Page 158: Insert the following before § 3.02

**ARIZONA STATE LEGISLATURE v. ARIZONA INDEPENDENT
REDISTRICTING COMMISSION ET AL.**

192 L.Ed.2d 704 (2015)

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power. “[P]artisan gerrymanders,” this Court has recognized, “[are incompatible] with democratic principles.” *Vieth v. Jubelirer*, 541 U. S. 267 , 292 (2004) (plurality opinion). Even so, the Court in *Vieth* did not grant relief on the plaintiffs’ partisan gerrymander claim. The plurality held the matter nonjusticiable. JUSTICE KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation.

In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at “ending the practice of gerrymandering and improving voter and candidate participation in elections.” Proposition 106 amended Arizona’s Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the Commission and its map for congressional districts violated the “Elections Clause” of the U.S. Constitution. That Clause, critical to the resolution of this case, provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” Art. I, §4, cl. 1.

The Arizona Legislature’s complaint alleged that “[t]he word ‘Legislature’ in the Elections Clause means [specifically and only] the

representative body which makes the laws of the people,” so read, the Legislature urges, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, “the Legislature” is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature’s complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona’s use of a commission to adopt congressional districts?

We now affirm the District Court’s judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona’s own Legislature.

I A

Direct lawmaking by the people was “virtually unknown when the Constitution of 1787 was drafted.” There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England’s town hall meetings and the submission of early state constitutions to the people for ratification. But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States.

The two main “agencies of direct legislation” are the initiative and the referendum. The initiative operates entirely outside the States’ representative assemblies; it allows “voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls.” While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows “voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls.” “The initiative [thus] corrects sins of omission” by representative bodies, while the “referendum corrects sins of commission.” ... By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State’s Constitution. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. ... For the delegates to Arizona’s constitutional convention, direct lawmaking was a “principal issu[e].” By a margin of more than three to one, the people of Arizona ratified the State’s Constitution,

which included, among lawmaking means, initiative and referendum provisions. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. ...

[Editor's Note: The court found the Arizona legislature had standing to challenge Proposition 106 since "Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan. This dispute, in short, 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" ...

III

... Before focusing directly on the ... constitutional prescription[] in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. ... *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565 (1916); *Hawke v. Smith (No. 1)*, 253 U. S. 221 (1920); and *Smiley v. Holm*, 285 U. S. 355 (1932).

A

Davis v. Hildebrant involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. ... In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, legitimately exercised by the people to disapprove the legislation creating congressional districts. For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.

Hawke v. Smith involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Davis v. Hildebrant*, the Court explained, involved the enactment of legislation, i.e., a redistricting plan, and properly held that "the referendum [was] part of the legislative authority of the State for [that] purpose."

Smiley v. Holm raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor's veto. The Minnesota Supreme Court had held that the Elections Clause placed

redistricting authority exclusively in the hands of the State’s legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota’s legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor. ... In contrast to those other functions, we observed, redistricting “involves lawmaking in its essential features and most important aspect.” Lawmaking, we further noted, ordinarily “must be in accordance with the method which the State has prescribed for legislative enactments.” In Minnesota, the State’s Constitution had made the Governor “part of the legislative process.” And the Elections Clause, we explained, respected the State’s choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to “the Legislature” a ratifying, electoral, or consenting function. Nothing in the Elections Clause, we said, “attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted.”

THE CHIEF JUSTICE, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were “chosen [in each State] by the Legislature thereof.” Art. I, §3. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting “the Legislature” to mean “the people”? Smiley, as just indicated, answers that question. Article I, §3, gave state legislatures “a function different from that of lawgiver,” it made each of them “an electoral body” charged to perform that function to the exclusion of other participants. So too, of the ratifying function. As we explained in *Hawke*, “the power to legislate in the enactment of the laws of a State is derived from the people of the State.” Ratification, however, “has its source in the Federal Constitution” and is not “an act of legislation within the proper sense of the word.”

Constantly resisted by *The Chief Justice*, but well understood in opinions that speak for the Court: “[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.” Thus “the Legislature” comprises the referendum and the Governor’s veto in the context of regulating congressional elections. In the context of ratifying constitutional amendments, in contrast, “the Legislature” has a different identity, one that excludes the referendum and the Governor’s veto.

In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto. The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional barrier to a State’s empowerment of its people by embracing that form of lawmaking. ...

[W]e hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word “legislature.” Samuel Johnson defined “legislature” simply as “[t]he power that makes laws.” Noah Webster defined the term precisely that way as well. *Compendious Dictionary of the English Language* 174 (1806). As to the “power that makes laws” in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. ...

1

The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013), the Clause “was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.” The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. ... Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. ... While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people’s legislative prerogatives—the initiative and the referendum—were not yet in our democracy’s arsenal. The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people’s hands.

2

The Arizona Legislature maintains that, by specifying “the Legislature thereof,” the Elections Clause renders the State’s representative body the sole “component of state government authorized to prescribe . . . regulations . . . for congressional redistricting.” THE CHIEF JUSTICE, in dissent, agrees. But it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” Arizona engaged in definition of that kind when its people placed both

the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority. This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *New State Ice Co. v. Liebmann*, 285 U. S. 262 , 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). ...

We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.

... We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, §4, really says "No" to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61. The Elections Clause is not sensibly read to subject States to that deprivation.

3

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. ...

4

Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating. The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the "Times, Places and Manner" of holding federal elections. Art. I, §4. ...

The importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States' legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails

to consider) election-related measures. Turning the coin, the legislature's responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

* * *

Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes. But the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes. Article I, §4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch v. Maryland*, 4 Wheat. 316, 404-405 (1819). So comprehended, the Clause doubly empowers the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." *The Federalist No. 57*. In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, §3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States.

What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, §4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

The Court’s position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court. The Constitution contains seventeen provisions referring to the “Legislature” of a State, many of which cannot possibly be read to mean “the people.” Indeed, several provisions expressly distinguish “the Legislature” from “the People.” See Art. I, §2; Amdt. 17. This Court has accordingly defined “the Legislature” in the Elections Clause as “the representative body which ma[kes] the laws of the people.”

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in “the Legislature” permits a State to wholly exclude “the Legislature” from redistricting. Arizona’s Commission might be a noble endeavor—although it does not seem so “independent” in practice—but the “fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution.” *INS v. Chadha*, 462 U. S. 919 , 944 (1983). No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution. I respectfully dissent.

I

The majority begins by discussing policy. I begin with the Constitution. . . . The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty “shall” be carried out “in each State by the Legislature thereof.” In Arizona, however, redistricting is not carried out by the legislature. Instead, as the result of a ballot initiative, an unelected body called the Independent Redistricting Commission draws the lines. The key question in the case is whether the Commission can conduct congressional districting consistent with the directive that such authority be exercised “by the Legislature.” . . .

Both the Constitution and our cases make clear that “the Legislature” in the Elections Clause is the representative body which makes the laws of the people.

A

The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority’s words, “retain autonomy to establish their own governmental processes,” if those “processes” violate the United States Constitution. In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way. Art. VI, cl. 2. The majority opinion

therefore largely misses the point.

The relevant question in this case is how to define “the Legislature” under the Elections Clause. The majority opinion ... fails to provide a coherent answer. The Court seems to conclude, based largely on its understanding of the “history and purpose” of the Elections Clause, that “the Legislature” encompasses any entity in a State that exercises legislative power. That circular definition lacks any basis in the text of the Constitution or any other relevant legal source. The majority’s textual analysis consists, in its entirety, of one paragraph citing founding era dictionaries. ... The notion that this definition corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority’s own admission that “[d]irect lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted.” Moreover, Dr. Johnson’s first example of the usage of “legislature” is this: “Without the concurrent consent of all three parts of the legislature, no law is or can be made.” ... Thus, even under the majority’s preferred definition, “the Legislature” referred to an institutional body of representatives, not the people at large.

Any ambiguity about the meaning of “the Legislature” is removed by other founding era sources. “[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives.” The Federalist Papers are replete with references to “legislatures” that can only be understood as referring to representative institutions. Noah Webster’s heralded American Dictionary of the English Language defines “legislature” as “[t]he body of men in a state or kingdom, invested with power to make and repeal laws.” It continues, “The legislatures of most of the states in America . . . consist of two houses or branches.” I could go on, but the Court has said this before. As we put it nearly a century ago, “Legislature” was “not a term of uncertain meaning when incorporated into the Constitution.” “What it meant when adopted it still means for the purpose of interpretation.”

B

The unambiguous meaning of “the Legislature” in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way. When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself. Our precedents new and old have employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole.

The Constitution includes seventeen provisions referring to a State’s “Legislature.” Every one of those references is consistent with the understanding of a legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature—and flatly incompatible with the majority’s reading of “the Legislature” to refer to the people as a whole.

Start with the Constitution’s first use of the term: “The House of

Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” Art. I, §2, cl. 1. This reference to a “Branch of the State Legislature” can only be referring to an institutional body, and the explicit juxtaposition of “the State Legislature” with “the People of the several States” forecloses the majority’s proposed reading.

The next Section of Article I describes how to fill vacancies in the United States Senate: “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.” §3, cl. 2. 1 The references to “the Recess of the Legislature of any State” and “the next Meeting of the Legislature” are only consistent with an institutional legislature, and make no sense under the majority’s reading. The people as a whole (schoolchildren and a few unnamed others excepted) do not take a “Recess.” The list goes on. ...

Each of these provisions offers strong structural indications about what “the Legislature” must mean. But the most powerful evidence of all comes from the Seventeenth Amendment. Under the original Constitution, Senators were “chosen by the Legislature” of each State, Art. I, §3, cl. 1, while Members of the House of Representatives were chosen “by the People,” Art. I, §2, cl. 1. That distinction was critical to the Framers. As James Madison explained, the Senate would “derive its powers from the States,” while the House would “derive its powers from the people of America.” The Federalist No. 39, at 244. George Mason believed that the power of state legislatures to select Senators would “be a reasonable guard” against “the Danger . . . that the national, will swallow up the State Legislatures.” Not everyone agreed. James Wilson proposed allowing the people to elect Senators directly. His proposal was rejected ten to one.

Before long, reformers took up Wilson’s mantle and launched a protracted campaign to amend the Constitution. That effort began in 1826[.] ... Over the next three-quarters of a century, no fewer than 188 joint resolutions proposing similar reforms were introduced in both Houses of Congress. At no point in this process did anyone suggest that a constitutional amendment was unnecessary because “Legislature” could simply be interpreted to mean “people.” In fact, as the decades rolled by without an amendment, 28 of the 45 States settled for the next best thing by holding a popular vote on candidates for Senate, then pressuring state legislators into choosing the winner. All agreed that cutting the state legislature out of senatorial selection entirely would require nothing less than to “Strike out” the original words in the Constitution and “insert, ‘elected by the people’” in its place.

Yet that is precisely what the majority does to the Elections Clause today—amending the text not through the process provided by Article V, but by judicial decision. The majority’s revision renders the Seventeenth Amendment an 86-year waste of time, and singles out the Elections Clause as the only one of the

Constitution’s seventeen provisions referring to “the Legislature” that departs from the ordinary meaning of the term. ... The majority observes that “the Legislature” of a State may perform different functions under different provisions of the Constitution. All true. The majority, however, leaps from the premise that “the Legislature” performs different functions under different provisions to the conclusion that “the Legislature” assumes different identities under different provisions. ...

The majority attempts to draw support from precedent, but our cases only further undermine its position. In *Hawke*, this Court considered the meaning of “the Legislatur[e]” in Article V, which outlines the process for ratifying constitutional amendments. The Court concluded that “Legislature” meant “the representative body which ma[kes] the laws of the people.” The Court then explained that “[t]he term is often used in the Constitution with this evident meaning.” The Court proceeded to list other constitutional provisions that assign different functions to the “Legislature,” just as the majority does today. Unlike the majority today, however, the Court in *Hawke* never hinted that the meaning of “Legislature” varied across those different provisions because they assigned different functions. The Court concluded that “Legislature” refers to a representative body, whatever its function. ... Remarkably, the majority refuses to even acknowledge the definition of “the Legislature” adopted in both *Smiley* and *Hawke*, and instead embraces the interpretation that this Court unanimously rejected more than 80 years ago.

C

The history of the Elections Clause further supports the conclusion that “the Legislature” is a representative body. The first known draft of the Clause to appear at the Constitutional Convention provided that “Each state shall prescribe the time and manner of holding elections.” After revision by the Committee of Detail, the Clause included the important limitation at issue here: “The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States.” The insertion of “the legislature” indicates that the Framers thought carefully about which entity within the State was to perform congressional districting. And the parallel between “the legislature of each state” and “the legislature of the United States” further suggests that they meant “the legislature” as a representative body. ...

The majority contends that its counterintuitive reading of “the Legislature” is necessary to advance the “animating principle” of popular sovereignty. But the ratification of the Constitution was the ultimate act of popular sovereignty, and the people who ratified the Elections Clause did so knowing that it assigned authority to “the Legislature” as a representative body. The Elections Clause was not, as the majority suggests, an all-purpose “safeguard against manipulation of electoral rules by politicians.” Like most provisions of the Constitution, the Elections Clause reflected a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like. ...

D

In addition to text, structure, and history, several precedents interpreting the Elections Clause further reinforce that “the Legislature” refers to a representative body. The first precedent comes not from this Court, but from Congress. Acting under its authority to serve as “the Judge of the Elections, Returns and Qualifications of its own Members,” Art. I, §5, cl. 1, the House of Representatives in 1866 confronted a dispute about who should be seated as the Congressman from the Fifth District of Michigan. ... The House Elections Committee ... decided, and the full House agreed, that “the Legislature” in the Elections Clause was the “legislature eo nomine”—the legislature by that name, a representative body. ...

The next relevant precedent is this Court’s decision in *McPherson v. Blacker*, 146 U. S. 1 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” §1, cl. 2. The question was whether the state legislature, as a body of representatives, could divide authority to appoint electors across each of the State’s congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in “the Legislature” of the State. That power, the Court explained, “can neither be taken away nor abdicated.” ...

* * *

The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, “the Legislature” is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded.

The majority’s contrary understanding requires it to accept a definition of “the Legislature” that contradicts the term’s plain meaning, creates discord with the Seventeenth Amendment and the Constitution’s many other uses of the term, makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority’s decision is to erase the words “by the Legislature thereof” from the Elections Clause. That is a judicial error of the most basic order. “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible.” *Marbury v. Madison*, 1 Cranch 137 , 174 (1803).

...

III

Justice Jackson once wrote that the Constitution speaks in “majestic generalities.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 , 639 (1943). In

many places it does, and so we have cases expounding on “freedom of speech” and “unreasonable searches and seizures.” Amdts. 1, 4. Yet the Constitution also speaks in some places with elegant specificity. A Member of the House of Representatives must be 25 years old. Art. I, §2, cl. 2. Every State gets two Senators. Art. I, §3, cl. 1. And the times, places, and manner of holding elections for those federal representatives “shall be prescribed in each State by the Legislature thereof.” Art. I, §4, cl. 1.

For the reasons I have explained, there is no real doubt about what “the Legislature” means. The Framers of the Constitution were “practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.” *South Carolina v. United States*, 199 U. S. 437, 449 (1905). We ought to give effect to the words they used.

The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth v. Jubelirer*, 541 U. S. 267 (2004). But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law’s virtues as a policy innovation cannot redeem its inconsistency with the Constitution. ...

* * *

The people of Arizona have concerns about the process of congressional redistricting in their State. For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers who won passage of the Seventeenth Amendment. Indeed, several constitutional amendments over the past century have involved modifications of the electoral process. Amdts. 19, 22, 24, 26. Unfortunately, today’s decision will only discourage this democratic method of change. Why go through the hassle of writing a new provision into the Constitution when it is so much easier to write an old one out?

I respectfully dissent.

§ 3.04 IMMUNITY FROM SUIT

Page 189: Insert the following before Alden v. Maine as Note (10):

(10) In *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) the Court held that *Ex parte Young* allows a federal court to adjudicate a lawsuit brought by a state agency for prospective injunctive relief

against officials of the same State. A 6-2 decision, written by Justice Scalia, rejected the argument that the principle of sovereign immunity precluded such an action.

The somewhat anomalous procedural situation arose after a federal statute offered States federal money to provide certain services to individuals with developmental disabilities but subject to the condition that the State establish a “protection and advocacy” (P & A) system to protect the intended beneficiaries. The State could empower a state agency or private nonprofit entity to discharge the P & A functions which included investigating incidents of neglect and abuse. Virginia was one of only eight states that designated a state agency rather than a private entity. When the Virginia state agency sought to obtain certain records from Virginia state officials at state run mental institutions incident to a P & A investigation, the officials refused based on a claim of privilege regarding certain medical records. The Virginia state agency then brought suit in federal court at which point the state officials moved to dismiss the action on the grounds that they were protected from suit by the doctrine of sovereign immunity related to the Eleventh Amendment.

Although Justice Scalia recognized the case presented a novel situation, he concluded that the suit was “consistent with our precedents and does not offend the distinctive interests protected by sovereign immunity.” Conventionally, in considering whether the Eleventh Amendment is an impediment to a suit against state officials the court asks whether the “complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” This case clearly met that straightforward inquiry. Had a private party brought the same suit it would clearly fall within the terms of the *Ex parte Young* exception, a “fiction” designed to allow federal courts to vindicate federal rights. The identity of the plaintiff should not affect the analysis. Any insult to state dignity, if any, was not one prohibited by the Constitution.

Chief Justice Roberts (joined by Justice Alito) dissented on the grounds that the Court’s holding constituted a “substantial and novel expansion” of the “narrow” *Ex parte Young* exception. The absence of analogous suits at the time of the founding and since provided grounds not to entertain a suit brought by a state agency against state officials.

Page 193: Insert the following as Note (9):

(9) **ALABAMA v. NORTH CAROLINA**, 560 U.S. 330 (2010), addressed, among other issues, whether a private entity created under the Interstate Compact Clause could sue a State without being barred by sovereign immunity in a situation in which it asserts only the claims which States (whose claims are not barred by sovereign immunity) also raise. After Congress consented to multiple interstate compacts to create -regional facilities to dispose of radioactive waste, Alabama, Florida, Tennessee, Virginia and the Southeast Interstate Low-Level Radioactive Management Commission sued

North Carolina for monetary sanctions for North Carolina's alleged failure to comply with the compact. North Carolina claimed that the Eleventh Amendment and structural principle of sovereign immunity barred the Commission's claim.

The Court, in a portion of the opinion which seven members joined, rejected North Carolina's argument. The Court assumed, but did not decide, that sovereign immunity considerations would normally bar the suit of the Commission, as an entity created through the Interstate Compact Clause. But here Justice SCALIA's majority opinion relied on the Supreme Court decision of *Arizona v. California*, 460 U.S. 605 (1983), in holding state sovereign immunity did not bar the private commission's suit when it asserted the same claims and sought the same relief as the plaintiff States whose suits were not barred. In that case, the Court had allowed several Indian Tribes to participate alongside the United States and various States in a suit against several States, reasoning in part that "our judicial power over the controversy is not enlarged. . . , and the State's sovereign immunity protected by the Eleventh Amendment is not compromised" by the inclusion of the Indian Tribes in the case. Here, the Court concluded that "[t]he Commission's claims under the Compact-related Counts are wholly derivative of the State's claims. . . . While the Commission may not bring them in a stand-alone action under this Court's original jurisdiction, it may assert them in this Court alongside the plaintiff States. Our judicial power over the controversy is not enlarged. . . , and the State's sovereign immunity protected by the Eleventh Amendment is not compromised."

Chief Justice Roberts, joined by Justice Thomas, dissented on the issue of sovereign immunity. The Chief Justice took a strict textual approach to the Eleventh Amendment, arguing the majority's reasoning was contrary to the language of the Constitution. "There is no carve-out for suits 'prosecuted' by private parties so long as those parties 'do not seek to bring new claims or issues.'" The Chief Justice argued that the relief - a plaintiff sought against a State was irrelevant to whether its suit was barred since the Eleventh Amendment protects a State's privilege not to be sued.

The dissent criticized *Arizona v. California* which the Chief Justice said was "built on sand" since its relevant portion "is almost wholly unreasoned" and since the Court's subsequent sovereign immunity jurisprudence eroded "*Arizona's* already weak foundations." The majority specifically declined to consider whether *Arizona* should be overruled since North Carolina did not ask for that relief and the parties had not argued the point.

How strong is the Chief Justice's textual argument? The Eleventh Amendment does not make jurisdiction over a suit against a State turn on the relief sought. But does its text apply to the parties in this suit?

(10) In *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), the Court held (6-2) that a state did not waive its sovereign immunity from suit for money damages by accepting federal funds under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Courts impose stringent standards for state waivers of sovereign immunity and the statutory language, which authorized "appropriate relief against a government," did not "so clearly and unambiguously waive sovereign immunity for damages" to allow the Court to conclude that the state had consented to such liability.

(11) The Court continued its uncertain course in applying its congruence and

proportionality test to decide when Congress can properly abrogate the states' sovereign immunity when it decided *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), during the October, 2011 term. Although the Family and Medical Leave Act, 29 U.S.C. 2601 et seq (FMLA) clearly abrogated state sovereign immunity, the Court held the act unconstitutional insofar as it allowed a private suit against a state pursuant to section 2612 (a)(1)(d) which required employers, including state employers, to grant unpaid leave for self-care for serious medical conditions under specified circumstances.

Significantly, *Coleman* involved a different FMLA provision from the one addressed in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), (casebook, pp. 192, 357) and Justice Kennedy's plurality opinion specifically distinguished the decision on that point. *Coleman*, 132 S. Ct. at 1334. Whereas the Court in *Hibbs* found that sufficient evidence informed Congress's decision that states had engaged in prohibited gender-based discrimination such that the remedy of requiring state employers to allow family-care leave was congruent and proportional, the self-care provision lacked sufficient evidence "of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Id.* Congress could not abrogate state sovereign immunity, the plurality opinion concluded, unless it could "identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations." *Id.*, at 1338.

Although Justice Scalia concurred in the decision of the case striking down the statutory abrogation of state sovereign immunity regarding the self-care remedy, he did not join Justice Kennedy's opinion owing to his misgivings regarding the congruence and proportionality test which he had asserted in his concurring opinion in *Tennessee v. Lane*, 541 U.S. 509(2004) (casebook, pp. 192, 358). Justice Scalia characterized the opinions of both the plurality and dissent as proper applications of the congruence and proportionality test which supported his conclusion that the test allowed "varying outcomes" which "make no sense." *Id.* at 1338. Instead of the "flabby [congruence and proportionality] test" which invited "judicial arbitrariness and policy-driven decision," Justice Scalia again advocated "an approach that is properly tied to the text of §5." *Id.*

Speaking for herself and Justice Breyer, and with one exception noted below for Justices Sotomayor and Kagan, Justice Ginsburg dissented largely on the grounds that the self-care provision satisfied the congruence and proportionality test. *Id.*, at 1339. Whereas Justices Ginsburg and Breyer, in a footnote, adhered to the view they had taken in prior sovereign immunity cases extending to *Seminole Tribe* (casebook, p. 182) that Congress could properly abrogate state sovereign immunity under Article I powers and could act under section 5 of the Fourteenth Amendment whenever it could "reasonably conclude" that such legislation was an appropriate way to enforce a basic equal protection requirement. *Id.* Justices Sotomayor and Kagan, who were not on the Court when those cases were decided, did not join that footnote.

Chapter IV

FEDERALISM AND STATE REGULATORY POWER

§ 4.01 FEDERAL SUPREMACY

Page 199: Insert the following after Note (4):

HAYWOOD v. DROWN

552 U.S. 491, 129 S. Ct. 2108, 170 L. Ed. 2d 190 (2009)

JUSTICE STEVENS delivered the opinion of the Court.

In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. § 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state law. While that rule is generally applicable to New York’s supreme courts — the State’s trial courts of general jurisdiction — New York’s Correction Law § 24 divests those courts of jurisdiction over § 1983 suits that seek money damages from correction officers. New York thus prohibits the trial courts that generally exercise jurisdiction over § 1983 suits brought against other state officials from hearing virtually all such suits brought against state correction officers. The question presented is whether that exceptional treatment of a limited category of § 1983 claims is consistent with the Supremacy Clause of the United States Constitution.

I

Petitioner, an inmate in New York’s Attica Correctional Facility, commenced two § 1983 actions against several correction employees alleging that they violated his civil rights in connection with three prisoner disciplinary proceedings and an altercation . . . The trial court dismissed the actions on the ground that, under [New York Correction Law § 24] it lacked jurisdiction to entertain any suit arising under state or federal law seeking money damages from correction officers for actions taken in the scope of their employment. The intermediate appellate court summarily affirmed the trial court.

The New York Court of Appeals, by a 4-to-3 vote, also affirmed the dismissal of petitioner’s damages action. The Court of Appeals rejected petitioner’s argument that Correction Law § 24’s jurisdictional limitation interfered with § 1983 and therefore ran afoul of the Supremacy Clause of the United States Constitution. The majority reasoned that, because Correction Law § 24 treats state and federal damages actions against correction officers equally (that is, neither can be brought in New York courts), the statute should be properly characterized as a “neutral state rule regarding the administration of the courts” and therefore a “valid excuse” for the State’s refusal to entertain the federal cause of action. . . . Recognizing the importance of the question decided by the New York Court of Appeals, we granted certiorari. We now reverse.

II

Motivated by the belief that damages suits filed by prisoners against state correction officers were by and large frivolous and vexatious, New York passed Correction Law § 24. The statute employs a two-step process to strip its courts of jurisdiction over such damages claims and to replace those claims with the State's preferred alternative. The provision states in full:

“1. No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of employment and in the discharge of the duties by such officer or employee.

“2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state.”

Thus, under this scheme, a prisoner seeking damages from a correction officer will have his claim dismissed for want of jurisdiction and will be left, instead, to pursue a claim for damages against an entirely different party (the State) in the Court of Claims — a court of limited jurisdiction.

For prisoners seeking redress, pursuing the Court of Claims alternative comes with strict conditions. In addition to facing a different defendant, plaintiffs in that Court are not provided with the same relief, or the same procedural protections, made available in § 1983 actions brought in state courts of general jurisdiction. Specifically, under New York law, plaintiffs in the Court of Claims must comply with a 90-day notice requirement; are not entitled to a jury trial; have no right to attorney's fees; and may not seek punitive damages or injunctive relief.

III

This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law “together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” Although § 1983, a Reconstruction-era statute, was passed “to interpose the federal courts between the States and the people, as guardians of the people's federal rights,” state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law. . . .

So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts[.]” Focusing on the latter

circumstance, we have emphasized that only a neutral jurisdictional rule will be deemed a “valid excuse” for departing from the default assumption that “state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”

In determining whether a state law qualifies as a neutral rule of judicial administration, our cases have established that a State cannot employ a jurisdictional rule “to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. . . .

It is principally on this basis that Correction Law § 24 violates the Supremacy Clause. In passing Correction Law § 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. Because it regards these suits as too numerous or too frivolous (or both), the State’s longstanding policy has been to shield this narrow class of defendants from liability when sued for damages. The State’s policy, whatever its merits, is contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. As we have unanimously recognized, “[a] State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make.” That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability.

IV

While our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim based on a policy disagreement, we have yet to confront a statute like New York’s that registers its dissent by divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim. The New York Court of Appeals’ holding was based on the misunderstanding that this equal treatment of federal and state claims rendered Correction Law § 24 constitutional. To the extent our cases have created this misperception, we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action. . . .

Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear. . . . Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.

In addition to giving too much weight to equality of treatment, respondents mistakenly treat this case as implicating the “great latitude [States enjoy] to establish the structure and jurisdiction of their own courts.” Although Correction Law § 24 denies state

courts authority to entertain damages actions against correction officers, this case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983. The State of New York has made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions. . . . It is only a particular species of suits — those seeking damages relief against correction officers — that the State deems inappropriate for its trial courts.

We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy. A State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution. We have never treated a State’s invocation of “jurisdiction” as a trump that ends the Supremacy Clause inquiry, and we decline to do so in this case. . . .

Accordingly, the dissent’s fear that “no state jurisdictional rule will be upheld as constitutional” is entirely unfounded. Our holding addresses only the unique scheme adopted by the State of New York — a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners). Based on the belief that damages suits against correction officers are frivolous and vexatious, Correction Law § 24 is effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.

V

The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join as to Part III, dissenting.

The Court holds that New York Correction Law Annotated § 24, which divests New York’s state courts of subject-matter jurisdiction over suits seeking money damages from correction officers, violates the Supremacy Clause of the Constitution, Art. VI, cl. 2, because it requires the dismissal of federal actions brought in state court under 42 U.S.C. § 1983. I disagree. Because neither the Constitution nor our precedent requires New York to open its courts to § 1983 federal actions, *I respectfully dissent*. . . .

III

Even accepting the entirety of the Court’s precedent in this area of the law, however, I still could not join the majority’s resolution of this case as it mischaracterizes

and broadens this Court’s decisions. The majority concedes not only that NYCLA § 24 is jurisdictional, but that the statute is neutral with respect to federal and state claims. Nevertheless, it concludes that the statute violates the Supremacy Clause because it finds that “equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.” This conclusion is incorrect in light of Court precedent for several reasons.

A

The majority mischaracterizes this Court’s precedent when it asserts that jurisdictional neutrality is “the beginning, not the end, of the Supremacy Clause analysis.” . . . “[S]ubject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, [and] define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power.” That “one limitation” is the neutrality principle that the Court has found in the Supremacy Clause. . . . That is all this Court’s precedent requires.

The majority’s assertion that jurisdictional neutrality is not the touchstone because “[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how even-handed it may appear,” reflects a misunderstanding of the law. A jurisdictional statute simply deprives the relevant court of the power to decide the case altogether. Such a statute necessarily operates without prejudice to the adjudication of the matter in a competent forum. Jurisdictional statutes therefore by definition are incapable of undermining federal law. NYCLA § 24 no more undermines § 1983 than the amount-in-controversy requirement for federal diversity jurisdiction undermines state law. The relevant law (state or federal) remains fully operative in both circumstances. The sole consequence of the jurisdictional barrier is that the law cannot be enforced in one particular judicial forum.

As a result, the majority’s focus on New York’s reasons for enacting this jurisdictional statute is entirely misplaced. The States “remain independent and autonomous within their proper sphere of authority.” *Printz v. United States*, (casebook, 179). New York has the organic authority, therefore, to tailor the jurisdiction of state courts to meet its policy goals.

It may be true that it was “Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.” But Congress has not enforced that judgment by statutorily requiring the States to open their courts to *all* § 1983 claims. And this Court has “never held that state courts must entertain § 1983 suits.” Our decisions have held only that the States cannot use jurisdictional statutes to discriminate against federal claims. Because NYCLA § 24 does not violate this command, any policy-driven reasons for depriving jurisdiction over a “federal claim in addition to an identical state claim,” are irrelevant for purposes of the Supremacy Clause. . . .

NYCLA § 24 is not merely “denominated” as jurisdictional — it actually is jurisdictional. The New York courts, therefore, have not declared a “category” of § 1983

claims to be “ ‘frivolous’ ” or to have “ ‘no merit’ ” in order to “ ‘relieve congestion’ ” in the state-court system. These courts have simply recognized that they lack the power to adjudicate this category of claims regardless of their merit.

At bottom, the majority’s warning that upholding New York’s law “would permit a State to withhold a forum for the adjudication of any federal cause of action with which it disagreed as long as the policy took the form of a jurisdictional rule” is without any basis in fact. This Court’s jurisdictional neutrality command already guards against antifederal discrimination. A decision upholding NYCLA § 24, which fully adheres to that rule, would not “circumvent our prior decisions.” It simply would adhere to them. . . .

Indeed, the majority’s novel approach breaks the promise that the States still enjoy “ ‘great latitude . . . to establish the structure and jurisdiction of their own courts.’ ” It cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts’ purview simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers. The Supremacy Clause does not fossilize the jurisdiction of state courts in their original form. Under this Court’s precedent, States remain free to alter the structure of their judicial system even if that means certain federal causes of action will no longer be heard in state court, so long as States do so on nondiscriminatory terms. Today’s decision thus represents a dramatic and unwarranted expansion of this Court’s precedent. . . .

§ 4.06 STATE REGULATION OF COMMERCE; THE DORMANT COMMERCE CLAUSE

[3] Facially Neutral Statutes

Page 227: Insert the following before [4] Market Participation Exception

COMPTROLLER OF THE TREASURY V. WYNNE, 135 S. Ct. 1787 (2015). The Court (5-4) held that Maryland violated the Dormant Commerce Clause by denying its residents a full credit against income taxes they paid to other states on income earned elsewhere, a practice which had the effect of encouraging taxpayers to pursue intrastate, rather than interstate, economic activity. The decision split the Court in an unconventional way, with the majority consisting of Chief Justice Roberts, and Justices Kennedy, Breyer, Alito and Sotomayor, while Justices Scalia, Thomas, Ginsburg and Kagan dissented.

Maryland’s personal income tax on state residents consisted of a state and county portion. Although Maryland allowed residents a credit for income tax paid to other states as against the state tax, it did not allow such a credit against the county tax. Maryland also taxed nonresidents on income earned in Maryland. The Wynnes, Maryland residents who earned much of their income out-of-state, argued that the absence of the county credit meant that their out-of-state income was subject to a double tax (by the state where earned and by Maryland’s county tax) and that this practice violated the Dormant Commerce Clause.

The majority, speaking through Justice Alito, agreed. It reasoned that to comply with the Dormant Commerce Clause, the state tax must be internally consistent, a determination that depended on examining Maryland's tax scheme in its entirety, including the fact that Maryland taxed nonresidents on income they earned within Maryland.

Under the internal inconsistency test the Court asks whether intrastate commerce would be discriminated against if every state adopted Maryland's approach. The system would discriminate against interstate commerce since instate residents would not receive credit for their county taxes paid elsewhere and nonresidents would be taxed on income both in the state of residence and the source state.

The dissenters did not argue that Maryland's tax was internally consistent. Justice Scalia, joined generally by Justice Thomas, castigated the Dormant Commerce Clause as "a judge invented rule." Although Justice Scalia allowed that the Dormant Commerce Clause might, as the majority contended, have deep roots, so, too, do "many weeds." Notwithstanding his disdain for the doctrine, Justice Scalia, based on principles of stare decisis, followed his familiar path of applying the Dormant Commerce Clause only to strike down a tax or other law that facially discriminates against interstate commerce or is indistinguishable from a tax previously held unconstitutional. Justice Thomas shared Justice Scalia's view of the Dormant Commerce Clause but would accord it even less deference. Rather than following Justice Scalia's stare decisis principle, he would jettison the doctrine as inconsistent with the Constitution's original understanding.

Justice Ginsburg, joined by Justices Scalia and Kagan, accepted the Dormant Commerce Clause and internal consistency tests but argued that the latter did not apply here. Prior cases using it did not involve income taxes on natural persons who resided in the state and presumably had political power there. She pointed out that States might have legitimate interests in protecting residents from double taxation and in taxing insiders and out-of-staters since both received benefits but it could not pursue both goals. The majority, however, saw no reason to treat personal income tax as differently than corporate income taxes.

[4] Market Participant Exception

Page 231: Insert the following after Note (7):

DEPARTMENT OF REVENUE OF KENTUCKY v. GEORGE W. DAVIS

553 U.S. 328, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)

JUSTICE SOUTER delivered the opinion of the Court, except as to Part III-B.

For the better part of two centuries States and their political subdivisions have issued bonds for public purposes, and for nearly half that time some States have

exempted interest on their own bonds from their state income taxes, which are imposed on bond interest from other States. The question here is whether Kentucky’s version of this differential tax scheme offends the Commerce Clause. We hold that it does not.

I

A

. . . The ostensible reason for this regime is the attractiveness of tax-exempt bonds at “lower rates of interest . . . than that paid on taxable . . . bonds of comparable risk.” . . . [T]he Commonwealth’s tax benefit to residents who buy its bonds makes lower interest rates acceptable, while limiting the exception to Kentucky bonds raises in-state demand for them without also subsidizing other issuers.

The significance of the scheme is immense. Between 1996 and 2002, Kentucky and its subdivisions issued \$7.7 billion in long-term bonds to pay for spending on transportation, public safety, education, utilities, and environmental protection, among other things. Across the Nation during the same period, States issued over \$750 billion in long-term bonds, with nearly a third of the money going to education, followed by transportation (13%) and utilities (11%). Municipal bonds currently finance roughly two-thirds of capital expenditures by state and local governments.

Funding the work of government this way follows a tradition going back as far as the 17th century. . . . Differential tax schemes like Kentucky’s have a long pedigree, too. State income taxation became widespread in the early 20th century. . . . Today, 41 States have laws like the one before us.

B

Petitioners (for brevity, Kentucky or the Commonwealth) collect the Kentucky income tax. Respondents George and Catherine Davis are Kentucky residents who paid state income tax on interest from out-of-state municipal bonds, and then sued the tax collectors in state court on a refund claim that Kentucky’s differential taxation of municipal bond income impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the National Constitution. The trial court granted judgment to the Commonwealth, relying in part on our cases recognizing the “market-participant” exception to the dormant Commerce Clause limit on state regulation. The Court of Appeals of Kentucky reversed. *See* 197 S.W.3d 557 (2006). . . . We granted certiorari owing to the conflict this raised on an important question of constitutional law, and because the result reached casts constitutional doubt on a tax regime adopted by a majority of the States. We now reverse.

II

The Commerce Clause empowers Congress “[t]o regulate Commerce . . . among the several States,” Art. I, § 8, cl. 3, and although its terms do not expressly restrain “the several States” in any way, we have sensed a negative implication in the provision since the early days. The modern law of what has come to be called the dormant Commerce Clause is driven by concern about “economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” The point is to “effectuat[e] the Framers’ purpose to ‘prevent a State from

retreating into [the] economic isolation,’ ” “that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” The law has had to respect a cross purpose as well, for the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.

Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. A discriminatory law is “virtually *per se* invalid,” and will survive only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Absent discrimination for the forbidden purpose, however, the law “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State laws frequently survive this *Pike* scrutiny.

Some cases run a different course, however, and an exception covers States that go beyond regulation and themselves “participat[e] in the market” so as to “exercis[e] the right to favor [their] own citizens over others.” This “market-participant” exception reflects a “basic distinction . . . between States as market participants and States as market regulators,” “[t]here [being] no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” Thus, in *Alexandria Scrap*, we found that a state law authorizing state payments to processors of automobile hulks validly burdened out-of-state processors with more onerous documentation requirements than their in-state counterparts. Likewise, *Reeves* accepted South Dakota’s policy of giving in-state customers first dibs on cement produced by a state-owned plant, and *White* held that a Boston executive order requiring half the workers on city-financed construction projects to be city residents passed muster.

Our most recent look at the reach of the dormant Commerce Clause came just last Term, in a case decided independently of the market participation precedents. *United Haulers* upheld a “flow control” ordinance requiring trash haulers to deliver solid waste to a processing plant owned and operated by a public authority in New York State. We found “[c]ompelling reasons” for “treating [the ordinance] differently from laws favoring particular private businesses over their competitors.” State and local governments that provide public goods and services on their own, unlike private businesses, are “vested with the responsibility of protecting the health, safety, and welfare of [their] citizens,” and laws favoring such States and their subdivisions may “be directed toward any number of legitimate goals unrelated to protectionism. And if more had been needed to show that New York’s object was consequently different from forbidden protectionism, we pointed out that “the most palpable harm imposed by the ordinances — more expensive trash removal — [was] likely to fall upon the very people who voted for the laws,” rather than out-of-state interests. Being concerned that a “contrary approach . . . would lead to unprecedented and unbounded interference by the courts with state and local government,” we held that the ordinance did “not discriminate against interstate commerce for purposes of the dormant Commerce Clause.”

III

A

It follows *a fortiori* from *United Haulers* that Kentucky must prevail. In *United Haulers*, we explained that a government function is not susceptible to standard dormant

Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. This logic applies with even greater force to laws favoring a State’s municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with the venerable history we have already sketched. . . . Bond proceeds are thus the way to shoulder the cardinal civic responsibilities listed in *United Haulers*: protecting the health, safety, and welfare of citizens. It should go without saying that the apprehension in *United Haulers* about “unprecedented . . . interference” with a traditional government function is just as warranted here, where the Davises would have us invalidate a century-old taxing practice.

In fact, this emphasis on the public character of the enterprise supported by the tax preference is just a step in addressing a fundamental element of dormant Commerce Clause jurisprudence, the principle that “any notion of discrimination assumes a comparison of substantially similar entities.” *United Haulers*. In *Bonaparte v. Tax Court*, 104 U.S. 592, 26 L.Ed. 845 (1882), a case involving the Full Faith and Credit Clause, we held that a foreign State is properly treated as a private entity with respect to state-issued bonds that have traveled outside its borders. Viewed through this lens, the Kentucky tax scheme parallels the ordinance upheld in *United Haulers*: it “benefit[s] a clearly public [issuer, that is, Kentucky], while treating all private [issuers] exactly the same.” There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being “substantially similar” to the other bond issuers in the market.

Thus, *United Haulers* provides a firm basis for reversal. Just like the ordinances upheld there, Kentucky’s tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does “not ‘discriminate against interstate commerce’ for purposes of the dormant Commerce Clause.”

B

[Editor’s Note: Section III B is not the opinion of the Court]

This case, like *United Haulers*, may also be seen under the broader rubric of the market participation doctrine, although the Davises say that market participant cases are inapposite here. In their view, we may not characterize state action under the Kentucky statutes as market activity for public purposes, because this would ignore a fact absent in *United Haulers* but central here: this is a case about differential taxation, and a difference that amounts to a heavier tax burden on interstate activity is forbidden.

The Davises make a fair point to the extent that they argue that Kentucky acts in two roles at once, issuing bonds and setting taxes, and if looked at as a taxing authority it seems to invite dormant Commerce Clause scrutiny of its regulatory activity.

But there is no ignoring the fact that imposing the differential tax scheme makes sense only because Kentucky is also a bond issuer. The Commonwealth has entered the market for debt securities, just as Maryland entered the market for automobile hulks, see *Alexandria Scrap*, and South Dakota entered the cement market, see *Reeves*. It simply blinks this reality to disaggregate the Commonwealth’s two roles and pretend that in exempting the income from its securities, Kentucky is independently regulating or regulating in the garden variety way that has made a State vulnerable to the dormant Commerce Clause. States that regulated the price of milk, see, e.g., *West Lynn Creamery*,

Inc. v. Healy, Baldwin v. G.A.F. Seelig, Inc., did not keep herds of cows or compete against dairy producers for the dollars of milk drinkers. But when Kentucky exempts its bond interest, it is competing in the market for limited investment dollars, alongside private bond issuers and its sister States, and its tax structure is one of the tools of competition.

The failure to appreciate that regulation by taxation here goes hand in hand with market participation by selling bonds allows the Davises to advocate the error of focusing exclusively on the Commonwealth as regulator and ignoring the Commonwealth as bond seller, just as the state court did in saying that “ ‘when a state chooses to tax its citizens, it is acting as a market regulator[,]’ not as a market participant.” To indulge in this single vision, however, would require overruling most, if not all, of the cases on point decided since *Alexandria Scrap*.

White, for example, also scrutinized a government acting in dual roles. The mayor of Boston promulgated an executive order that bore the hallmarks of regulation: it applied to every construction project funded wholly or partially by city funds (or funds administered by the city), and it imposed general restrictions on the hiring practices of private contractors, [.] . . . At the same time, the city took part in the market by “expend[ing] its own funds in entering into construction contracts for public projects.” . . . Similarly, in *Alexandria Scrap*, Maryland employed the tools of regulation to invigorate its participation in the market for automobile hulks. . . .

In each of these cases the commercial activities by the governments and their regulatory efforts complemented each other in some way, and in each of them the fact of tying the regulation to the public object of the foray into the market was understood to give the regulation a civic objective different from the discrimination traditionally held to be unlawful: in the paradigm of unconstitutional discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by local private actors, not by governments and those they employ to fulfill their civic objectives. In sum, our cases on market regulation without market participation prescribe standard dormant Commerce Clause analysis; our cases on market participation joined with regulation (the usual situation) prescribe exceptional treatment for this direct governmental activity in commercial markets for the public’s benefit.

The Kentucky tax scheme falls outside the forbidden paradigm because the Commonwealth’s direct participation favors, not local private entrepreneurs, but the Commonwealth and local governments. The Commonwealth enacted its tax code with an eye toward making some or all of its bonds more marketable. When it issues them for sale in the bond market, it relies on that tax code, and seller and purchaser treat the bonds and the tax rate as joined just as intimately, say, as the work force requirements and city construction contracts were in Boston. Issuing bonds must therefore have the same significance under the dormant Commerce Clause as government trash processing, junk car disposal, or construction; and *United Haulers, Alexandria Scrap*, and *White* can be followed only by rejecting the Davises’ argument that Kentucky’s regulatory activity should be viewed in isolation as Commerce Clause discrimination.

C

A look at the specific markets in which the exemption’s effects are felt both confirms the conclusion that no traditionally forbidden discrimination is underway and

points to the distinctive character of the tax policy. The market as most broadly conceived is one of issuers and holders of all fixed-income securities, whatever their source or ultimate destination. In this interstate market, Kentucky treats income from municipal bonds of other States just like income from bonds privately issued in Kentucky or elsewhere; no preference is given to any local issuer, and none to any local holder, beyond what is entailed in the preference Kentucky grants itself when it engages in activities serving public objectives.

A more specialized market can be understood as commerce solely in federally tax-exempt municipal bonds, much of it conducted through interstate municipal bond funds. Here, of course, the distinction between the taxing State's bonds and their holders and issuers and holders of out-of-state counterparts is at its most stark. But what is remarkable about the issuers in this and the broader interstate market is that nearly every taxing State believes its public interests are served by the same tax-and-exemption feature, which is supported in this Court by every one of the States (with or without an income tax) despite the ranges of relative wealth and tax rates among them. These facts suggest that no State perceives any local advantage or disadvantage beyond the permissible ones open to a government and to those who deal with it when that government itself enters the market. . . .

In sum, the differential tax scheme is critical to the operation of an identifiable segment of the municipal financial market as it currently functions, and this fact alone demonstrates that the unanimous desire of the States to preserve the tax feature is a far cry from the private protectionism that has driven the development of the dormant Commerce Clause. It is also fatal to the Davises' backup argument that this case should be remanded for analysis under the rule in *Pike*.

IV

Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.

The Davises' request for *Pike* balancing assumes an answer to an open question: whether *Pike* even applies to a case of this sort. We need not decide this question today, however, for Kentucky has not argued that *Pike* is irrelevant, and even on the assumption that a *Pike* examination might generally be in order in this type of case, the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case. . . .

What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.

While it is not our business to suggest that the current system be reconsidered, if it is to be placed in question a congressional forum has two advantages. Congress has some hope of acquiring more complete information than adversary trials may produce, and an

elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done. And risk is the essence of what the Davises are urging here. It would miss the mark to think that the Kentucky courts, and ultimately this Court, are being invited merely to tinker with details of a tax scheme; we are being asked to apply a federal rule to throw out the system of financing municipal improvements throughout most of the United States, and the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the Davises request. . . .

We have been here before. Our predecessors on this Court responded to an earlier invitation to the adventurism of overturning a traditional local taxing practice. Justice Holmes answered that “the mode of taxation is of long standing, and upon questions of constitutional law the long settled habits of the community play a part. . . . [T]he fact that the system has been in force for a very long time is of itself a strong reason . . . for leaving any improvement that may be desired to the legislature.” *Paddell v. City of New York*, 211 U.S. 446, 448.

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

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, dissenting.

Eighteenth-century thinkers, even those most prescient, could not foresee our technological and economic interdependence. Yet they understood its foundation. Free trade in the United States, unobstructed by state and local barriers, was indispensable if we were to unite to ensure the liberty and progress of the whole Nation and its people. This was the vision, and a primary objective, of the Framers of the Constitution. History, as we know, vindicates their judgment. The national, free market within our borders has been a singular force in shaping the consciousness and creating the reality that we are one in purpose and destiny. The Commerce Clause doctrine that emerged from the decisions of this Court has been appropriate and necessary to implement the Constitution’s purpose and design.

These general observations are offered at the outset to underscore the imprudent risk the Court now creates by misinterpreting our precedents to decide this case. True, the majority opinion, wrong as it is, will not threaten the whole economy or national unity on these facts alone. The explicit, local discrimination the Court ratifies today likely will result in extra, though manageable, accommodation costs and can be welcomed by existing interests ready to profit from it. This market perhaps can absorb the costs of discrimination; our jurisprudence, unless the decision stands alone as an anomaly, cannot.

Reactive institutions and adjusting forces — for instance mutual funds for state and municipal bonds issued within a single State — already are in place in response to the local protectionist laws here at issue and now in vogue. These mechanisms may allow the market, though necessarily distorted by deviation from essential constitutional principles, to continue to cope in a more or less efficient manner; and the damage likely will be limited to the discrete, and now distorted, market for state and municipal bonds. Many economists likely will find it unfortunate, and inefficient, that a specialized

business has emerged to profit from a departure from constitutional principles. Even if today's decision is welcomed by those who profit from the discrimination, the system as a whole would benefit from a return to a market with proper form, freed from artificial restraints. It does seem necessary, however, to point out the systemic consequences of today's decision — if only to confine it and to discourage new experiments with local laws that discriminate against interstate commerce and trade.

The incorrect result the majority reaches; its treatment of the Commerce Clause cases in which our predecessors reached a delicate, sensible implementation of the Framers' original purpose; and the unsatisfactory, brief, circular reasoning contained in the part of the opinion that commands a majority of the Court are all inconsistent with our precedents and require this respectful dissent.

Protectionist trade laws and policies, pursued to favor local interests within a larger trading area, invite prompt retaliatory response. This dynamic was one the Framers understood in theory and saw in fact. . . . The object of creating free trade throughout a single nation, without protectionist state laws, was a dominant theme of the convention at Philadelphia and during the ratification debates that followed. . . .

The doctrine invalidating laws that impose unreasonable burdens upon interstate commerce no doubt has been a deterrent to local enactments attempting to regulate in ways that restrict a free, national market. The corollary rule that nondiscriminatory laws imposing a reasonable burden are valid allows the States to exercise their powers based on information and expertise more readily available to them than to the National Government. The result is to eliminate the demand and necessity for sweeping national legislation. This line of cases has found occasional detractors. The undue burden rule, however, remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act. Those cases were the background for the formulation used in *Pike*, which is in essence ignored by the decision in today's case. The Court's precedents discussing the undue burden principle, and *Pike*, need not be addressed here, however.

That is because the law in question is invalid under a second line of precedents. These cases instruct that laws with either the purpose or the effect of discriminating against interstate commerce to protect local trade are void. These are the authorities relevant to the only part of the opinion that commands a majority, and it is necessary to address the reasons the Court advances in seeking to disregard them.

The Court defends the Kentucky law by explaining that it serves a traditional government function and concerns the "cardinal civic responsibilities" of protecting health, safety, and welfare. This is but a reformulation of the phrase "police power," long abandoned as a mere tautology. It is difficult to identify any state law that has come before us that would not meet the Court's description. . . . The police power concept is simply a shorthand way of saying that a State is empowered to enact laws in the absence of constitutional constraints; but, of course, that only restates the question. . . .

The Court holds the Kentucky law is valid because bond issuance fulfills a governmental function: raising revenue for public projects. Aside from the point that this is but an extension of the police power ("this is a good law") argument, the premise is wrong. The law in question operates on those who hold the bonds and trade them, not

those who issue them. The bonds are not issued with a covenant promising tax exemption or tax relief to the holder. The bonds contain no such provision. The security is issued as a formal obligation to repay. . . .

Even if the Court were correct to say the relevant legal framework is bond issuance, not taxation of bonds already issued, its conclusion would be incorrect; for the discrimination against out-of-state commerce still would be too plain and prejudicial to be sustained. The insufficiency of the Court's reasoning is even more apparent, however, because its own premise is incorrect. The challenged state activity is differential taxation, not bond issuance. The state tax provision at issue could be repealed tomorrow without altering or impairing a single obligation in the bonds. It is the tax that matters; and Kentucky gives favored tax treatment to some securities but not others depending solely upon the State of issuance, and it does so to disadvantage bonds from other States.

Our cases establish this rule: A State has no authority to use its taxing power to erect local barriers to out-of-state products or commodities. Nothing in our cases even begins to suggest this rule is inapplicable simply because the State uses a discriminatory tax to favor its own enterprise. The tax imposed here is an explicit discrimination against out-of-state issuances for admitted protectionist purposes. It cannot be sustained unless the Court disavows the discrimination principle, one of the most important protections we have elaborated for the Nation's interstate markets. . . .

Differential taxation favoring local trade over interstate commerce poses serious threats to the national free market because the taxing power is at once so flexible and so potent. The Court's differential tax cases are mentioned here at the outset because taxation is the issue; and discriminatory tax schemes are relatively rare, if only because they resemble tariffs — the “paradigmatic . . . law[s] discriminating against interstate commerce.” . . .

In the only part of the Court's opinion that commands a majority the main point is that validation of Kentucky's tax exemption follows from the Court's opinion last Term in *United Haulers*. But that overlooks the argument that was central to the entire holding of *United Haulers*. There the Court concluded the ordinance applied equally to interstate and in-state commerce — and so it applied without differentiation between in-state and out-of-state commerce — because the government had monopolized the waste processing industry. Nondiscrimination, not just state involvement, was central to the rationale. That justification cannot be invoked here, for discrimination against out-of-state bonds is the whole purpose of the law in question. Kentucky has not monopolized the bond market or the municipal bond market. Kentucky has entered a competitive, nonmonopolized market and, to give its bonds a market advantage, has taxed out-of-state municipal bonds at a higher rate. The explicit rationale of the law is to differentiate between local and interstate commodities. This case is not an extension of *United Haulers*; it is a rejection of its principal rationale — that in monopolizing the local market, the ordinance applied equally to interstate and local commerce. . . .

The issue in this case, then, cannot be resolved by determining what the issuer does with the proceeds. And to the extent the Court says there is a consumer preference for a State's own bonds within its own borders, this makes the mistake of defining a market by first assuming the validity of the discriminatory law at issue. No precedent

permits the Court to define a market in terms of the very law under challenge for protectionist purposes and effects. This double counting does not work. If the discriminatory barrier did not exist, then the national market for all state and municipal bonds would operate like other free, nationwide markets. The fact that the national market for tax-free state and municipal bonds is a discrete one serves only to reinforce the point that it should operate without local restriction.

That the people in each of 49 States that joined a brief in support of Kentucky are alleged to want the law is irrelevant. Protectionist interests always want the laws they pass, even if their fellow citizens bear the burden, for they are positioned to profit from the barrier. The circumstance that the residents choose to bear the costs of a protectionist measure (assuming this to be so even though entrenched interests are the usual source for the law) has been found by this Court to be quite irrelevant: “This argument, if accepted, would undermine almost every discriminatory tax case. State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional.” *West Lynn*. . . .

The Court’s categorical approach would seem to allow States to discriminate against out-of-state, government bonds in other ways. Nothing in the Court’s rationale justifying this scheme would stop Kentucky from taxing interest on out-of-state bonds at a high rate, say 80%, simply to give its own bonds further advantage. . . . Today the Court upholds a scheme no different in kind from those patently unconstitutional schemes. Furthermore, the Court’s approach would permit a State to condition tax-free treatment of out-of-state bonds on reciprocal treatment in another State.

Throughout the Court’s argument is the concern that, were this law to be invalidated, the national market for bonds would be disrupted. The concern is legitimate, but if it is to be the controlling rationale the Court should cast its decision in those terms. The Court could say there needs to be a *sui generis* exception, noting that the interstate discrimination has been entrenched in many States and for a considerable time. That rationale would prompt my own statement of disagreement as a matter of principle and economic consequences, but it would be preferable to a decision that misinterprets the Court’s precedents. Instead, today the Court weakens the preventative force of the Commerce Clause and invites other protectionist laws, thus risking further dislocations and market inefficiencies based on the origin of products and commodities that should be traded nationwide and without local trade barriers.

For these reasons, in my view, the judgment of the Court of Appeals of Kentucky should be affirmed.

NOTES

(1) Justice Souter rejected the dissent’s claim that the plurality’s market participant analysis conflicted with *South-Central Timber Development, Inc. v. Wunnicke* (casebook, p. 231). He wrote:

In *South-Central*, Alaska conditioned the sale of state timber to private purchasers by requiring that the timber be processed within the State

prior to export, and a plurality struck down the condition under the Commerce Clause. The case turned on the plurality's conclusion that the processing requirement constituted a "restrictio[n] on dispositions subsequent to the goods coming to rest in private hands." 467 U.S., at 98. Kentucky imposes no such restrictions on the disposition of Kentucky bonds; bond holders are free to sell the bonds to whomever they please. Thus, the type of "downstream regulation" that *South-Central* found objectionable is simply not present here. We note also that *South-Central* expressly applied "more rigorous" Commerce Clause scrutiny because the case involved "foreign commerce" and restrictions on the resale of "a natural resource." Neither of those elements appears here.

(2) Justice Scalia concurred in part, joining all but those sections containing the discussions of the market participant exception and the *Pike* balancing test. Regarding the latter he wrote:

The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest "outweighs" the other without deciding which interest is more important to you. And that will always be the case. I would abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.

[5] Congressional Action

Page 232: Insert the following at the end of (1):

During the October 2008 term, the Supreme Court considered — and rejected — federal preemption in a pair of product-information cases. *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) and *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1173 L. Ed. 2d 51 (2009). In both cases, product users sued product manufacturers for compensatory damages under state common or statutory law, claiming the manufacturers had failed to disclose crucial information. Both times, the Court, speaking through Justice John Paul Stevens, held that the federal statutes and regulations at issue did not pre-empt the plaintiffs' state law claims.

In *Altria Group*, the Court's five-justice majority held that neither a federal statute nor federal agency regulations preempted what it characterized as a state fraud claim —

manufacturers' deceptive advertising that "light" cigarettes were less harmful than their regular counterparts. The Court emphasized the paramount importance of Congressional intent, express or implied, when determining the scope of preemption. However, Justice Stevens wrote for the majority, courts also assume that unless preemption was a "clear and manifest purpose" of Congress, state police power is to be undisturbed. Here the federal Labeling Act reflected "Congress' determination that the prescribed federal warnings are both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking." States could "not impede commerce in cigarettes by enforcing rules that are based on an assumption that the federal warnings are inadequate." Although "the Act's purposes are furthered by prohibiting States from supplementing the federally prescribed warning," they would not "be served by limiting the States' authority to prohibit deceptive statements in cigarette advertising."

In *Wyeth v. Levine*, the Court, in a 6-3 ruling, held that a state tort claim based on a failure to warn of risks incident to injection with a drug was not preempted by federal law. The Court again reiterated the "two cornerstones of our pre-emption jurisprudence": (1) Congressional intent and (2) a presumption against preemption in all cases, with particular force in traditional state areas. Although a regulation with the force of law could pre-empt conflicting state law, the Court would not automatically defer to an agency's conclusion that state tort law impeded the accomplishment of federal objectives especially where that conclusion was inconsistent with Congress's purposes.

Here, the agency's statement in the preamble that state law was preempted simply was not enough. "The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness. Under this standard, the FDA's 2006 preamble does not merit deference."

Page 234: Insert the following after Note (7):

(8) *Douglas v. Independent Living Center of Southern California, Inc.* 132 S. Ct. 1204 (2012) The Court granted certiorari on whether Medicaid providers and recipients may maintain a Supremacy Clause right of action to enforce federal Medicaid law that preempted state law. After the federal agency responsible for administering the law approved the state statutes as consistent with the federal act, the Court, in a 5-4 decision, remanded the case for the lower courts to consider whether such an action could still be maintained.

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, addressed the constitutional issue at length, however, in dissenting. The Roberts dissent argued that the Supremacy Clause does not create such a right. The Supremacy Clause operates differently from other constitutional provisions, the Chief Justice reasoned. Drawing from the Federalist Papers, Roberts asserted that "the purpose of the Supremacy Clause is instead to ensure that, in a conflict with state law, whatever Congress says goes. Since Congress did not intend to create a cause of action, the Supremacy Clause may not furnish one.

(9) In a 5-3¹ decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012) the Supreme Court struck down much of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1071) which made it unlawful for an unauthorized alien to seek or engage in work in Arizona and gave Arizona officials various authority and duties regarding such aliens. The United States argued that federal immigration law preempted the measure.

The majority reaffirmed the “broad, undoubted” national power over immigration and alienage which it described as “well settled” in view of the extensive and important foreign policy implications. Moreover, it described federal governance of immigration and alienage as “extensive and complex.” Nonetheless, states also have interests which are implicated by the presence and activities of illegal aliens.

In striking down three of the four provisions at issue, the Court reiterated and applied familiar preemption principles which flow from the Supremacy Clause. The majority stated that the federal government may expressly preempt specific regulatory areas or may oust state regulatory authority based on implied field preemption or conflict preemption. Arizona’s requirement that aliens carry registration documents conflicted with the federal intent to occupy the regulatory field which was implicit in the comprehensive regime it had created regarding alien registration. An Arizona criminal prohibition against illegal aliens seeking or engaging in work conflicted with federal law which constructed a regulatory regime by penalizing employers who hired illegal employees rather than the employees themselves. An Arizona measure which allowed state officers to arrest someone who the state official had probable cause to believe had committed an offense which made him removable went beyond federal law and conflicted with the principle that removal decisions are entrusted to the federal government. Moreover, some of the Arizona remedies came in direct conflict with those the federal government had prescribed.

The Court held it would be premature to rule that a fourth provision conflicted with federal law. That provision required state officials to make a reasonable attempt to determine the immigration status of someone they stop for some other legitimate purpose if reasonable basis exists to suspect the person is an alien unlawfully in the United States. The Court reasoned that it was unclear how the state law would be interpreted and accordingly the Court could not assume that the law would be applied in a manner which would conflict with federal law. Further review of this provision would depend upon the state’s interpretation and application of the law.

In dissent, Justice Scalia argued that the Court’s decision deprived Arizona of a principal attribute of sovereignty, the power to exclude. States enjoyed that power before the Constitution went into effect and the Constitution did not deprive them of that power. During the early years under the Constitution, this state power was widely recognized. Although Justice Scalia accepted broad federal power over immigration as consistent with the federal government’s sovereign status, he would conclude that a state regulation was precluded only if it had been expressly prohibited or it conflicted with a federal

¹ Justice Kennedy wrote the majority opinion which Chief Justice Roberts and Justices Ginsburg, Breyer and Sotomayor joined. Justices Scalia, Thomas and Alito dissented. Justice Kagan did not participate.

regulation. The federal government had not prohibited Arizona from acting and field preemption should not be applied regarding an area which went to the core of state sovereignty. Justice Scalia suggested that the states would not have formed the union if the proposed Constitution had included the majority's holding in this case.

Chapter V

THE PRESIDENCY AND SEPARATION OF POWERS

§ 5.03 ADMINISTRATIVE CHIEF

Page 281: Insert the following after Note (6):

(6.1) In *NLRB v. Canning*, 134 S. Ct. 2550 (2014), the Court unanimously construed the Recess Appointments Clause in a way which invalidated three of President Obama’s recess appointments to the National Labor Relations Board (NLRB) although the unanimous decision concealed sharp divisions over the scope of the Clause.

Noel Canning challenged an adverse NLRB decision on the grounds that the NLRB was improperly constituted since President Obama had appointed three of its five members unconstitutionally, relying on the Recess Appointments Clause at a time when the Senate was not in recess. Although the Constitution normally requires the Advice and Consent of the Senate for the President to appoint an “Office[r] of the United States,” the Recess Appointments Clause allows the President “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, section 2, cl. 3. President Obama made the three appointments on January 4, 2012 after one of the nominations had been pending for more than a year, the others for a few weeks. The Senate had adopted a resolution authorizing a series of brief recesses from December 18, 2011 to January 23, 2012 but also providing for *pro forma* sessions every Tuesday and Friday during which no business would be transacted. The January 4th appointments occurred between the January 3 and January 6 *pro forma* sessions.

In his opinion for the Court, Justice Breyer identified three questions for decision: First, whether “recess of the Senate” only applied to breaks between two formal sessions of Congress or whether it also included intra-session breaks?; Second, whether “vacancies that may happen” applied only to vacancies that occur during the recess or also those that preceded the recess but continue during it?; and third, whether *pro forma* sessions, like those the Senate authorized from December 18, 2011 to January 23, 2012 count as sessions such that at the time President Obama made the recess appointments the Senate was only on a three day break, not a longer one? Although the Court held that “recess of the Senate” included intra-session breaks including those that began before the recess but continued in it, the Court recognized *pro forma* sessions as interrupting an intra-session recess and concluded that a three day period was not a recess.

Justice Breyer’s opinion was animated by two background considerations, one relating to the Recess Appointments Clause itself, the other to appropriate modes of constitutional interpretation. First, he concluded that the Recess Appointments Clause was a subsidiary method of appointing officers of the United States and should not be

interpreted in a manner which would allow routine circumvention of the primary Advice and Consent requirement for appointment. Second, he concluded that historical practice, including that occurring long after the founding, should receive “significant weight” in interpreting the Clause.

Although the Court found the text ambiguous as to whether the Clause applied to intra-session, as well as inter-session, recesses, the Clause’s purpose and historical practice supported the broader interpretation. The continued functioning of the federal government might require unilateral presidential action when the Senate was away during, as well as between, sessions. Although the Senate essentially did not take intra-session recesses prior to the Civil War (rendering that part of history largely irrelevant for this purpose) since then numerous presidents had frequently invoked the Clause during intra-session breaks with the near unanimous support of publicly available opinions by a variety of Attorney Generals. Moreover, Senates had generally defined “recess” in a manner which would include intra-session breaks.

Justice Breyer also found the Clause ambiguous regarding whether “vacancies that may happen during the recess of the Senate” was limited to those beginning during the recess or included those commencing before the recess but continuing during it. The former was the more natural reading but the latter was also plausible. Once again the purpose of the Clause supported the broader interpretation (since otherwise a President might be precluded from filling an important position which fell vacant right before a recess) and 200 years of historical practice “strongly” favored that construction.

Justice Breyer, however, held that the *pro forma* sessions were sessions, not part of a longer recess, since, “for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business,” a standard satisfied here. This judicial deference to the Senate found support in constitutional provisions which empowered the Senate to establish its own rules and the Court’s precedents. During the *pro forma* sessions, the Senate claimed it was in session and although it had resolved not to conduct business it could have done so by unanimous consent.

The majority held that a three day break (January 3 to 6) was too short to constitute a “recess.” Although the United States government had suggested a three day limit by analogy to the Adjournments Clause (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.” Art. I, section 5, cl. 4) the majority did not accept that test exclusively and further stated that a recess of less than 10 days was also “presumptively” too short.

Although the Court was unanimous in concluding that the three NLRB appointments violated the Recess Appointment Clause, four members of the Court (Chief Justice Roberts, and Justices Scalia, Thomas, and Alito) construed the Clause more narrowly to afford the President less latitude to avoid the normal Advice and Consent requirement. They joined Justice Scalia’s concurring opinion which limited the Recess Appointments Clause to “the intermission between two formal legislative sessions” and

to situations when offices “become vacant during that intermission.” The Scalia concurrence found those conclusions “clear from the Constitution’s text and structure, . . .and well understood at the founding.” It criticized Justice Breyer’s majority opinion for reaching “atextual results” based “on an adverse-possession theory of executive authority” and for “cast[ing] aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best.” Justice Scalia predicted that the majority’s approach would diminish the Court’s role in resolving separation of powers disputes. Indeed, he criticized the majority for ignoring “two overarching principles”: that the Constitution’s structural provisions protect liberty and that the Court has the duty of judicial review in resolving structural disputes.

Justice Scalia argued that the original meaning of “recess” and “session” limited their use to inter-session breaks and thought the majority had no “textual basis” for determining the length of a break that would trigger the Clause. He argued that for a vacancy to “happen” during the Senate’s recess it must occur, not simply exist, during the recess, based on the text’s plain meaning and constitutional structure. On both points, Justice Scalia contested the majority’s use and reading of ongoing practice. Instead of “an ambiguous text and a clear historical practice,” he said the case presented a “clear text and an at-best-ambiguous historical practice,” thereby supporting his narrow reading of the Clause.

Page 282: Insert the following opinion after Note (9):

**FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD**
561 U.S. 477 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Our Constitution divided the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” Article II vests “[t]he executive Power . . . in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” Art. II, §1, cl. 1; *id.*, §3. In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.”

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. This Court has determined, however, that this authority is not without limit. . . .

We are asked, however, to consider a new situation not yet encountered by the Court. . . . May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. . . . The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). But the individual members of the Board are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures. . . .

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. . . . Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents. A divided Court of Appeals affirmed. . . . We granted certiorari. . . .

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, §1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the

power of appointing, overseeing, and controlling those who execute the laws.” The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that “prevailed, as most consonant to the text of the Constitution” and “to the requisite responsibility and harmony in the Executive Department,” was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not “expressly taken away, it remained with the President.” Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). . . .

The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President “the general administrative control of those executing the laws.” 272 U.S., at 164. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase. As we explained in *Myers*, the President therefore must have some “power of removing those for whom he cannot continue to be responsible.”

Nearly a decade later in *Humphrey’s Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for “‘inefficiency, neglect of duty, or malfeasance in office.’ ” . . . *Humphrey’s Executor* did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. This Court has upheld for-cause limitations on that power as well. . . .

B

. . . [W]e have previously upheld limited restrictions on the President’s removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer’s conduct merited removal under the good-cause standard. The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board. The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President’s review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board’s conduct, to the

same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.”

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President . . . can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.” . . .

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents. The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” Art. II, §2, cl. 2. They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” The Federalist No. 72, (A. Hamilton). Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” . . .

C

. . . No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the “ ‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,’ ” for “ ‘[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.’ ” *Bowsher*, (quoting *Chadha*).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches

almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people. This concern is largely absent from the dissent’s paean to the administrative state. . . .

The Framers created a structure in which “[a] dependence on the people” would be the “primary controul on the government.” The Federalist No. 51, at 349 (J. Madison). . . . A key “constitutional means” vested in the President—perhaps *the* key means—was “the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong., at 463. And while a government of “opposite and rival interests” may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Bowsher, supra*, at 730. . . .

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman’s lament, to “persuad[ing]” his unelected subordinates “to do what they ought to do without persuasion.” In its pursuit of a “workable government,” Congress cannot reduce the Chief Magistrate to a cajoler-in-chief. . . .

V

. . . [P]etitioners argue that Board members are principal officers requiring Presidential appointment with the Senate’s advice and consent. We held in *Edmond v. United States*, 520 U.S. 651, 662–663 (1997), that “[w]hether one is an ‘inferior’ officer depends on whether he has a superior,” and that “ ‘inferior officers’ are officers whose work is directed and supervised at some level” by other officers appointed by the President with the Senate’s consent. In particular, we noted that “[t]he power to remove officers” at will and without cause “is a powerful tool for control” of an inferior. As explained above, the statutory restrictions on the Commission’s power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission’s other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a “Hea[d] of Departmen[t].”

But, petitioners argue, the Commission is not a “Departmen[t]” like the “Executive departments” (*e.g.*, State, Treasury, Defense) listed in 5 U.S.C. §101. In *Freytag*, we specifically reserved the question whether a “principal agenc[y], such as . . . the Securities and Exchange Commission,” is a “Departmen[t]” under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a “Departmen[t],” because it is a “freestanding, self-contained entity in the Executive Branch.” Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, and we do. Respondents’ reading of the Appointments Clause is consistent with the common, near-contemporary definition of a “department” as a “separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.” 1 N. Webster, *American Dictionary of the English Language* (1828) It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint “an assistant, and deputy postmasters, at all places where such shall be found necessary,”—thus treating him as the

“Hea[d] of [a] Departmen[t]” without the title of Secretary or any role in the President’s Cabinet. And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a “Departmen[t]” for the purposes of the Appointments Clause.

[Petitioners] argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Commission’s “Hea[d].” As a constitutional matter, we see no reason why a multimember body may not be the “Hea[d]” of a “Departmen[t]” that it governs. The Appointments Clause necessarily contemplates collective appointments by the “Courts of Law,” Art. II, §2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. I, §2, cl. 5; *id.*, §3, cl. 5. . . .

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority “would greatly diminish the intended and necessary responsibility of the chief magistrate himself.” The Federalist No. 70, at 478. While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way. The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, dissenting.

The Court holds unconstitutional a statute providing that the Securities and Exchange Commission can remove members of the Public Company Accounting Oversight Board from office only for cause. It argues that granting the “inferior officer[s]” on the Accounting Board “more than one level of good-cause protection . . . contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’ ” I agree that the Accounting Board members are inferior officers. But in my view the statute does not significantly interfere with the President’s “executive Power.” Art. II, §1. It violates no separation-of-powers principle. And the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I

A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes “necessary and proper” to the exercise of its specifically enumerated constitutional authority. Art. I, §8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers’ efforts to create a Constitution that would “endure for ages to come.” *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). . . . And Congress has drawn on that power over the past century to create numerous federal agencies in response to “various crises of human affairs” as they have arisen. On the other hand, the opening sections of Articles I, II, and III of the Constitution separately and respectively vest “all legislative Powers” in Congress, the “executive Power” in the President, and the “judicial Power” in the Supreme Court (and such “inferior Courts as Congress may from time to time ordain and establish”). In doing so, these provisions imply a structural separation-of-powers principle. . . . Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. *Myers v. United States*, 272 U.S. 52 (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post. And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation. In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases. That is because, with the exception of the general “vesting” and “take care” language, the Constitution is completely “silent with respect to the power of removal from office.”

Nor does history offer significant help. The President’s power to remove Executive Branch officers “was not discussed in the Constitutional Convention.” The First Congress enacted federal statutes that limited the President’s ability to *oversee* Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today’s United States Attorneys), and, to a lesser extent, the Secretary of the Treasury. . . . But those statutes did not directly limit the President’s authority to *remove* any of those officials—“a subject” that was “much disputed” during “the early history of this government,” “and upon which a great diversity of opinion was entertained.” . . .

Nor does this Court’s precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. . . . In *Myers*, the Court invalidated—for the first and only time—a congressional statute on the ground that it unduly limited the President’s authority to remove an Executive Branch official. But soon thereafter the Court expressly disapproved most of *Myers*’ broad reasoning. See *Humphrey’s Executor*. Moreover, the Court has since said that “the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.’ ” And that feature of

the statute—a feature that would *aggrandize* the power of Congress—is not present here. Congress has not granted itself any role in removing the members of the Accounting Board. . . . In short, the question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent provides any clear answer. . . .

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. . . . It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and “exigencies,” which at the time of the founding could be seen only “dimly,” and perhaps not at all. *McCulloch*. For another, a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances. That is why the “powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role” over time. . . .

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. . . . [T]oday vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government’s work, it is not surprising that administrative units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens’ song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official’s regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President's friends and allies may weaken him. But a rule that takes power from the President's opponents may strengthen him. And what if the rule takes power from a functionally *neutral* independent authority? In that case, it is difficult to predict how the President's power is affected in the abstract.

These practical reasons not only support our precedents' determination that cases such as this should examine the specific functions and context at issue; they also indicate that judges should hesitate before second-guessing a "for cause" decision made by the other branches. . . . Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context. There is no indication that the two comparatively more expert branches were divided in their support for the "for cause" provision at issue here. In this case, the Act embodying the provision was passed by a vote of 423 to 3 in the House of Representatives and a by vote of 99 to 0 in the Senate. The creation of the Accounting Board was discussed at great length in both bodies without anyone finding in its structure any constitutional problem. The President signed the Act. And, when he did so, he issued a signing statement that critiqued multiple provisions of the Act but did not express any separation-of-powers concerns. . . . Thus, here, as in similar cases, we should decide the constitutional question in light of the provision's practical functioning in context. And our decision should take account of the Judiciary's comparative lack of institutional expertise.

II

A

To what extent then is the Act's "for cause" provision likely, as a practical matter, to limit the President's exercise of executive authority? In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. That is why President Truman complained that " 'the powers of the President amount to' " bringing " 'people in and try[ing] to persuade them to do what they ought to do without persuasion.' " . . . Indeed, notwithstanding the majority's assertion that the removal authority is "*the key*" mechanism by which the President oversees inferior officers in the independent agencies, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision. . . .

But even if we put all these other matters to the side, we should still conclude that the "for cause" restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President's power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President "is

powerless to intervene” if he has determined that the Board members’ “conduct merit[s] removal” because “[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control.” But so long as the President is *legitimately* foreclosed from removing the *Commissioners* except for cause (as the majority assumes), nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be “powerless to intervene” by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why *two* layers of “for cause” protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President’s* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.

2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President’s ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President’s contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.

4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two *helps the President*, for it hinders the Commission’s ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority’s decision to eliminate only *Layer Two* accomplishes virtually nothing. And that is because a removal restriction’s effect upon presidential power depends not on the presence of a “double-layer” of for-cause removal, as the majority pretends, but rather on the real world nature of the President’s relationship with the Commission. If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission’s membership must reflect both political parties, 15 U.S.C. §78d(a)—the restriction on the *Commission’s* ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to *implement* his policy preferences, Layer One is irrelevant, for the President and Commission see eye to eye. . . .

[O]nce we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board’s functions. . . .What is left? The Commission’s inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency? What is the practical

likelihood of that occurring, or, if it does, of the President's serious concern about such a matter? Everyone concedes that the President's control over the Commission is constitutionally sufficient. And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged "for cause" provision. First and foremost, the Board adjudicates cases. This Court has long recognized the appropriateness of using "for cause" provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. Indeed, as early as 1789 James Madison stated that "there may be strong reasons why an" executive "officer" such as the Comptroller of the United States "should not hold his office at the pleasure of the Executive branch" if one of his "principal dut[ies]" "partakes strongly of the judicial character." . . . Moreover, . . . the Accounting Board members supervise, and are themselves, technical professional experts. . . . Here, the justification of insulating the "technical experts" on the Board from fear of losing their jobs due to political influence is particularly strong. . . . In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. . . . And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear power production, the Court's assertion that we should simply learn to get by "without being" regulated "by experts" is, at best, unrealistic—at worst, dangerously so.

C

Where a "for cause" provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. . . . Here, the removal restriction may somewhat diminish the *Commission's* ability to control the Board, but it will have little, if any, negative effect in respect to the President's ability to control the Board, let alone to coordinate the Executive Branch. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President's important historic power to control criminal prosecutions, a " 'purely executive' " function, the constitutionality of the present restriction would seem to follow *a fortiori*. Second, as previously pointed out, this Court has repeatedly upheld "for cause" provisions where they restrict the President's power to remove an officer with adjudicatory responsibilities. . . .

[T]he Court has said that "[o]ur separation-of powers jurisprudence generally focuses on the danger of one branch's *aggrandizing its power* at the expense of another branch." . . . Congress here has "drawn" no power to itself to remove the Board members. It has instead sought to *limit* its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. And this case thereby falls outside the ambit of the Court's most serious constitutional concern.

In sum, the Court's prior cases impose functional criteria that are readily met here. Once one goes beyond the Court's elementary arithmetical logic (*i.e.*, "one plus one is greater than one") our precedent virtually dictates holding that the challenged "for

cause” provision is constitutional.

D

We should ask one further question. Even if the “for cause” provision before us does not itself significantly interfere with the President’s authority or aggrandize Congress’ power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President’s central constitutional role? The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this “for cause” provision might bring about. The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court’s opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer “perform[s] adjudicative . . . functions.” But the Accounting Board performs adjudicative functions. . .

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission and the Board. But the only characteristic of the “relationship “between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. . . . Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? In a word, what differences are relevant? . . . The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to “the civil service.” The “civil service” is defined by statute to include “all appointive positions in . . . the Government of the United States,” excluding the military, but including *all* civil “officer[s]” up to and including those who are subject to Senate confirmation. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. . . .

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, the exclusion would be insufficient. This is because the Court’s “double for-cause” rule applies to appointees who are “inferior officer[s].” And who are they? Courts and scholars have struggled for more than a century to define the constitutional term “inferior officers,” without much success. . . . The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority’s new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court’s opinion) threatens serious harm. . . . Reading the criteria [for inferior officers] as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk. . . .

And what about the military? Commissioned military officers “are ‘inferior officers.’ ” There are over 210,000 active-duty commissioned officers currently serving

in the armed forces. . . .The majority might simply say that the military is different. But it will have to explain *how* it is different. It is difficult to see why the Constitution would provide a President who is the military’s “commander-in-chief,” “Art. II, §2, cl. 1, with *less* authority to remove “inferior” “military” “officers” than to remove comparable civil officials. . . .

The majority asserts that its opinion will not affect the Government’s ability to function while these many questions are litigated in the lower courts because the Court’s holding concerns only “the conditions under which th[e]se officers might someday be removed.” But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were *subject to regulation* “ ‘*here-and-now*’ ” and who “object to the” very “existence” of the regulators themselves. And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court’s amorphous new rule will be able to bring an “implied private right of action directly under the Constitution” “seeking . . . a declaratory judgment that” “the official’s actions are “unconstitutional and an injunction preventing the” official “from exercising [his] powers.” . . .

Thus, notwithstanding the majority’s assertions to the contrary, the potential consequences of today’s holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court’s decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive. . . . With respect I dissent.

§ 5.04 Foreign Affairs

Page 291: Insert the following before 5.05 Commander-in-Chief

[3] Recognition

ZIVOTOFSKY V. KERRY
135 S.Ct. 2076 (2015)

Supreme Court of the United States

JUSTICE KENNEDY delivered the opinion of the Court.

...The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is “Israel.”

I

A

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs....The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." In 2002, Congress passed ... the Foreign Relations Authorization Act, Fiscal Year 2003[.] §214(d) ... seeks to override [State Department policy] by allowing citizens born in Jerusalem to list their place of birth as "Israel." ...When he signed the Act into law, President George W. Bush issued a statement declaring his position that §214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." ...

B

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son [and] asked that his place of birth be listed as "Jerusalem, Israel." The Embassy clerks explained that, pursuant to State Department policy, the passport would list only "Jerusalem." Zivotofsky's parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce §214(d).... [Editors' Note: Although the District Court initially dismissed the case as presenting a nonjusticiable political question and for lack of standing, the Court of Appeals reversed on standing but reaffirmed the District Court's political question determination. The Supreme Court granted certiorari, vacated the judgment, and remanded the case after holding that whether §214(d) was constitutional was not a political question. On remand the Court of Appeals held the statute unconstitutional since section 214 (d) contradicts the Executive branch's power to recognize a foreign sovereign. The Supreme Court again granted certiorari.]

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from [his *Youngstown* concurring opinion]. The framework divides exercises of Presidential power into three categories: ... To succeed in [the] third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue. In this case the Secretary contends that §214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." In so doing the Secretary acknowledges the President's power is "at its lowest ebb." Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his

claim must be “scrutinized with caution,” and he may rely solely on powers the Constitution grants to him alone. To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution’s text and structure, as well as precedent and history bearing on the question.

A

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” *Restatement (Third) of Foreign Relations Law of the United States* §203, *Comment a*, p. 84 (1986). ... Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the *Reception Clause*, which directs that the President “shall receive Ambassadors and other public Ministers.” *Art. II, §3*. As Zivotofsky notes, the *Reception Clause* received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.” *The Federalist* No. 69. At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. It is a logical and proper inference, then, that a *Clause* directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations. This in fact occurred early in the Nation’s history when President Washington recognized the French Revolutionary Government by receiving its ambassador. After this incident the import of the *Reception Clause* became clear—causing Hamilton to change his earlier view. ... As a result, the *Reception Clause* provides support, although not the sole authority, for the President’s power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. ... The President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation’s ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the “executive Power” shall be vested in the President, provides further support for the President’s action here. *Art. II, §1, cl. 1*.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which

governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must “speak . . . with one voice. That voice must be the President’s. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, “[d]ecision, activity, secrecy, and dispatch.” The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition.. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President’s Article II powers. As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. . . .

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. **[Editor’s Note:** Citations to various congressional powers omitted.] Under basic separation-of-powers principles, it is for the Congress to enact the laws, including “all Laws which shall be necessary and proper for carrying into Execution” the powers of the Federal Government. §8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown*, (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress. In practice, then, the President’s recognition determination is just one part of a political process that may require Congress to make laws. The President’s exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the

President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See *The Federalist* No. 51.

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, or between the courts and the political branches, not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive. ...

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. ...

[A] description of the President's exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations. ...

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

... This Court's cases do not hold that the recognition power is shared.... To be sure, the Court has mentioned both of the political branches in discussing international recognition, but it has done so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations. This is consistent with the fact that Congress, in the ordinary course, does support the President's recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.

C

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." *NLRB v. Noel Canning*, 573 U. S. ___, ___, 134 S. Ct. 2550, (2014). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. ... The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

... Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." ... But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem."

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. ... Congress in effect would exercise the recognition power.

If Congress may not pass a law, speaking in its own voice, that effects formal

recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations. Although the statement required by §214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition. .

..

The flaw in §214(d) is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” The House Conference Report proclaimed that §214 “contains four provisions related to the recognition of Jerusalem as Israel’s capital.” And, indeed, observers interpreted §214 as altering United States policy regarding Jerusalem—which led to protests across the region. From the face of §214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President’s policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do. ...

* * *

In holding §214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is Affirmed.

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

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly. Second, it vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President by way of Article II’s Vesting Clause.

Section 214(d) ... ignores that constitutional allocation of power insofar as it directs the President, contrary to his wishes, to list “Israel” as the place of birth of Jerusalem-born citizens on their passports. The President has long regulated passports under his residual foreign affairs power, and this portion of §214(d) does not fall within any of Congress’ enumerated powers. By contrast, §214(d) poses no such problem insofar as it regulates

consular reports of birth abroad. Unlike passports, these reports were developed to effectuate the naturalization laws, and they continue to serve the role of identifying persons who need not be naturalized to obtain U. S. citizenship. The regulation of these reports does not fall within the President’s foreign affairs powers, but within Congress’ enumerated powers under the Naturalization and Necessary and Proper Clauses.

Rather than adhere to the Constitution’s division of powers, the Court relies on a distortion of the President’s recognition power to hold both of these parts of §214(d) unconstitutional. Because I cannot join this faulty analysis, I concur only in the portion of the Court’s judgment holding §214(d) unconstitutional as applied to passports. I respectfully dissent from the remainder of the Court’s judgment.

I

A

The Constitution specifies a number of foreign affairs powers and divides them between the political branches.... These specific allocations, however, cannot account for the entirety of the foreign affairs powers exercised by the Federal Government. Neither of the political branches is expressly authorized, for instance, to communicate with foreign ministers, to issue passports, or to repel sudden attacks. Yet the President has engaged in such conduct, with the support of Congress, since the earliest days of the Republic.

The President’s longstanding practice of exercising unenumerated foreign affairs powers reflects a constitutional directive that “the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. *Hamdi v. Rumsfeld*, 542 U. S. 507, 580, (2004) (THOMAS, J., dissenting). Specifically, the Vesting Clause of Article II provides that “[t]he executive Power shall be vested in a President of the United States.” Art. II, § 1. This Clause is notably different from the *Vesting Clause of Article I*, which provides only that “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States,” *Art. I, § 1* (emphasis added). By omitting the words “herein granted” in Article II, the Constitution indicates that the “executive Power” vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the “executive Power” of the Federal Government.

B

Founding-era evidence reveals that the “executive Power” included the foreign affairs powers of a sovereign State. [Editor’s Note: Discussion of John Locke, William Blackstone, Baron de Montesquieu omitted.] Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the “executive Power” vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution. ... These statements confirm that the “executive Power” vested in the President by Article II includes the residual foreign affairs powers of the Federal Government not otherwise allocated by the Constitution. ... Early practice of the founding generation also supports this understanding of the “executive Power.” ...

II

The statutory provision at issue implicates the President’s residual foreign affairs power. Section 214(d) instructs the Secretary of State, upon request of a citizen born in Jerusalem (or that citizen’s legal guardian), to list that citizen’s place of birth as Israel on his passport and consular report of birth abroad, even though it is the undisputed position of the United States that Jerusalem is not a part of Israel. ...

... The President is not constitutionally compelled to implement §214(d) as it applies to passports because passport regulation falls squarely within his residual foreign affairs power and Zivotofsky has identified no source of congressional power to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen’s passport. Section 214(d) can, however, be constitutionally applied to consular reports of birth abroad because those documents do not fall within the President’s foreign affairs authority but do fall within Congress’ enumerated powers over naturalization.

A ...

2 ... a

... The Constitution contains no Passport Clause, nor does it explicitly vest Congress with “plenary authority over passports.” ... Section 214(d)’s passport directive . . . does not fall within the power “[t]o regulate Commerce with foreign Nations.” “At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U. S. 549, 585 (1995) (THOMAS, J., concurring). The listing of the place of birth of an applicant—whether born in Jerusalem or not—does not involve selling, buying, bartering, or transporting for those purposes. Our cases have upheld *Commerce Clause* regulation of intrastate activity [under the power to regulate commerce among the several States] only where that activity is economic in nature”). True, a passport is frequently used by persons who may intend to engage in commerce abroad, but that use is insufficient to bring §214(d)’s passport directive within the scope of this power. The specific conduct at issue here—the listing of the birthplace of a U. S. citizen born in Jerusalem on a passport by the President—is not a commercial activity. Any commercial activities subsequently undertaken by the bearer of a passport are yet further removed from that regulation. The power “[t]o establish a uniform Rule of Naturalization” is similarly unavailing. At the founding, the word “naturalization” meant “[t]he act of investing aliens with the privileges of native subjects.” A passport has never been issued as part of the naturalization process. It is—and has always been—a “travel document,” ... For similar reasons, the Necessary and Proper Clause gives Congress no authority here. That Clause provides, “The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”. As an initial matter, “Congress lacks authority to legislate [under this provision] if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.” The “end [must] be legitimate” under our constitutional structure.

McCulloch v. Maryland, 17 U.S. 316, 4 *Wheat*. 316, 421, 4 L. Ed. 579 (1819).

The argument that §214(d), as applied to passports, could be an exercise of Congress' power to carry into execution its foreign commerce or naturalization powers falters because this aspect of §214(d) is directed at neither of the ends served by these powers. ... The law in question must be "directly link[ed]" to the enumerated power. As applied to passports, §214(d) fails that test because it does not "carr[y] into Execution" Congress' foreign commerce or naturalization powers. ... Nor can this aspect of §214(d) be justified as an exercise of Congress' power to enact laws to carry into execution the President's residual foreign affairs powers. Simply put, §214(d)'s passport directive is not a "proper" means of carrying this power into execution. ...

* * *

Because the President has residual foreign affairs authority to regulate passports and because there appears to be no congressional power that justifies §214(d)'s application to passports, Zivotofsky's challenge to the Executive's designation of his place of birth on his passport must fail.

B

Although the consular report of birth abroad shares some features with a passport, it is historically associated with naturalization, not foreign affairs. In order to establish a "uniform Rule of Naturalization," Congress must be able to identify the categories of persons who are eligible for naturalization, along with the rules for that process. Congress thus has always regulated the "acquisition of citizenship by being born abroad of American parents . . . in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization." It has determined that children born abroad to U. S. parents, subject to some exceptions, are natural-born citizens who do not need to go through the naturalization process. The consular report of birth abroad is well suited to carrying into execution the power conferred on Congress in the Naturalization Clause. The report developed in response to Congress' requirement that children born abroad to U. S. citizens register with the consulate or lose their citizenship. And it continues to certify the acquisition of U. S. citizenship at birth by a person born abroad to a U. S. citizen. ... Once acknowledged as U. S. citizens, they need not pursue the naturalization process to obtain the rights and privileges of citizenship in this country. Regulation of the report is thus "appropriate" and "plainly adapted" to the exercise of the naturalization power. By contrast, regulation of the report bears no relationship to the President's residual foreign affairs power. It has no historical pedigree uniquely associated with the President, contains no communication directed at a foreign power, and is primarily used for domestic purposes. To the extent that a citizen born abroad seeks a document to use as evidence of his citizenship abroad, he must obtain a passport. Because regulation of the consular report of birth abroad is justified as an exercise of Congress' powers under the Naturalization and Necessary and Proper Clauses and does not fall within the President's foreign affairs powers, §214(d)'s treatment of that document is constitutional. ...

III ...

* * *

Adhering to the Constitution’s allocation of powers leads me to reach a different conclusion in this case from my colleagues: Section 214(d) can be constitutionally applied to consular reports of birth abroad, but not passports. I therefore respectfully concur in the judgment in part and dissent in part.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “for what is at stake is the equilibrium established by our constitutional system.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637-638 (Jackson, J., concurring). JUSTICE SCALIA’s principal dissent, which I join in full, refutes the majority’s unprecedented holding in detail. I write separately to underscore the stark nature of the Court’s error on a basic question of separation of powers.

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to “take Care that the Laws be faithfully executed.” *Art. II, §3*. The Executive may disregard “the expressed or implied will of Congress” only if the Constitution grants him a power “at once so conclusive and preclusive” as to “disabl[e] the Congress from acting upon the subject.” *Youngstown*, 343 U. S., at 637-638(Jackson, J., concurring). Assertions of exclusive and preclusive power leave the Executive “in the least favorable of possible constitutional postures,” and such claims have been “scrutinized with caution” throughout this Court’s history. For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive’s contention. I have serious doubts about that position. The majority places great weight on the *Reception Clause*, which directs that the Executive “shall receive Ambassadors and other public Ministers.” *Art. II, §3*. But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by *Article II, Section 3*, not the *powers* granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton’s assurance that executive reception of ambassadors “is more a matter of dignity than of authority” and “will be without consequence in the administration of the government.” *The Federalist No. 69*. In short, at the time of the founding, “there was no reason to view the *reception clause* as a source of discretionary authority for the president.” The majority’s other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. *Art. II, §2*. But those authorities are *shared* with Congress, so they hardly support an inference that the recognition power is *exclusive*.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. When the best you can muster is conflicting dicta, precedent can hardly be said to support your side. As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. ...

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the "conclusive and preclusive" power required to justify defiance of an express legislative mandate. *Youngstown*, 343 U. S., at 638 (Jackson, J., concurring). ... But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. The relevant provision, §214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. The State Department itself has explained that "identification"—not recognition—"is the principal reason that U. S. passports require 'place of birth.'" Congress has not disputed the Executive's assurances that §214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that §214(d) does "not itself constitute a formal act of recognition." Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving §214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." But as just noted, neither Congress nor the Executive Branch regards §214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a *perceived* contradiction based on a *mistaken* understanding of the effect of §214(d), insisting that some "observers interpreted §214 as altering United States policy regarding Jerusalem." To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto.

Moreover, expanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does §214(d). If, for example, the President recognized a particular country in opposition to Congress's wishes, Congress could declare war or impose a trade embargo on that country. ...

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not

implicated by §214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

I respectfully dissent.

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

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom’s foreign affairs. ... The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle. The People therefore adopted a Constitution that divides responsibility for the Nation’s foreign concerns between the legislative and executive departments. The Constitution gave the President the “executive Power,” authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§1-3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, §8. “Fully eleven of the powers that Article I, §8 grants Congress deal in some way with foreign affairs.”

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

I

... Before turning to Presidential power under Article II, I think it well to establish the statute’s basis in congressional power under Article I. Congress’s power to “establish an uniform Rule of Naturalization,” Art. I, §8, cl. 4, enables it to grant American citizenship to someone born abroad. The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power “carries with it all those incidental powers which are necessary to its complete and effectual execution.” Even on a miserly understanding of Congress’s incidental authority, Congress may make grants of citizenship “effectual” by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report,

it may also require these papers to record his birthplace as “Israel.” The birthplace specification promotes the document’s citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government’s citizenship records. To be sure, recording Zivotovsky’s birthplace as “Jerusalem” rather than “Israel” would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the “discretion” to choose the one it deems “most beneficial to the people.” *McCulloch v. Maryland*, 17 U.S. 316 (1819). It thus has the right to decide that recording birthplaces as “Israel” makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer’s conscientious belief that Jerusalem belongs to Israel. No doubt congressional discretion in executing legislative powers has its limits; Congress’s chosen approach must be not only “necessary” to carrying its powers into execution, but also “proper.” Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, §214(d) does not transgress any such restriction.

II

The Court frames this case as a debate about recognition. . . . I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that “the weight of historical evidence” supports exclusive executive authority over “the formal determination of recognition.” But even with its attention confined to formal recognition, the Court is forced to admit that “history is not all on one side.” To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. In the course of doing so, Congress directed the President to “recognize the independence of the Philippine Islands as a separate and self-governing nation” and to “acknowledge the authority and control over the same of the government instituted by the people thereof.” Constitutional? And if Congress may control recognition when exercising its power “to dispose of . . . the Territory or other Property belonging to the United States,” Art. IV, §3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because §214(d) plainly does not concern recognition. . . .

Section 214(d) does not require the Secretary to make a formal declaration about Israel’s sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list “Israel.” But in fact it requires only those passports to list “Israel” for which the citizen (or his guardian) *requests* “Israel”; all the rest, under the Secretary’s policy, list “Jerusalem.” It is utterly impossible for this deference to private

requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. . . . Since birthplace specifications in citizenship documents are matters within Congress’s control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to “record the place of birth as Israel” “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport.” And the law bears the caption, “Record of Place of Birth as Israel *for Passport Purposes.*” . . .

III

The Court complains that §214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title “United States Policy with Respect to Jerusalem as the Capital of Israel”; and that foreign “observers interpreted [it] as altering United States policy regarding Jerusalem.” But these features do not show that §214(d) recognizes Israel’s sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel’s territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. . . . In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else §214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel’s sovereignty over Jerusalem.

IV

The Court does not try to argue that §214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face. The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the “formal recognition determination,” the President holds an ancillary exclusive power “to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds.” It follows, the Court explains, that Congress may not “requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch.” So requiring

imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. ... No consistent or coherent theory supports the Court's decision. At times, the Court seems concerned with the possibility of congressional interference with the President's ability to extend or withhold legal recognition. The Court concedes, as it must, that the notation required by §214(d) "would not itself constitute a formal act of recognition." It still frets, however, that Congress *could* try to regulate the President's "statements" in a way that "override[s] the President's recognition determination." But "[t]he circumstance, that . . . [a] power may be abused, is no answer. All powers may be abused." 2 J. Story, Commentaries on the Constitution of the United States. What matters is whether *this* law interferes with the President's ability to withhold recognition. It would be comical to claim that it does. ...

At other times, the Court seems concerned with Congress's failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that §214(d) "directly contradicts" the President's refusal to recognize Israel's sovereignty over Jerusalem. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President's recognition decisions. Because the President and Congress are "perfectly coordinate by the terms of their common commission," The Federalist No. 49, the President's use of the recognition power does not constrain Congress's use of its legislative powers. ...

In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations"—principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem. The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

V

* * *

International disputes about statehood and territory are neither rare nor obscure. ... A President empowered to decide all questions relating to these matters, immune from laws embodying congressional disagreement with his position, would have uncontrolled mastery of a vast share of the Nation's foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that "[t]he accumulation of all

powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other’s policies. Under the Constitution they approved, Congress may require Zivotofsky’s passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President’s preference for neutrality about the status of Jerusalem.

I dissent.

Chapter VII

LIBERTY AND PROPERTY RIGHTS IN THE DUE PROCESS, TAKING, AND CONTRACT CLAUSES

§ 7.02 THE RIGHTS OF THE ACCUSED: THE “INCORPORATION CONTROVERSY”

The note on Caperton v. A.T. Massey, on p. ___ of the supplement can also be read in § 7.02 The Rights of the Accused: The “Incorporation Controversy” at page 386, right before § 7.03 Regulation of Business and Other Property Interests

§ 7.02A THE SECOND AMENDMENT

Page 386: Insert the following before § 7.03 Regulation of Business and Other Property Interests

DISTRICT OF COLUMBIA v. HELLER
554 U.S. 570, 128 S. Ct., 2783, 171 L.Ed.2d 637 (2008)

JUSTICE SCALIA delivered the opinion of the Court. . . .

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. *See* D. C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities.

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds to enjoin the city from enforcing the bar on the registration of handguns. . . .

II

A

. . . The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*,

282 U.S. 716, 731 (1931). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. . . . Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. . . .

[A]part from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.³ “It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” J. Bishop, *Commentaries on Written Laws and Their Interpretation* § 51, p. 49 (1882). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.⁴

1. Operative Clause

a. *“Right of the People.”* The first salient feature of the operative clause is that it codifies a “right of the people.” The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”). . . .

As we will describe below, the “militia” in colonial America consisted of a subset

³ [Court’s footnote 3] . . . [I]n America “the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.” [J. Sutherland, *Statutes and Statutory Construction*, 47.04 (N. Singer ed. 5th ed. 1992).]

Justice Stevens says that we violate the general rule that every clause in a statute must have effect. But where the text of a clause itself indicates that it does not have operative effect, such as “whereas” clauses in federal legislation or the Constitution’s preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

⁴ [Court’s footnote 4] . . . In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of “the right of the people to keep and bear arms” furthers the purpose of an effective militia no less than (indeed, more than) the dissent’s interpretation.

of “the people” — those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to “keep and bear Arms” in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as “the people.”

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. “*Keep and bear Arms.*” . . . [T]he Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. . . .

The phrase “keep arms” was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to “keep Arms” as an individual right unconnected with militia service. . . .

At the time of the founding, as now, to “bear” meant to “carry.” *See* [1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson)]. . . Although the phrase implies that the carrying of the weapon is for the purpose of “offensive or defensive action,” it in no way connotes participation in a structured military organization. . . .

In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. . . . Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.”

The phrase “bear Arms” also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or “to wage war.” *See* [Brief for Professors of Linguistics and English as *Amici Curiae* 18 (hereinafter Linguists’ Brief)]. But it *unequivocally* bore that idiomatic meaning only when followed by the preposition “against,” which was in turn followed by the target of the hostilities. *See* [2 Oxford English Dictionary 21 (2d ed. 1989) (hereinafter Oxford)]. . . . Every example given by petitioners’ *amici* for the idiomatic meaning of “bear arms” from the founding period either includes the preposition “against” or is not clearly idiomatic. . . .

In any event, the meaning of “bear arms” that petitioners and Justice Stevens propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby “bear arms” connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving “bear Arms” its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war — an absurdity that no commentator has ever endorsed. . . .

Petitioners justify their limitation of “bear arms” to the military context by pointing out the unremarkable fact that it was often used in that context — the same mistake they made with respect to “keep arms.” It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of

congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. . . . Other legal sources frequently used "bear arms" in nonmilitary contexts. Cunningham's legal dictionary . . . gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, & c. and not bear other arms"). [1 A New and Complete Law Dictionary (1771).] And if one looks beyond legal sources, "bear arms" was frequently used in nonmilitary contexts. . . .

Justice Stevens places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only to military service. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service. . . .

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. . . .

Englishmen . . . obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689). This right has long been understood to be the predecessor to our Second Amendment. . . . It was clearly an individual right, having nothing whatever to do with service in a militia . . . held only against the Crown, not Parliament. . . .

By the time of the founding . . . Blackstone . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. *See* 1 Blackstone 136, 139–140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140; *see also* 3 *id.*, at 2–4 (1768). Other contemporary authorities concurred. *See* G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and . . . 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That

provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. . . .

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not, *see, e.g., United States v. Williams*, 553 U.S. 285 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause

The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State. . . .”

a. “Well-Regulated Militia.” In *United States v. Miller*, 307 U.S. 174, 179 (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources. . . .

Petitioners take a seemingly narrower view of the militia, stating that “[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15–16).” . . . Congress is given the power to “provide for calling forth the militia,” § 8, cl. 15; and the power not to create, but to “organiz[e]” it — and not to organize “a” militia, which is what one would expect if the militia were to be a federal creation, but to organize “the” militia, connoting a body already in existence, *id.*, cl. 16. . . . Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them. . . .

b. “Security of a Free State.” The phrase “security of a free state” meant “security of a free polity,” not security of each of the several States as the dissent below argued. . . . Joseph Story wrote in his treatise on the Constitution that “the word ‘state’ is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.” 1 Story § 208; *see also* 3 *id.*, § 1890 (in reference to the Second Amendment’s prefatory clause: “The militia is the natural defence of a free country”). . . . Moreover, the other instances of “state” in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States. . . .

3. Relationship between Prefatory Clause and Operative Clause

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it

was) but over whether it needed to be codified in the Constitution. . . . It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down. . . .

The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution. . . .

[P]etitioners' interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, . . . it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. . . . It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation. . . .

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. . . .

[T]he most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. . . .

Between 1789 and 1820, nine States adopted Second Amendment analogues. . . . That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. . . .

C

Justice Stevens relies on the drafting history of the Second Amendment — the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. . . .

Justice Stevens' view . . . relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with Justice Stevens' equating of these sources with postenactment legislative

history. . . . “Postenactment legislative history,” a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

1. Post-ratification Commentary

Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service. . . .

Joseph Story . . . explained that the English Bill of Rights had also included a “right to bear arms,” a right that, as we have discussed, had nothing to do with militia service. He then equated the English right with the Second Amendment:

“§ 1891. A similar provision [to the Second Amendment] in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, ‘that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.’ But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.” (Footnotes omitted.)

. . . . As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, “[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.” *Andrews v. State*, 50 Tenn. 165, 183 (1871). Story’s Commentaries also cite as support Tucker and Rawle, both of whom clearly viewed the right as unconnected to militia service. In addition, in a shorter 1840 work Story wrote: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.” *A Familiar Exposition of the Constitution of the United States* § 450 (reprinted in 1986).

Antislavery advocates routinely invoked the right to bear arms for self-defense. . . . Charles Sumner proclaimed:

“The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest.” .

..

We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia — and he recognized that the prevailing view was to the contrary. . . .

2. Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service . . . though subject to certain

restrictions . . .

3. Post-Civil War Legislation

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. . . .

A joint congressional Report decried:

“in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freemen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that ‘the right of the people to keep and bear arms shall not be infringed.’ ” . . . Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton).

. . . The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion . . . saying that the founding generation “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.” Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment. . . . Representative Nye thought the Fourteenth Amendment unnecessary because “[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense.” *Id.*, at 1073 (1866).

4. Post-Civil War Commentators

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. Concerning the Second Amendment it said:

“Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is ‘a well-regulated militia,’ but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts.” *Id.*, at 350.

. . . All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey the general flavor:

“[The purpose of the Second Amendment is] to secure a well-armed militia. . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by

any law or proceeding to invade or destroy the right to keep and bear arms. . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected.” J. Pomeroy, *An Introduction to the Constitutional Law of the United States* 152–153 (1868) (hereinafter Pomeroy). . . .

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

United States v. Cruikshank, 92 U.S. 542, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. “. . . The second amendment . . . means no more than that it shall not be infringed by Congress. . . .” 92 U.S., at 553. States, we said, were free to restrict or protect the right under their police powers.⁵

Presser v. Illinois, 116 U.S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

Justice Stevens places overwhelming reliance upon this Court’s decision in *United States v. Miller*, 307 U.S. 174 (1939). . . .

The judgment in the case upheld against a Second Amendment challenge two men’s federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act. It is entirely clear that the Court’s basis for saying that the Second Amendment did not apply . . . was that the *type of weapon at issue* was not eligible for Second Amendment protection: “In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*.” 307 U.S., at 178 (emphasis added). “Certainly,” the Court continued, “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” . . .

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that “have some reasonable relationship to the preservation or efficiency of a well regulated militia”). . . . The most Justice Stevens can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General’s

⁵ [Court’s footnote 23] With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886) and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

argument (made in the alternative) that the right was collective. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons. . . .

Justice Stevens claims that the opinion reached its conclusion “[a]fter reviewing many of the same sources that are discussed at greater length by the Court today.” Not many, which was not entirely the Court’s fault. The respondent made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government. . . . The Government’s brief spent two pages discussing English legal sources, concluding “that at least the carrying of weapons without lawful occasion or excuse was always a crime” and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) “the early English law did not guarantee an unrestricted right to bear arms.” . . . As for the text of the Court’s opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia, 307 U.S., at 178 (which we do not dispute).⁶

Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” 307 U.S., at 179. The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” *State v. Kessler*, 614 P.2d 94, 98 (1980) (citing G. Neumann, *Swords and Blades of the American Revolution* 6–15, 252–254 (1973)). . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. . . .

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931. . . .

III

⁶ [Court’s footnote 24] As for the “hundreds of judges,” who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller*: . . . their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. . . .

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁷

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” 307 U.S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.” *See* 4 Blackstone 148–149 (1769). . . .

It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

. . . [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms”. . . . The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” 478 F.3d at 400, would fail constitutional muster.

Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). *See* 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme

⁷ [Court’s footnote 26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Court likewise held that a statute that forbade openly carrying a pistol “publicly or privately, without regard to time or place, or circumstances,” 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). . . .

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. . . .

Respondent conceded at oral argument that he does not “have a problem with . . . licensing” and that the District’s law is permissible so long as it is “not enforced in an arbitrary and capricious manner.” We therefore assume that petitioners’ issuance of a license will satisfy respondent’s prayer for relief and do not address the licensing requirement.

Justice Breyer has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District’s prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. . . . Of the laws he cites, only one offers even marginal support for his assertion. . . . In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws Justice Breyer cites are gunpowder-storage laws . . . ; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

Justice Breyer points to other founding-era laws that he says “restricted the firing of guns within the city limits to at least some degree” in Boston, Philadelphia and New York. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 *Law & Hist. Rev.* 139, 162 (2007). Those laws provide no support for the severe restriction in the present case. . . .

A broader point about the laws that Justice Breyer cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. . . . The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even

obtaining a gun in the first place.

Justice Breyer . . . criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” . . .

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. . . .

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field. . . .

In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. . . .

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller*, 307 U.S. 174 (1939), provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of

the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Upholding a conviction under that Act, this Court held that, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Miller*, 307 U.S. at 178. The view of the Amendment we took in *Miller* — that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons — is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.

Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980. See *Lewis v. United States*, 445 U.S. 55, 65–66, n. 8 (1980).⁸ No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment’s text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court’s decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law.⁹

⁸ [Dissent’s footnote 3] Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: “These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they entrench upon any constitutionally protected liberties. See *Miller*, 307 U.S. at 178. (the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’).” 445 U.S. at 65, n. 8.

⁹ [Dissent’s footnote 4] See *Vasquez v. Hillery*, 474 U.S. 254, 265, 266 (1986) (“[*Stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of

I

The text of the Second Amendment is brief. . . .

Three portions of that text merit special focus: the introductory language defining the Amendment’s purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

“A well regulated Militia, being necessary to the security of a free State”

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies. . . .

The parallels between the Second Amendment and these state declarations, and the Second Amendment’s omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania’s 1776 Declaration of Rights announced that “the people have a right to bear arms for the defence *of themselves* and the state,” [1 B. Schwartz, *The Bill of Rights* 266 (1971) (hereinafter Schwartz) (emphasis added)]; § 43 of the Declaration assured that “the inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.” *Id.*, at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed “[t]hat the people have a right to bear arms for the defence *of themselves* and the State.” *Id.*, at 324 (emphasis added). . . .

Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to “find” its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. . . .¹⁰

“The right of the people”

individuals, and thereby contributes to the integrity of our constitutional system of government. . . .”); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting) (“The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this Court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people”).

¹⁰ [Dissent’s footnote 7] . . . “The preamble cannot control the enacting part of the statute *in cases where the enacting part is expressed in clear, unambiguous terms.*” 2A N. Singer, *Sutherland on Statutory Construction* § 47.04, p. 146 (rev. 5th ed. 1992) (emphasis added). Surely not even the Court believes that the Amendment’s operative provision, which, though only 14 words in length, takes the Court the better part of 18 pages to parse, is perfectly “clear and unambiguous.”

The centerpiece of the Court’s textual argument is its insistence that the words “the people” as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions — as well as the Constitution’s preamble, section 2 of Article I, and the Tenth Amendment — “the term unambiguously refers to all members of the political community, not an unspecified subset.” But the Court *itself* reads the Second Amendment to protect a “subset” significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to “law-abiding, responsible citizens.” But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. . . .

“To keep and bear Arms”

Although the Court’s discussion of these words treats them as two “phrases” — as if they read “to keep” and “to bear” — they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities. . . .

[T]he Court limits the Amendment’s protection to the right “to possess and carry weapons in case of confrontation.” . . .

The term “bear arms” is a familiar idiom; when used unadorned by any additional words, its meaning is “to serve as a soldier, do military service, fight.” 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre*, which, translated literally, means “to bear [*ferre*] war equipment [*arma*].” Brief for Professors of Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined “arms” as “weapons of offence, or armour of defence,” 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that “[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, & c. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions.” 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (1794). Had the Framers wished to expand the meaning of the phrase “bear arms” to encompass civilian possession and use, they could have done so by the addition of phrases such as “for the defense of themselves,” as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of “bear arms,” by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.¹¹ The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.¹² . . .

¹¹ [Dissent’s footnote 9] *Amici* professors of Linguistics and English reviewed uses of the term “bear arms” in a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the Second Amendment. *Amici* determined that of 115 texts that employed the term, all but five usages were in a clearly military context, and in four of the remaining five instances, further qualifying language conveyed a different meaning. The Court allows that the phrase “bear Arms” did have as an idiomatic meaning, “to serve as a soldier, do military service, fight,” but asserts that it “*unequivocally* bore that idiomatic meaning only when followed by the preposition ‘against,’ which was in turn followed by the target of the hostilities.”

¹² [Dissent’s footnote 10] *Aymette v. State*, 21 Tenn. 154, 156 (1840), a case we cited in *Miller*, further

[A] number of state militia laws in effect at the time of the Second Amendment’s drafting used the term “keep” to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. . . .

This reading is confirmed by the fact that the clause protects only one right, rather than two. . . . [T]he single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary. . . .

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. . . . Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. . . . [T]he Court falls far short of sustaining that heavy burden. And the Court’s emphatic reliance on the claim “that the Second Amendment . . . codified a *pre-existing* right” is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I’s Militia Clauses and the Second Amendment, represent quintessential examples of the Framers’ “splitting the atom of sovereignty.”

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. “On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.” *Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990). . . . On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members “as the primary means of providing for the common defense,” *Perpich*, 496 U.S., at 340; during the Revolutionary War, “[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint.” Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 182 (1940). In order to respond to those twin concerns, a compromise was reached: Congress would be

confirms this reading of the phrase. In *Aymette*, the Tennessee Supreme Court construed the guarantee in Tennessee’s 1834 Constitution that “ ‘the free white men of this State, have a right to keep and bear arms for their common defence.’ ” Explaining that the provision was adopted with the same goals as the Federal Constitution’s Second Amendment, the court wrote: “The words ‘bear arms’ . . . have reference to their military use. . . . As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.” 21 Tenn. at 158. The court elaborated: “[W]e may remark, that the phrase ‘*bear arms*’ is used in the Kentucky Constitution as well as our own, and implies, as has already been suggested, their military use. . . . A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*, much less could it be said, that a private citizen *bears arms*, because he has a dirk or pistol concealed under his clothes.” . . . *Id.*, at 161.

authorized to raise and support a national Army and Navy, and also to organize, arm, discipline, and provide for the calling forth of “the Militia.” U.S. Const., Art. I, § 8, cls. 12–16. The President, at the same time, was empowered as the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Art. II, § 2. . . . Although Congress would have the power to call forth,¹³ organize, arm, and discipline the militia, as well as to govern “such Part of them as may be employed in the Service of the United States,” the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress. Art. I, § 8, cl. 16.¹⁴

Article I contained a significant gap: While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia’s *disarmament*. . . .

The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies. . . .

The relevant proposals sent by the Virginia Ratifying Convention read as follows:

“17th. That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and be governed by the civil power.” [3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401, 659 (2d ed. 1863) (hereinafter, Elliot).]

“19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.” *Ibid.*

North Carolina adopted Virginia’s proposals and sent them to Congress as its own.

New York produced a proposal with nearly identical language. . . .

Notably, each of these proposals used the phrase “keep and bear arms,” which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning.

By contrast, New Hampshire’s proposal, although it followed another proposed amendment that echoed the familiar concern about standing armies, described the

¹³ [Dissent’s footnote 19] This “calling forth” power was only permitted in order for the militia “to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const., Art. I, § 8, cl. 15.

¹⁴ [Dissent’s footnote 20] . . . The States’ power to create their own militias provides an easy answer to the Court’s complaint that the right as I have described it is empty because it merely guarantees “citizens’ right to use a gun in an organization from which Congress has plenary authority to exclude them.”

protection involved in more clearly personal terms. Its proposal read:

“*Twelfth*, Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” [2 Schwartz,] 758, 761.

... The rejected Pennsylvania proposal, . . . signed by a minority of the State’s delegates (those who had voted against ratification of the Constitution), *id.*, at 628, 662, read:

7. “That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers.” *Id.*, at 665.

. . . Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the Second Amendment. . . . Madison had been a member, some years earlier, of the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: “No freeman shall ever be debarred the use of arms [within his own lands or tenements].” 1 Papers of Thomas Jefferson 363 (J. Boyd ed. 1950). But the committee rejected that language, adopting instead the provision drafted by George Mason.¹⁵

With all of these sources upon which to draw, it is strikingly significant that Madison’s first draft omitted any mention of nonmilitary use or possession of weapons. . . . “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” [The Complete Bill of Rights 169 (N. Cogan ed. 1997) (hereinafter Cogan). 169.]

Madison’s decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. . . .

Madison’s initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. . . . Specifically, there was concern that Congress “can declare who are those religiously scrupulous, and prevent them from bearing arms.” The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment — to protect against congressional disarmament, by whatever means, of the States’ militias. . . .

[B]oth Virginia and North Carolina included the following language: “That any

¹⁵ [Dissent’s footnote 24] The adopted language, Virginia Declaration of Rights P13 (1776), read as follows: “That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.” 1 Schwartz 234.

person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear arms in his stead*” (emphasis added).¹⁶ There is no plausible argument that the use of “bear arms” in those provisions was not unequivocally and exclusively military.

... [S]tate militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed. . . .

III

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone’s Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history.¹⁷ All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court’s conclusion.¹⁸

The English Bill of Rights

The Court’s reliance on Article VII of the 1689 English Bill of Rights (which, like most of the evidence offered by the Court today, was considered in *Miller* — is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the Second Amendment, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose.

The English Bill of Rights . . . did not establish a general right of all persons, or even of all Protestants, to possess weapons. Rather, the right was qualified in two distinct ways: First, it was restricted to those of adequate social and economic status (“suitable to their Condition”); second, it was only available subject to regulation by Parliament (“as allowed by Law”). . . .

Blackstone’s Commentaries

The Court’s reliance on Blackstone’s Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English Bill of Rights. . . .

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others post-dating it by close to

¹⁶ [Dissent’s footnote 26] The failed Maryland proposals contained similar language.

¹⁷ [Dissent’s footnote 28] The Court’s fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision’s drafters. . . .

¹⁸ [Dissent’s footnote 29] The Court stretches to derive additional support from scattered state-court cases primarily concerned with state constitutional provisions. . . .

a century. Those scholars are for the most part of limited relevance. . . .

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. . . .

“ . . . It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace. . . . The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers. . . . ”
2 J. Story, *Commentaries on the Constitution of the United States* § 1897, pp. 620–621 (4th ed. 1873).

. . . There is not so much as a whisper in the passage above that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense. . . .

Story's writings as a Justice of this Court, to the extent that they shed light on this question, only confirm that Justice Story did not view the Amendment as conferring upon individuals any “self-defense” right disconnected from service in a state militia. . . .

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. . . . All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates. . . .

IV

The brilliance of the debates that resulted in the Second Amendment faded into oblivion during the ensuing years, for the concerns about Article I's Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the Second Amendment were short lived.

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish “an Uniform Militia throughout the United States.” 1 Stat. 271. The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to “provide himself with a good musket or firelock” and other specified weaponry. *Ibid.* The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. . . .

The postratification history of the Second Amendment is strikingly similar. The Amendment played little role in any legislative debate about the civilian use of firearms for most of the 19th century, and it made few appearances in the decisions of this Court. Two 19th-century cases, however, bear mentioning.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court . . . wrote[:] . . .

“ . . . This is one of the amendments that has no other effect than to restrict the powers of the national government.” *Id.*, at 553.

. . . Only one other 19th-century case in this Court, *Presser v. Illinois*, 116 U.S. 252

(1886), engaged in any significant discussion of the Second Amendment. . . .

Presser . . . both affirmed *Cruikshank*'s holding that the Second Amendment posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the context of a militia "authorized by law" and organized by the State or Federal Government.¹⁹ . . .

. . . [T]he dominant understanding of the Second Amendment's inapplicability to private gun ownership continued well into the 20th century. The first two federal laws directly restricting civilian use and possession of firearms — the 1927 Act prohibiting mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person," Ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machine guns — were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates. . . .

After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S., at 178.²⁰

The key to that decision did not, as the Court belatedly suggests, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellee in *Miller* did not file a brief or make an appearance. . . . But, as our decision in *Marbury v. Madison*, 5 U.S. 137, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. Of course, if it can be demonstrated that new evidence or arguments were genuinely not available to an earlier Court, that fact should be given special weight as we consider

¹⁹ [Dissent's footnote 36] . . . In *Burton v. Sills*, 394 U.S. 812 (1969) (*per curiam*), the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey Supreme Court upholding, against a Second Amendment challenge, New Jersey's gun control law. Although much of the analysis in the New Jersey court's opinion turned on the inapplicability of the Second Amendment as a constraint on the States, the court also quite correctly read *Miller* to hold that "Congress, though admittedly governed by the second amendment, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states."

²⁰ [Dissent's footnote 38] . . . [I]t is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures. Indeed, reliance interests surely cut the other way[.] . . .

whether to overrule a prior case. . . .

The majority cannot . . . disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

V

. . . Today judicial craftsmen have confidently asserted that a policy choice that denies a “law-abiding, responsible citize[n]” the right to keep and use weapons in the home for self-defense is “off the table.” Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District’s policy choice may well be just the first of an unknown number of dominoes to be knocked off the table. . . .

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting. . . .

I

. . . The majority’s conclusion is wrong for two independent reasons. The first reason is that set forth by Justice Stevens — namely, that . . . self-defense alone, detached from any militia-related objective, is not the Amendment’s concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are — whether they do or do not include an independent interest in self-defense — the majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

In this opinion I shall focus upon the second reason. . . . [T]he District’s regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem. . . .

II

. . . I shall . . . assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. And I shall then ask whether the Amendment nevertheless permits the District handgun restriction at issue here.

Although I adopt for present purposes the majority’s position that the Second Amendment embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. . . .

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the “right to keep and bear arms,” whether embodied in Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. . . .

Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm. . . . [A]s the District’s law does today[,] Boston’s gunpowder law imposed a £10 fine upon “any Person” who “shall take into any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of Boston, any . . . Fire-Arm, loaded with, or having Gun-Powder.” . . .

Although it is unclear whether these laws, like the Boston law, would have prohibited the storage of gunpowder inside a firearm, they would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be in the portion of the house where the extra gunpowder was required to be kept. *See* 7 United States Encyclopedia of History 1297 (P. Oehser ed. 1967) (“Until 1835 all small arms [were] single-shot weapons, requiring reloading by hand after every shot”). And Pennsylvania, like Massachusetts, had at the time one of the self-defense-guaranteeing state constitutional provisions on which the majority relies. . . .

III

. . . The majority is wrong when it says that the District’s law is unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.” . . . The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a “rational relationship” to that “legitimate” life-saving objective. . . .

Respondent proposes that the Court adopt a “strict scrutiny” test, which would require reviewing with care each gun law to determine whether it is “narrowly tailored to achieve a compelling governmental interest.” *Abrams v. Johnson*, 521 U.S. 74, 82 (1997). But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws — prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales — whose constitutionality under a strict scrutiny standard would be far from clear.

. . . [A]lmost every gun-control regulation will seek to advance (as the one here does) a “primary concern of every government — a concern for the safety and indeed the lives of its citizens.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Court has deemed that interest, as well as “the Government’s general interest in preventing crime,” to be “compelling,” *see id.*, at 750, 754, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties. . . . Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter. . . .

The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or

unconstitutionality (as in strict scrutiny). Rather, “where a law significantly implicates competing constitutionally protected interests in complex ways,” the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). Any answer would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority’s unsupported suggestion that this sort of “proportionality” approach is unprecedented, the Court has applied it in various constitutional contexts. . . .

In applying this kind of standard the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion. . . .

Experience as much as logic has led the Court to decide that in one area of constitutional law or another, the interests are likely to prove stronger on one side of a typical constitutional case than on the other. . . . Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference. *See Winkler, Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 687, 716–718 (2007) (describing hundreds of gun-law decisions issued in the last half-century by Supreme Courts in 42 States, which courts with “surprisingly little variation,” have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. . . .

IV

. . . The . . . District . . . requires that the lawful owner of a firearm keep his weapon “unloaded and disassembled or bound by a trigger lock or similar device”. . . . The only dispute regarding this provision appears to be whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense. . . . The District concedes that such an exception exists. . . . And because I see nothing in the District law that would *preclude* the existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting the statute to include it. . . .

The third District restriction prohibits (in most cases) the registration of a handgun within the District. . . . I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.

A

No one doubts the constitutional importance of the statute’s basic objective, saving lives. . . . I begin by reviewing the statute’s tendency to secure that objective from the perspective of (1) the legislature . . . and (2) a court that seeks to evaluate the Council’s decision today.

First, consider the facts as the legislature saw them when it adopted the District statute. . . . The committee concluded, on the basis of “extensive public hearings” and “lengthy research,” that “[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years.” It reported to the Council “startling statistics,” regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District.

The committee informed the Council that guns were “responsible for 69 deaths in this country each day” for a total of “[a]pproximately 25,000 gun-deaths . . . each year,” along with an additional 200,000 gun-related injuries. Three thousand of these deaths, the report stated, were accidental. A quarter of the victims in those accidental deaths were children under the age of 14. And according to the committee, “[f]or every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home.”

In respect to local crime, the committee observed that there were 285 murders in the District during 1974 — a record number. The committee also stated that, “[c]ontrary to popular opinion on the subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities.” Citing an article from the *American Journal of Psychiatry*, the committee reported that “[m]ost murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted.” “Twenty-five percent of these murders,” the committee informed the Council, “occur within families.” . . .

Of the 285 murders in the District in 1974, 155 were committed with handguns. This did not appear to be an aberration, as the report revealed that “handguns [had been] used in roughly 54% of all murders” (and 87% of murders of law enforcement officers) nationwide over the preceding several years. Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. “A crime committed with a pistol,” the committee reported, “is 7 times more likely to be lethal than a crime committed with any other weapon.” The committee furthermore presented statistics regarding the availability of handguns in the United States and noted that they had “become easy for juveniles to obtain,” even despite then-current District laws prohibiting juveniles from possessing them.

In the committee’s view, the current District firearms laws were unable “to reduce the potentiality for gun-related violence,” or to “cope with the problems of gun control in the District” more generally. . . .

2

. . . Petitioners, and their *amici*, have presented us with more recent statistics that tell much the same story that the committee report told 30 years ago. . . .

From 1993 to 1997, there were 180, 533 firearm-related deaths in the United States, an average of over 36,000 per year. Fifty-one percent were suicides, 44% were homicides, 1% were legal interventions, 3% were unintentional accidents, and 1% were of undetermined causes. . . .

The statistics are particularly striking in respect to children and adolescents. In

over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. . . . More male teenagers die from firearms than from all natural causes combined. . . .

From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. Dept. of Justice, Bureau of Justice Statistics, C. Perkins, *Weapon Use and Violent Crime*, p. 8 (Sept. 2003) (statistics indicating roughly the same rate for 1993–2001). In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. . . .

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. . . . [S]tolen handguns in particular are an important source of weapons for both adult and juvenile offenders. . . .

A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime. . . . [F]rom 1985 to 1993, for example, “half of all homicides occurred in 63 cities with 16% of the nation’s population.” Wintemute, *The Future of Firearm Violence Prevention*, 282 *JAMA* 475 (1999). . . .

3

Respondent and his many *amici* . . . disagree strongly with the District’s *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. . . .

First, they point out that, since the ban took effect, violent crime in the District has increased, not decreased. . . .

Second, respondent’s *amici* point to a statistical analysis that regresses murder rates against the presence or absence of strict gun laws in 20 European nations. That analysis concludes that strict gun laws are correlated with *more* murders, not fewer. They also cite domestic studies, based on data from various cities, States, and the Nation as a whole, suggesting that a reduction in the number of guns does not lead to a reduction in the amount of violent crime. . . .

Third, they point to evidence indicating that firearm ownership does have a beneficial self-defense effect. Based on a 1993 survey, the authors of one study estimated that there were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually. . . . Another study estimated that for a period of 12 months ending in 1994, there were 503,481 incidents in which a burglar found himself confronted by an armed homeowner, and that in 497,646 (98.8%) of them, the intruder was successfully scared away. A third study suggests that gun-armed victims are substantially less likely than non-gun-armed victims to be injured in resisting robbery or assault. And additional evidence suggests that criminals are likely to be deterred from burglary and other crimes if they know the victim is likely to have a gun. *See* Kleck, *Crime Control Through the Private Use of Armed Force*, 35 *Social Problems* 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns). . . .

Fourth, respondent’s *amici* argue that laws criminalizing gun possession are self-

defeating, as evidence suggests that they will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns. . . .

In the view of respondent's *amici*, this evidence shows that other remedies — such as *less* restriction on gun ownership, or liberal authorization of law-abiding citizens to carry concealed weapons — better fit the problem. . . .

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. . . . The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it*. What would the District's crime rate have looked like without the ban? . . .

What about the fact that foreign nations with strict gun laws have higher crime rates? Which is the cause and which the effect? The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out of the fact that a nation already has a higher crime rate. . . .

In a word, the studies to which respondent's *amici* point raise policy-related questions. . . .

Thus, it is not surprising that the District and its *amici* support the District's handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. Still others suggest that the defensive uses of handguns are not as great in number as respondent's *amici* claim. . . .

[T]his Court, in First Amendment cases applying intermediate scrutiny, has said that our “sole obligation” in reviewing a legislature’s “predictive judgments” is “to assure that, in formulating its judgments,” the legislature “has drawn reasonable inferences based on substantial evidence.” [*Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 428, 195 (1997).] . . . [T]he District’s judgment, while open to question, is nevertheless supported by “substantial evidence.” . . .

B

I next assess the extent to which the District's law burdens the interests that the Second Amendment seeks to protect. Respondent and his *amici*, as well as the majority, suggest that those interests include: (1) the preservation of a “well regulated Militia”; (2) safeguarding the use of firearms for sporting purposes, *e.g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

1

The District's statute burdens the Amendment's first and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a “well regulated Militia.” . . .

To begin with, the present case has nothing to do with *actual* military service. . . .

Nonetheless, as some *amici* claim, the statute might interfere with training in the use of weapons, training useful for military purposes. . . .

[T]he District’s law does not seriously affect military training interests. . . . [R]esidents . . . may register (and thus possess in their homes) weapons other than handguns, such as rifles and shotguns. . . . And they may operate those weapons within the District “for lawful recreational purposes.” § 7-2507.02. . . .

And while the District law prevents citizens from training with handguns *within the District*, the District consists of only 61.4 square miles of urban area. . . .

I conclude that the District’s law burdens the Second Amendment’s primary objective little, or not at all.

2

. . . For reasons similar to those I discussed in the preceding subsection — that the District’s law does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States — . . . the District’s law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District’s law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. . . .

C

. . . The reason there is no clearly superior, less restrictive alternative to the District’s handgun ban is that the ban’s very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun. . . .

[T]he very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous. . . . That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. . . .

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. . . .

Licensing restrictions would not similarly reduce the handgun population, and the District may reasonably fear that even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals. . . .

The absence of equally effective alternatives to a complete prohibition finds support in the empirical fact that other States and urban centers prohibit particular types of weapons. . . .

In addition, at least six States and Puerto Rico impose general bans on certain types of weapons, in particular assault weapons or semiautomatic weapons. . . .

D

. . . I turn now to the final portion of the “permissible regulation” question: Does the District’s law *disproportionately* burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. . . . That urban area suffers from a serious handgun-fatality problem. The District’s law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the *primary* interest, but at most a subsidiary interest, that the Second Amendment seeks to serve. The Second Amendment’s language, while speaking of a “Militia,” says nothing of “self-defense.” . . .

Nor, for that matter, am I aware of any evidence that *handguns* in particular were central to the Framers’ conception of the Second Amendment. . . .

[S]ince the District of Columbia (the subject of the Seat of Government Clause) was the only *urban* area under direct federal control, it seems unlikely that the Framers thought about *urban* gun control at all. . . .

[T]he colonial Boston law [is] not identical. But the Boston law disabled an even wider class of weapons (indeed, all firearms). . . .

Today’s decision . . . will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. . . .

As important, the majority’s decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems . . . in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

V

. . . In the majority’s view, the Amendment also protects an interest in armed personal self-defense, at least to some degree. . . . Yet, with one critical exception, it does not explain which confrontations count. . . .

The majority . . . describes the Amendment as “elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” . . .

Nor is it at all clear to me how the majority decides *which* loaded “arms” a homeowner may keep. The majority says that that Amendment protects those weapons “typically possessed by law-abiding citizens for lawful purposes.” . . . On the majority’s reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. . . .

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached "to the commercial sale of arms." Why these? . . . The majority fails to cite any colonial analogues. . . .

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? . . .

VI

For these reasons, I conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it. . . .

Page 386: Insert the following after District of Columbia v. Heller

MCDONALD v. CITY OF CHICAGO, 561 U.S. 742 (2010). In *McDonald v. City of Chicago*, the Court held that the Second Amendment right established in *District of Columbia v. Heller*, (supplement, p. 101), is "fully applicable to the States" through incorporation by the Fourteenth Amendment. A plurality opinion written by Justice Alito incorporated the Second Amendment through the Due Process Clause, while Justice Thomas' decisive fifth vote effected incorporation through the Privileges or Immunities Clause. By applying the Second Amendment to the States, the Court invalidated laws in Chicago and its suburb Oak Park that "banned the possession of handguns in the home."

Chicago's city ordinance, like the handgun ban in *Heller*, provided: "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration." The ordinance "prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City."

Writing for a plurality of four, Justice Alito opined, "For many decades, the question of the rights protected by the *Fourteenth Amendment* against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause." The plurality saw no reason to "disturb" the approach of the *Slaughter-House Cases* toward the Privileges or Immunities Clause. The plurality also declined to adopt Justice Black's theory of " 'total incorporation' " of the Bill of Rights through the Due Process Clause. Justice Alito noted that although the Court never "embraced" total incorporation, it has "eventually moved in that direction" by the "process of 'selective incorporation.' " Through selective incorporation "the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments." The Court would incorporate a particular right if it was "fundamental to *our* scheme of ordered liberty and system of justice." Justice Alito

continued: “Only a handful of the *Bill of Rights* protections remain unincorporated,”²¹ and the “incorporated *Bill of Rights* protections ‘are all to be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment.’ ”²²

For incorporation through the Due Process Clause, the Court “must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty,” or whether the right is “ ‘deeply rooted in this Nation’s history and tradition.’ ” For example, the 39th Congress’ debates over the Fourteenth Amendment “referred to the right to keep and bear arms as a fundamental right” that deserves protection. “Evidence from the period immediately following the ratification of the *Fourteenth Amendment* only confirms that the right to keep and bear arms was considered fundamental.” Moreover, “legal commentators from the period emphasized the fundamental nature of the right.” This “right to keep and bear arms was also widely protected by state constitutions at the time.”²³ The plurality and Justice Thomas concluded that “it is clear that the Framers and ratifiers of the *Fourteenth Amendment* counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”

The plurality characterized the municipalities’ arguments as treating the Second Amendment like a “second-class right, subject to an entirely different body of rules than the other *Bill of Rights* guarantees that we have held to be incorporated into the Due Process Clause.” The municipalities argued that “the Due Process Clause protects only those rights ‘recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.’ ” ” Considering “such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the *Fourteenth Amendment*.” The plurality rejected this line of argument as “of course, inconsistent with the long-established standard we apply in incorporation cases,” and also harboring “present-day implications” that are “stunning.” In this connection, “many of the rights that our *Bill of Rights* provides for persons accused of criminal offenses are virtually unique to this country.”²⁴ Moreover, the Establishment Clause is incorporated against the States, but “several of the countries that municipal respondents recognize as civilized have established state churches.”²⁵

Turning to public safety, the right to keep and bear arms “is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the

²¹ The only rights not fully incorporated, not including “the right to keep and bear arms (and the *Sixth Amendment* right to a unanimous jury verdict),” are “(1) the *Third Amendment’s* protection against quartering of soldiers; (2) the *Fifth Amendment’s* grand jury indictment requirement; (3) the *Seventh Amendment* right to a jury trial in civil cases; and (4) the *Eighth Amendment’s* prohibition on excessive fines.”

²² The one exception is the Sixth Amendment right to trial by jury, for state criminal trials do not require a unanimous jury verdict but federal criminal trials do.

²³ “These state constitutional protections often reflected a lack of law enforcement in many sections of the country.”

²⁴ Justice Alito noted that “the United States affords criminal jury trials far more broadly than other countries. Similarly, our rules governing pretrial interrogation differ from those in countries sharing a similar legal heritage. And the ‘Court-pronounced exclusionary rule . . . is distinctively American.’ ”

²⁵ “England and Denmark have state churches.”

prosecution of crimes fall into the same category.” The Court “made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’ ” Contradicting the municipalities’ “doomsday proclamations,” incorporation does not “imperil every law regulating firearms.” The *Heller* opinion “recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias.” *Heller* states, “self-defense was ‘the *central component* of the right itself.’ ”

In response to Justice Stevens’ dissenting argument that incorporated provisions of the Bill of Rights “need not be identical in shape or scope to the rights protected against Federal Government infringement,” the plurality explained that “the Court, for the past half-century, has moved away from the two-track approach.” Justice Alito continued: “The relationship between the *Bill of Rights*’ guarantees and the States must be governed by a single, neutral principle.”

The plurality also responded to the four primary reasons articulated by Justice Breyer for opposing incorporation. “First, we never held that a provision of the *Bill of Rights* applies to the States only if there is a ‘popular consensus’ that the right is fundamental,” but even so, there is evidence of such a consensus in two *amicus* briefs submitted by 58 Senators, 251 Members of the House of Representatives, and 38 States. Justice Alito also noted that many “who live in high-crime areas dispute the proposition that the *Second Amendment* right does not protect minorities and those lacking political clout.” Indeed, the “number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq.” Moreover, “80% of the Chicago victims were black.” Lastly, Justice Alito stated that Justice Breyer is “incorrect” to argue that “incorporation will require judges to assess the costs and benefits of firearms restrictions.” Although Justice Breyer’s “opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.”

Concurring, Justice Scalia joined the Court’s opinion in full. “Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the *Bill of Rights* ‘because it is both long established and narrowly limited.’ ” He criticized Justice Stevens’ approach to incorporation as doing “nothing to stop a judge from arriving at any conclusion he sets out to reach.” Justice Stevens’ response to his concurrence “makes the usual rejoinder of ‘living Constitution’ advocates” to lack of judicial constraints. The traditional, historically focused method, he says, still “reposes discretion in judges” because the difficulty of historical analysis “requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” Although Justice Scalia conceded this criticism, “the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world.” The historical approach “is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges

favor.” Historical analysis limits judicial discretion. “In the most controversial matters brought before this Court -- for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty -- *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion. Moreover, the methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments Justice Stevens would have courts pronounce.” Justice Stevens’ approach “would not eliminate, but multiply, the hard questions courts must confront, since he would not *replace* history with moral philosophy, but would have courts consider *both*.”

Justice Thomas concurred in part and in the judgment. He disagreed that the Second Amendment “is enforceable against the States through a clause that speaks only to ‘process.’ Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the *Fourteenth Amendment’s* Privileges or Immunities Clause.” Accounting for the Fourteenth Amendment being enacted soon after the Civil War, Justice Thomas noted that the language in the Privileges or Immunities Clause facially, “appears to grant the persons just made United States citizens a certain collection of rights -- *i.e.*, privileges or immunities -- attributable to that status.”

The Court’s precedents accept that point, but define the relevant collection of rights quite narrowly. The plurality instead “determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect” these rights. “Replaying a debate that has endured from the inception of the Court’s substantive due process jurisprudence, the dissents laud the ‘flexibility’ in this Court’s substantive due process doctrine, while the plurality makes yet another effort to impose principled restraints on its exercise.” Justice Thomas recognized “the volume of precedents that have been built upon the substantive due process framework.” Nevertheless, “*stare decisis* is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means.” Relying on *Marbury v. Madison*, (casebook, p. 1), he stated, “ ‘It cannot be presumed that any clause in the constitution is intended to be without effect.’ ”

From the time of Blackstone to the Amendment’s ratification, the words “ ‘privileges’ ” and “ ‘immunities,’ ” either “standing alone or paired together, were used interchangeably with the words ‘rights,’ ‘liberties,’ and ‘freedoms.’ ” Justice Thomas then investigated congressional statements made during the Ratification. “When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase.” Numerous congressional statements “corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States.” He continued: “Legislation passed in furtherance of the *Fourteenth Amendment* demonstrates even more clearly this understanding.”

Justice Thomas concluded that the “right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities

Clause.”²⁶ In addition, Justice Thomas noted that there was no reason to limit the Privileges or Immunities Clause to only the Bill of Rights.²⁷ Interpreting the Privileges or Immunities Clause “may produce hard questions.” Nevertheless, “those questions are more worthy of this Court’s attention -- and far more likely to yield discernable answers -

- than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.” Insofar as “Justice Stevens is concerned that reliance on the Privileges or Immunities Clause may invite judges to ‘write their personal views of appropriate public policy into the Constitution,’ his celebration of the alternative -- the ‘flexibility,’ ‘transcend[ence],’ and ‘dynamism’ of substantive due process -- speaks for itself.”

Justice Thomas rejected “*Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship.” Justice Thomas also rejected *United States v. Cruikshank*, 92 U.S. 542 (1876). “Three years after *Slaughter-House*, the Court in *Cruikshank* squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre. *Cruikshank* is not a precedent entitled to any respect.” It also has a flawed interpretation of the original meaning of the Privileges or Immunities Clause. Its “holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves.” When faced with mob violence, the “use of firearms for self-defense was often the only way black citizens could protect themselves.” This type of self-defense did not always succeed. However, sometimes “the use of firearms allowed targets of mob violence to survive.” In conclusion, “the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood -- just as the Framers of the *Second Amendment* did -- that the right to keep and bear arms was essential to the preservation of liberty.”

Justice Stevens dissented. “The so-called incorporation question” was already “correctly resolved in the late 19th century” by *Cruikshank*. In response to Justice Thomas’ advocacy for the Privileges or Immunities Clause, Justice Stevens argued the “Clause holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution.” Justice Stevens disagreed with the plurality’s “summary of our ‘incorporation’ doctrine, and its implicit (and untenable) effort to wall off that doctrine from the rest of our substantive due process jurisprudence.” He continued: “Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations.” Historically, “at least by the time of the Civil War if not much earlier, the

²⁶ Justice Thomas expressed no view on regulating firearm possession for noncitizens, although he raised the issue because the Privileges or Immunities Clause applies only to citizens, whereas the Due Process Clause “covers all ‘person[s].’” The claimant here was a citizen.

²⁷ Justice Thomas explained that the Constitution protects individual rights outside the Bill of Rights, like the Writ of Habeas Corpus, and “there is no obvious evidence” the Framers of the Clause meant to exclude additional rights. Also, some provisions of the Bill of Rights do not purport to protect individual rights, like the Ninth and Tenth Amendments and the First Amendment’s Establishment Clause.

phrase ‘due process of law’ had acquired substantive content.” Justice Stevens continued: “If text and history are inconclusive on this point, our precedent leaves no doubt: It has been ‘settled’ for well over a century that the Due Process Clause ‘applies to matters of substantive law as well as to matters of procedure.’ *Whitney v. California* 274 U.S. 357 (1927).”

Substantive due process involves fundamentally “personal liberty.” Moreover, the “rights protected against state infringement by the *Fourteenth Amendment’s Due Process Clause* need not be identical in shape or scope to the rights protected against Federal Government infringement” by the Bill of Rights. “As drafted, the *Bill of Rights* directly constrained only the Federal Government. Although the enactment of the *Fourteenth Amendment* profoundly altered our legal order, it ‘did not unstitch the basic federalist pattern woven into our constitutional fabric.’ ” The Court has “never accepted a ‘total incorporation’ theory,” and has declined to apply several provisions of the Bill of Rights to the States. Justice Stevens said that it was “an overstatement to say that the Court has ‘abandoned,’ a ‘two-track approach to incorporation.’ The Court moved away from that approach in the area of criminal procedure.”

The “*Second Amendment* differs in fundamental respects from its neighboring provisions in the *Bill of Rights*.” The ruling applies a uniform national standard to an area where the “relevant regulatory interests vary significantly across localities.” It also prevents States’ “beneficent ‘experimentation,’ ” and “implicates the States’ core police powers.”

Justice Stevens asserted that “the liberty safeguarded by the *Fourteenth Amendment* is not merely preservative in nature but rather is a ‘dynamic concept.’ ” He continued: “Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect -- these are the central values we have found implicit in the concept of ordered liberty.” However, “judicial enforcement may not be appropriate,” if States are already carefully considering and continually calibrating “a particular liberty interest.” Chicago “allows residents to keep functional firearms, so long as they are registered, but it generally prohibits the possession of handguns, sawed-off shotguns, machine guns, and short-barreled rifles.” Fourteenth Amendment “ ‘liberty’ ” interests generally protect the individual “against direct state interference, whereas a personal right of self-defense runs primarily against other individuals; absent government tyranny.”

Justice Stevens argued that “firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical.” He continued: “*Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.” In addition, that America’s “oldest allies have almost uniformly found it appropriate to regulate firearms extensively,” weakens the argument that the Second Amendment is “fundamental.” Justice Stevens explained: “While the ‘American perspective’ must always be our focus, it is silly -- indeed, arrogant -- to think we have nothing to learn about liberty from the billions of people beyond our borders.”

The preamble to the Second Amendment demonstrates the right’s structural function to protect the States from the Federal Government, even though the *Heller* Court tries to write it out of the Constitution. Actually, the “idea that States may place

substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right.” The majority’s ruling exacts a heavy toll on state sovereignty. Moreover, it is “unwise for this Court to limit experimentation in an area ‘where the best solution is far from clear,’ ” and where there are “divided researchers” in a “rapidly developing empirical controversy.” As many different types of firearm regulations are now implicated, “today’s decision invites an avalanche of litigation.”

On historical analysis, he stated, “Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the *Second Amendment*, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole.” Moreover, under Justice Scalia’s approach, the “judge must canvas the entire landscape of American law as it has evolved through time, and perhaps older laws as well.” Justice Stevens cautioned: “It is not the role of federal judges to be amateur historians.” In sum, “the *Second Amendment* does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The *Second Amendment* was adopted to protect the *States* from federal encroachment.”

Justice Breyer also dissented, joined by Justices Ginsburg and Sotomayor. Justice Breyer acknowledged that Justice Stevens “has demonstrated that the *Fourteenth Amendment’s* guarantee of ‘substantive due process’ does not include a general right to keep and bear firearms for purposes of private self-defense.” In contrast to “other forms of substantive liberty, the carrying of arms for that purpose often puts others’ lives at risk.” Justice Breyer wrote to dispute the majority’s incorporation reasoning, for the primary opinion relied more on incorporation precedents than substantive due process. *Heller* “rejected the pre-existing judicial consensus that the *Second Amendment* was primarily concerned with the need to maintain a ‘well regulated Militia.’ ” Since that decision, “historians, scholars, and judges have continued to express the view that the Court’s historical account was flawed.” Historians now explain that “the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia.” Historically, “ ‘*Parliament* had the power’ to arm the citizenry,” and thus when the Declaration of Right states “private persons can possess guns only ‘as allowed by law,’ ” it refers “*to the right of Parliament to raise a militia.*” The historians imply that *Heller’s* historical account “would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1.”

Particularly “in cases where the history is so unclear,” the Court should “consider the basic values that underlie a constitutional provision and their contemporary significance,” and a provision’s “relevant consequences and practical justifications.” Also important are “the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution’s structural aims, including its division of powers among different governmental institutions (and the people as well).” Another consideration is whether a statute is too popular for Congress to overturn it as unconstitutional, which would offer a “particular comparative judicial advantage.”

To dispute incorporation, Justice Breyer explained that a private self-defense right, unlike other Bill of Rights provisions, “does not significantly seek to protect

individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority.” It also “does not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation.” Justice Breyer warned that incorporation “*will* work a significant disruption in the constitutional allocation of decisionmaking authority.” First, “gun regulation is the quintessential exercise of a State’s ‘police power.’ ” Second, judging such regulations “requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make. Justice Breyer queries: “Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?” Other questions include, “Does the presence of a convicted felon in the house matter? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders?” Incorporation stifles federalism, which is “the ability of States to reflect local preferences and conditions.”²⁸

Justice Breyer asked, “why, in a Nation whose Constitution foresees democratic decisionmaking, is it so *fundamental* a matter as to require taking that power from the people? What is it here that the people did not know? What is it that a judge knows better?” Many factors argue against incorporation: “the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations.” In the incorporation of other rights, “*some* of these problems have arisen,” but “in this instance *all*” are present. Although “many States have constitutional provisions protecting gun possession,” the “provisions typically do no more than guarantee that a gun regulation will be a *reasonable* police power regulation.”

Justice Breyer found no “historical consensus” that the *Heller* right is “‘fundamental.’ ” On the plurality’s Reconstruction-era historical account, Justice Breyer first agreed with declining to revisit interpretation of the Privileges or Immunities Clause. Justice Breyer then asserted that the laws enacted in that period show only a fundamental concern for eradicating discrimination. For example, the Second Freedman’s Bureau Act provides that “each citizen ‘shall have . . . *full and equal benefit* of all laws and proceedings . . . the constitutional right to bear arms . . . without *respect to race or color, or previous condition of slavery.*’ ” Justice Breyer explained, “This sounds like an *antidiscrimination* provision.”²⁹ Moreover, “why would those who wrote the *Fourteenth Amendment* have wanted to give such a right to Southerners who had so recently waged war against the North?” With regard to recent history, “in every State and many local communities, highly detailed and complicated regulatory schemes governed (and continue to govern) nearly every aspect of firearm ownership.” In the sixty years before 2007, only six cases struck down “gun control laws: three that banned ‘the transportation

²⁸ Gun ownership differs significantly across the Nation, for “approximately 60% of adults who live in the relatively sparsely populated Western States of Alaska, Montana, and Wyoming report that their household keeps a gun, while fewer than 15% of adults in the densely populated Eastern States of Rhode Island, New Jersey, and Massachusetts say the same.”

²⁹ The Civil Rights Act of 1866, and the Equal Protection Clause itself, both also focus on discrimination.

of any firearms for any purpose whatsoever,’ a single ‘permitting law,’ and two as-applied challenges in ‘unusual circumstances.’ ” Justice Breyer highlighted that, “as evidenced by the breadth of existing regulations, States and local governments maintain substantial flexibility to regulate firearms -- much as they seemingly have throughout the Nation’s history -- even in those States with an arms right in their constitutions.”

Justice Breyer concluded that “the Framers did not write the *Second Amendment* in order to protect a private right of armed self-defense,” and “nothing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense, as described in *Heller*, is ‘deeply rooted in this Nation’s history or tradition’ or is otherwise ‘fundamental.’ Indeed, incorporating the right recognized in *Heller* may change the law in many of the 50 States.”

§ 7.03 REGULATION OF BUSINESS & OTHER PROPERTY INTERESTS

Page 422: Insert the following before (b) Public Use

HORNE v. DEPARTMENT OF AGRICULTURE, 135 S. Ct. 1039 (2015). In *Horne*, the Court invalidated as an unconstitutional taking a US Department of Agriculture's California Raisin Marketing Order requiring growers to set aside, free of charge, a specific percentage of their crop that the Department of Agriculture could dispose of as a pleased in order to maintain an orderly market for raisins. The Department had issued the order under the Agricultural Marketing Agreement Act of 1937, which allowed “the Secretary of Agriculture to promulgate ‘marketing orders’ to help maintain stable markets for particular agricultural products.” The Department ordered growers to turn over 47% of their crop in 2002-03 and 30% of their crop in 2003-04. Growers turn over their crops to raisin handlers who separate the percentage ordered by the government. Horne is both a grower and a handler. The government uses the proceeds from disposing the raisins to subsidize raisin exports; Horne is not a raisin exporter. One year the proceeds were less than the cost of producing the raisins; another year, there were no proceeds at all. When Horne refused to turn over the raisins requisitioned by the government, the government fined Horne the value of the raisins (\$480,000) and assessed an additional penalty of over \$200,000.

Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined, and in which Justices Ginsburg, Breyer, and Kagan, joined as to Parts I and II. Justice Sotomayor dissented. The protections of the Takings Clause extend to personal and real property. The protections of the Takings Clause go back at least as far as Magna Carta and continued through the charters of the American Colonies. *Lucas v. South Carolina Coastal Council*, (casebook, p. 424), suggests that certain protections of the Clause – specifically the prohibition against regulatory takings – might only extend to real property, but its protection against “government acquisitions of property” extends to both real and personal property.

“The reserve requirement imposed by the Raisin Committee is a clear physical taking.” Both title and control of the property passed to the government; the raisin growers

lose their entire “bundle” of property rights. While the government can prohibit growing raisins altogether, this is not equivalent to simply taking them. The distinction between “appropriation and regulation” is important. While the impact on the grower may be the same, the Constitution is concerned with both means and ends.

Second, “[t]he Government contends that because growers are entitled to these net proceeds” realized from government disposing of the raisins, the growers “retain the most important property interest in the reserve raisins, so there is no taking in the first place.” In the case of physical takings of property, the Takings Clause also compensates for partial takings. “The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.” The Chief Justice also distinguishes the case of *Andrus v. Allard*, (casebook p. 415), as another example of a regulatory rather than physical taking.

Third, the government's action effected a *per se* taking. The Court rejected the government's contention “that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don’t like the program, they can ‘plant different crops,’ or ‘sell their raisin-variety grapes as table grapes or for use in juice or wine.’” Chief Justice Roberts found that “the Government is wrong as a matter of law.” The Court distinguished *Ruckelshaus v. Monsanto Co.*, (casebook p. 416), on the ground that the manufacturer in that case received the “valuable Government benefit” of being licensed to sell dangerous chemicals in exchange for revealing trade secrets about these chemicals. While selling produce may be regulated, it is not a similar “special governmental benefit.”

The Chief Justice also distinguished *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), in which the government required oyster harvesters to remit 10% of their detached marketable shells. As the oysters were government property, harvesting oysters was a privilege.

The Chief Justice also rejected the argument that the property owner first had to pay the government imposed fine, and then seek reimbursement. As plaintiffs were both growers and handlers, they could bring suit alleging that the fine levied against them as handlers was a taking as the raisins they refused to set aside for government use were their raisins.

The Court also rejected the government's argument that the amount of the taking be reduced by what the raisins would have been worth without the reserve program and other benefits of the reserve program. “The Court has repeatedly held that just compensation normally is to be measured by “the market value of the property at the time of the taking.””

The government had already calculated the fair market value of the raisins as \$483,843.53. Consequently there is no reason for remand to determine the value. In rejecting the government's argument, the Chief Justice left open questions of how the exercise of eminent domain can increase the value of real property by adding access to waterways or highways. The Court only rejected “a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here.” In

rejecting a remand, the Chief Justice noted that litigation had gone on for 10 years, and that was long enough.

Concurring, Justice Thomas questioned the public use if government “takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments.”

Justice Breyer dissented in part, joined by Justices Ginsburg and Kagan. Justice Breyer agreed that a taking had occurred here, but would remand the case for a determination of just compensation as the petition for certiorari did not present the question of just compensation and the briefs “barely touched” the question. As the reserve requirement enhances the price of raisins, the government may be right that no compensable taking has occurred. In calculating just compensation, the Court “sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of the property.” Justice Breyer does not think the majority provides any meaningful way to distinguish this case from the *Bauman v. Ross*, 167 U.S. 548 (1897), line of cases. For over a century, this rule has applied whether all in the neighborhood benefit or the benefit is specific to only one property. Indeed, there may not be a taking at all if the government program increased the value of the raisins sold more than the value of the raisins taken. If no taking has occurred, even the plaintiffs concede that they have to pay the fine.

Justice Sotomayor dissented. She did not think that the government's action met the “high bar” for a *per se* taking articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*, (casebook p. 417). *Loretto* specifies that “a permanent physical occupation” by the government is one way of effectuating a *per se* taking. For *Loretto* to apply, however, the government must completely destroy the owner’s entire bundle of property rights. First, not all of the bundle of property rights is eliminated; plaintiffs just can't sell the reserve raisins. For example, they could still consume them or feed them to farm animals. Moreover, surrendering certain property rights in order to enter a regulated market, does not effectuate a taking.

Ultimately, the majority opinion rests on two errors. First, it relaxes the stringent *Loretto* rule by not requiring the complete elimination of the entire bundle of property rights to effectuate a *per se* taking. Second, the Court absolutely rejects treating this program as a regulatory taking because of the physical intrusion. Justice Sotomayor sharply disagreed with the Court’s approach “that any regulation that involves the slightest physical movement of property is necessarily evaluated as a *per se* taking rather than as a regulatory taking.”

Page 530: Insert the following as note 4

(4) *Civil contempt proceedings*. In *Turner v. Rogers*, 131 S. Ct. 2507 (2011), an indigent defendant who failed to pay child support was sentenced to one year imprisonment. He contested the sentence on the basis that he was not represented by counsel. Writing for the Court, Justice Breyer held “that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an

indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards.” These safeguards include or must be equivalent to “(1) notice to the defendant that his ‘ability to pay’ is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.” The Court, however, remanded the case because defendant “received neither counsel nor the benefit of alternative procedures like those we have described.” Justice Thomas dissented joined by Justice Scalia, and joined in part by Chief Justice Roberts and Justice Alito. Rather than remand, Justice Thomas would affirm the decision below. “Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised.”

[2] Limiting Punitive Damages Under the Due Process Clause

Page 403: Insert the following at the end of the Note

In *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Supreme Court reduced punitive damages awarded in excess of \$5 billion to a one to one ratio with compensatory damages. The case stemmed from the Exxon Valdez oil spill where eleven million gallons of crude oil spilled into Prince William Sound. At the time of the accident, the blood alcohol level of the ship’s captain was .241, or “three times the legal limit for driving in most states.” During his tenure with Exxon, Hazelwood had completed an alcohol treatment program. His superiors knew about the program, but they were unaware that he had dropped out of the follow up treatment and had not been attending Alcoholics Anonymous. Additionally, contested testimony was introduced at trial that “Hazelwood drank with Exxon officials and that members of Exxon management knew of his relapse.” No evidence was presented at trial that Exxon monitored Hazelwood following his return from the alcohol treatment program.

Following the spill, Exxon spent approximately \$2.1 billion in clean up efforts. It also settled both state and federal environmental damage claims for more than \$1 billion. Respondents, a class of 32,000 plaintiffs consisting of commercial fishermen, native Alaskans, and landowners brought this action for “economic losses to individuals dependent on Prince William Sound for their livelihoods.” At trial, the jury awarded plaintiffs \$287 million in compensatory damages. After the court deducted payments, such as released claims and settlements, a balance of \$19,590,257 remained. The jury also awarded \$5,000 in punitive damages against Hazelwood and \$5 billion against Exxon, which was later remitted by the Ninth Circuit to \$2.5 billion.

Writing for the Court, Justice Souter first considered whether maritime law

allowed corporate liability for punitive damages based on acts of managerial agents. The Court was evenly split (Justice Alito did not participate in the case) on this issue, and therefore could not issue an order or grant a reversal. Thus, the Ninth Circuit's ruling that Exxon was liable for Hazelwood's acts was undisturbed, but the disposition had no precedential effect "on the derivative liability question."

The Court turned to "punitive damages in maritime law," which fall within "a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise." Despite studies showing an increase in punitive damages, the rate of punitive to compensatory damages has typically stayed at a less than 1:1 ratio. Moreover, for courts "concerned with fairness and consistency," the stark unpredictability of punitive awards is a "very real problem." For example, a "recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1, and a standard deviation of 13.81."

The Court emphasized that its analysis was under federal maritime law. The Court was not examining "the outer limit allowed by due process." To resolve this case, the Court fashioned a common law remedy in the absence of a statute. Justice Souter compared the need to reduce "unjustified disparities" in punitive damages with the need for consistency in criminal sentencing. In *State Farm v. Campbell*, (casebook, p. 401), the Court held "a single digit maximum is appropriate in all but the most exceptional of cases." This "constitutional upper limit confirms that the 1:1 ratio is not too low."

Justice Stevens concurred in part and dissented in part stating that legislatures, not courts, typically fashion "caps and ratios."

Justice Ginsburg concurred in part and dissented in part. She was concerned that the Court would require the 1:1 ratio universally using the due process clause.

Justice Breyer concurred in part and dissented in part noting that Exxon's " 'egregious' " conduct " 'justifie[d] a considerably higher ratio' than the 1:1 ratio we had applied in our most recent due process case."

[4] Government Takings of Property Requiring Just Compensation

Page 433: Insert the following after Palazzolo v. Rhode Island

STOP THE BEACH RENOURISHMENT, INC. v. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 560 U.S. 702 (2010). In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Court unanimously found that no taking resulted from a Florida Supreme Court decision. The Florida Supreme Court held that beachfront owners suffered no property right infringement from the state filling in submerged coastline as public land. The disagreement among the Justices arose over the plurality's assertion that the *Takings Clause* applies to the judicial branch, which the other Justices warned was unnecessary to reach the result as the Court unanimously held that no taking had occurred here.

The Court relied on Florida law in unanimously finding no Fifth Amendment taking. “Generally speaking, state law defines property interests, including property rights in navigable waters and the lands underneath them.” Florida law provides that the ordinary boundary between private beachfront, termed littoral³⁰ property, and state-owned land, is the mean high-water tide line, averaged over the preceding 19 years. Beyond the mean high-water line, “the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line).” Littoral property owners enjoy rights “generally akin to easements” (in access to, use of, and view of the water) and most centrally to this case, the right to accretions.³¹ Accretions are gradual and imperceptible “additions of alluvion (sand, sediment, or other deposits) to waterfront land.” An accretion occurs so “slowly that one could not see the change occurring.” Florida law distinguishes this from an avulsion, defined as a “ ‘sudden or perceptible loss of or addition to land by the action of the water.’ ” The distinction is critical, as “the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State).” An avulsion alters the water line without changing the boundary of ownership between littoral property and the state, as accretions would. Thus, when an avulsion adds waterfront land, “the littoral owner has no right to subsequent accretions.” Instead, accretions belong to the State.³²

Florida’s Beach and Shore Preservation Act of 1961 permits local governments to “apply to the Department of Environmental Protection for the funds and the necessary permits to restore a beach.” When a “beach restoration ‘is determined to be undertaken,’ the Board sets what is called ‘an erosion control line.’ ” The erosion control line “must be set by reference to the existing mean high-water line, though in theory it can be located seaward or landward of that.” Most of the work to prevent erosion “occurs seaward of the erosion-control line, as sand is dumped on what was once submerged land. The fixed erosion-control line replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property.” Under a Florida statute, when “the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion).” Therefore, beachfront landowners can no longer receive property extensions by accretion, because the property “remains bounded by the permanent erosion-control line.”

These legal issues arose in 2003 when the city of Destin and Walton County sought to combat beach erosion on 6.9 miles of coastline by adding “about 75 feet of dry sand seaward of the mean high-water line.” In the ensuing litigation, the Florida District Court of Appeal ruled for the property owners, concluding that “contrary to the Act’s

³⁰ Fla. Stat. §§ 177.27(14)-(15), 177.28(1) (2007). “Many cases and statutes use ‘riparian’ to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby ‘riparian’ means abutting a river or stream and ‘littoral’ means abutting an ocean, sea, or lake.”

³¹ Relictions occur when water recedes to expand littoral property, and for “simplicity’s sake” the Court referred to both accretions and relictions as accretions.

³² “Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State.”

preservation of ‘all common-law riparian rights,’ the order had eliminated two of the Members’ littoral rights: (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact.” The Florida Supreme Court reversed, “fault[ing] the Court of Appeal for not considering the doctrine of avulsion, which it concluded permitted the State to reclaim the restored beach on behalf of the public. It described the right to accretions as a future contingent interest, not a vested property right, and held that there is no littoral right to contact with the water independent of the littoral right of access, which the Act does not infringe.” The property owners then “sought rehearing on the ground that the Florida Supreme Court’s decision itself effected a taking of the Members’ littoral rights contrary to the *Fifth* and *Fourteenth Amendments*.”

Justice Scalia wrote for a unanimous Court in holding that no taking occurred, but represented only a plurality in asserting that the *Takings Clause* applies to the judicial branch. Justice Scalia, joined in the plurality by The Chief Justice and Justices Thomas and Alito, maintained: “It would be absurd to allow a State to do by judicial decree what the *Takings Clause* forbids it to do by legislative fiat.” He noted that “the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” If a judicial taking occurred, the remedy would not exclusively be compensation, for compensation “is even rare for a legislative or executive taking.” If the Supreme Court “were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court’s judgment that the Beach and Shore Preservation Act can be applied to the Members’ property. The power to effect a *compensated* taking would then reside, where it has always resided, not in the Florida Supreme Court but in the Florida Legislature.”³³

Although a plurality asserted that the *Takings Clause* applies to the judiciary, no Justice found a taking here. The property owners claimed that “the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water.” Justice Scalia, here writing for the entire Court, rebuked the owners’ argument: “This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court’s decision, littoral-property owners had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.

“Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral

³³ “Respondents argue that federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them. But federal courts must often decide what state property rights exist in nontakings contexts.”

landowners. Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not." The Florida Supreme Court decision "is consistent with these background principles of state property law."

Justice Scalia noted, "The result under Florida law may seem counter-intuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction." The Court "cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law," and therefore the decision is affirmed.

Justice Kennedy, joined by Justice Sotomayor, concurred in part and concurred in the judgment. "The Court's analysis of the principles that control ownership of the land in question, and of the rights of petitioner's members as adjacent owners, is correct." Nevertheless, he agreed with Justice Breyer that "this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the *Takings Clause of the Fifth Amendment*." Takings involve "the power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view. And, as a matter of custom and practice, these are matters for the political branches -- the legislature and the executive -- not the courts." He continued: "The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power." In contrast to the executive and legislative branches, courts "are not designed to make policy decisions about 'the need for, and likely effectiveness of, regulatory actions.' "

"The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." Justice Kennedy warned that "even if the state court decided to rescind its decision that changed the law, a temporary taking would have occurred in the interim."

"These difficult issues are some of the reasons why the Court should not reach beyond the necessities of the case to recognize a judicial takings doctrine. It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators."

Justice Breyer also concurred in part and in the judgment, joined by Justice Ginsburg. He explained: "Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims." As this case demonstrates, a judicial taking "can involve state property law issues of considerable complexity. Hence, the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of,

state-law cases in an area of law familiar to state, but not federal, judges.” Justice Breyer objected to the Court deciding more than that “the Florida Supreme Court’s decision in this case did not amount to a ‘judicial taking.’ ” Justice Stevens took no part in this case.

KOONTZ v. ST. JOHNS RIVER WATER MGMT. DIST., 133 S. Ct. 2586 (2013). In a 5-4 decision, the Court extended the *Nollan v. California Coastal Commission*, (casebook, p. 430), and *Dolan v. City of Tigard*, (casebook, p. 428), nexus and proportionality test to apply to a situation in which the regulating authority a) had denied the property owner’s permit application rather than grant it subject to a condition and b) had demanded money, not property, as a condition of granting the permit. All nine justices agreed that the *Nollan-Dolan* test applied regardless of whether the government approved the development application subject to a condition subsequent that the owner convey property (the conventional paradigm) or denied the application due to the property owner’s failure to satisfy a condition precedent (that it convey property). The majority and dissent also agreed that the government could have denied the development application, without imposing any conditions on the property, and that would not have constituted a taking as no property would have been taken.³⁴ The Court split, however, over whether the *Nollan-Dolan* requirements applied when the condition involved payment of money, as it did here, as opposed to conveyance of real property as in the earlier cases.

Petitioner sought “to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits.” The Management and Storage of Surface Water (MSSW) permit, allows the District to “impose ‘such reasonable conditions’ on the permit as are ‘necessary to assure’ that construction will ‘not be harmful to the water resources of the district.’ ” The Wetlands Management permit (WRM) requires that applicants seeking to build on wetlands “offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.” In order to “mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11 acre southern section of his land by deeding to the District a conservation easement on that portion of his property.” The District rejected his proposal, and offered two alternatives to acquire the necessary permits. “First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres.” As an alternative option, “the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away.” Petitioner found the District’s “demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused.”

In an opinion by Justice Alito, the majority treated a condition that the property owner pay money as equivalent to one that it relinquish property. Otherwise, government

³⁴ While it may not have violated the takings clause, denial of a development permit, without imposing any conditions, might have violated other legal provisions.

could always evade *Nollan-Dolan* by offering the property owner the option of paying a sum of money instead of surrendering some property interest. The majority distinguished *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a case on which the dissent relied, in which five justices had concluded that an obligation to spend money could not give rise to a takings claim. There, five justices (including Justice Kennedy) had found no taking when the government had retroactively required a former mine company pay medical benefits for retired miners because the government imposed financial obligations did not “ ‘operate upon or alter an identified property interest.’ ” In this case, however, the obligation to pay money did operate on an identified property owner, a factor which the majority (including Justice Kennedy) found dispositive. In response to the dissent, the majority repeated that taxes are not takings and thought the dissent exaggerated the difficulties in enforcing the boundaries between the concepts.

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan thought that the majority ran “roughshod” over *Apfel* which dictated a contrary result. Moreover, the dissenters argued that the Court’s decision might subject normal permit fees to takings analysis, thereby complicating land use regulation, and would confuse the boundaries between monetary exactions, which are subject to takings review, and taxes, which are not.

§ 7.04 Liberty in Procreation and Other Personal Matters

[3] Homosexuality

Page 508: Insert the following after Lawrence v. Texas

[**Editor's Note:** *United States v. Windsor*, combines federalism, equal protection, and substantive due process analyses. Consequently, the case can usefully be discussed immediately after *Lawrence v. Texas*, casebook p. 508, or after *Romer v. Evans*, casebook p. 719.]

UNITED STATES v. WINDSOR

133 S. Ct. 2675 (2013)

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United

States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U.S.C. §1738C.

Section 3 is at issue here. . . . Section 3 . . . provides as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. §7.

. . . The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. . . .

. . . Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U.S.C. §2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. . . .

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA's §3. . . . This case is unusual, however, because the §530D letter was not preceded by an adverse judgment. . . .

Although “the President . . . instructed the Department not to defend the statute in *Windsor*,” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” . . .

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose

limited intervention by BLAG. . . . The District Court . . . did grant intervention by BLAG as an interested party. . . .

. . . [T]he Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. . . .

II

. . . The Government's position — agreeing with Windsor's legal contention but refusing to give it effect — meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties. . . .

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is “a real and immediate economic injury,” *Hein*, 551 U.S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury. . . . The judgment orders the United States to pay money that it would not disburse but for the court's order. . . . It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

This Court confronted a comparable case in *INS v. Chadha*. . . . There, as here, the Executive determined that the statute was unconstitutional. . . . The INS, however, continued to abide by the statute. . . .

It is true that “[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” *Roper, supra*, at 333. . . . But this rule “does not have its source in the jurisdictional limitations of Art. III. . . .

. . . Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “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 (1962).

. . . Unlike Article III requirements — which must be satisfied by the parties before judicial consideration is appropriate — the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.” . . .

. . . BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. . . . True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

. . . On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. . . .

The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. . . . [T]here is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. . . .

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. . . . [M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. . . .

. . . New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. . . . New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.

. . . By history and tradition the definition and regulation of marriage, . . . has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. . . .

. . . Congress determined that marriages “entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.

. . . DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes. . . .

. . . The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” *Ibid.* . . .

. . . In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. . . .

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930). . . .

. . . DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage . . . may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. . . . When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. . . . “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’” *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The Federal Government uses this state-defined class . . . to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth

Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. . . .

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). . . . [R]ecognition of the validity of same-sex marriages. . . . is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Constitution's guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973). In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. *Supra*, at 19 (quoting *Romer, supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. . . . The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . .” H. R. Rep. No. 104-664, pp. 12-13 (1996). The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Id.*, at 16. . . . Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage. . . .

DOMA's operation in practice confirms. . . . a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. . . . Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality. . . . DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. . . . This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

. . . . It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries. . . .

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, *Social Security Survivors Benefits* 5 (2012). . . .

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life. . . . For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. . . . Federal executive and agency officials are prohibited from “participat[ing] personally and substantially” in matters as to which they or their spouses have a financial interest. A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. . . .

. . . . [T]he principal purpose and the necessary effect of this law. . . . requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U.S., at 499-500; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages. . . .

CHIEF JUSTICE ROBERTS, dissenting.

I agree with Justice Scalia that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something — as the majority puts it — “thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.” . . . At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

. . . The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their “historic and essential authority to define the marital relation,” may continue to utilize the traditional definition of marriage.

The majority. . . . states that “[t]his opinion and its holding are confined to those lawful marriages,” referring to same-sex marriages that a State has already recognized as

a result of the local “community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.” Justice Scalia believes this is a “ ‘bald, unreasoned disclaime[r].’ ” In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. The dominant theme of the majority opinion is that the Federal Government's intrusion into an area “central to state domestic relations law applicable to its residents and citizens” is sufficiently “unusual” to set off alarm bells. . . .

. . . Thus, while “[t]he State's power in defining the marital relation is of central relevance” to the majority's decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty. . . .

. . . [T]he majority focuses on the legislative history and title of this particular Act, those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I

A

The Court is eager — *hungry* — to tell everyone its view of the legal question at the heart of this case. . . . [T]he plaintiff and the Government agree. . . . that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

. . . Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we “undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.” *Ibid.*

That is jaw-dropping. . . . It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of “primary” power, and so created branches of government that would be “perfectly coordinate. . . .” The Federalist, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). . . .

. . . Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.

. . . One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it.³⁵ What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals. . . . The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

. . . [W]e have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question's answer. The United States reluctantly conceded that at oral argument.

The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*, 462 U.S. 919 (1983). But in that case, two parties to the litigation disagreed with the position of the United States and with the court below: the House and Senate. . . .

³⁶

. . . There, absent a judgment setting aside the INS order, Chadha faced deportation. . . . When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it*. . . .

The majority's discussion. . . . proceeds to call the requirement of adverseness a “prudential” aspect of standing. . . . Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the

³⁵ [Court's footnote 1] For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another “Motion to Dismiss” like the one the United States filed in District Court: It argued that the court should agree “with Plaintiff and the United States” and “*not* dismiss” the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.

³⁶ [Court's footnote 2] There the Justice Department's refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department's abandoning the law in the present case. . . .

complaint. . . . [T]he question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.

. . . The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a “prudential” requirement that we have invented, but an essential element of an Article III case or controversy. The majority’s notion that a case between friendly parties can be entertained so long as “adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor” the other side of the issue, effects a breathtaking revolution in our Article III jurisprudence.

. . . This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994) — in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive’s determination of unconstitutionality would have escaped this Court’s desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. . . . What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from *Marbury v. Madison*, 5 U.S. 137 that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” . . . The very next sentence of Chief Justice Marshall’s opinion makes the crucial qualification that today’s majority ignores: “*Those who apply the rule to particular cases, must of necessity expound and interpret that rule.*” 5 U.S. 137, (emphasis added). . . .

B

. . . Justice Alito would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. . . .³⁷ Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress’s liking. . . .

³⁷ [Court’s footnote 3] Justice Alito attempts to limit his argument by claiming that Congress is injured (and can therefore appeal) when its statute is held unconstitutional without Presidential defense, but is *not* injured when its statute is held unconstitutional *despite* Presidential defense. I do not understand that line. The injury to Congress is the same whether the President has defended the statute or not. And if the injury is threatened, why should Congress not be able to participate in the suit from the beginning, just as the President can? . . .

To be sure, if Congress cannot invoke our authority in the way that Justice Alito proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. . . . Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. . . .

II

. . . Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

A

. . . [T]he opinion starts with seven full pages about the traditional power of States to define domestic relations — initially fooling many readers, I am sure, into thinking that this is a federalism opinion. . . . Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. What to make of this? . . . My guess is that the majority . . . needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

. . . As nearly as I can tell, the . . . opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. . . .

The majority opinion . . . says that DOMA . . . violates “basic due process” principles, and that it inflicts an “injury and indignity” of a kind that denies “an essential part of the liberty protected by the Fifth Amendment.” The majority never utters the dread words “substantive due process,” perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation's history and tradition,” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of “‘ordered liberty.’” *Id.*, at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

. . . The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role). . . .

B

. . . “It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”

United States v. O'Brien, 391 U.S. 367, 383 (1968). Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

. . . [I]t is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. . . . DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

. . . When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses. . . . DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. . . .

. . . [T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements. . . . [T]he . . . Act . . . did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence — indeed, had been unquestioned in virtually all societies for virtually all of human history. . . .

The penultimate sentence of the majority's opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State.” I have heard such “bald, unreasoned disclaimer[s]” before. *Lawrence*, 539 U.S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.*, at 578. Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” with an accompanying citation of *Lawrence*. . . .

. . . In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the “personhood and dignity” which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that “personhood and dignity” in the first place. . . .

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. . . .

. . . Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices--in other words, democracy. . . .

. . . We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. . . .

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. . . . The Constitution, however, does not dictate that choice. It leaves the choice to the people. . . . I would . . . hold that Congress did not violate Windsor's constitutional rights by enacting §3 of the Defense of Marriage Act (DOMA). . . .

I

I turn first to the question of standing. In my view, the United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below. . . . Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates. . . .

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. . . . It is remarkable that the Court has simultaneously decided that the United States, which “receive[d] all that [it] ha[d] sought” below, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.³⁸

A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has “ ‘suffered an injury in fact’ that is caused by ‘the conduct complained of’ and that ‘will be redressed by a favorable decision.’ ” *Camreta v. Greene*, 563 U.S. , ,

³⁸ [Court's footnote 1] Our precedents make clear that, in order to support our jurisdiction, BLAG must demonstrate that it had Article III standing in its own right. . . . See *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“ . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III” (citation omitted)); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). . . .

(2011). In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter, suffered just such an injury.

. . . [B]ecause legislating is Congress' central function, any impairment of that function is a . . . grievous injury. . . .

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, . . . it is certainly contrary to the *Chadha* Court's endorsement of the principle that "Congress is the proper party to defend the validity of a statute" when the Executive refuses to do so on constitutional grounds. 462 U.S., at 940. . . .

II . . .

Same-sex marriage presents a highly emotional and important question of public policy — but not a difficult question of constitutional law. . . . [N]o provision of the Constitution speaks to the issue.

. . . [I]t is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). . . .

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. . . .

. . . The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage³⁹

³⁹ [Court's footnote 6] . . . Willis, Can Marriage Be Saved? A Forum, *The Nation*, p. 16 (2004) (celebrating the fact that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart").

III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. . . .

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. . . . And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. . . . While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment — marked by strong emotional attachment and sexual attraction — between two persons. . . .

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted)⁴⁰ Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence. . . .

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. . . .

In any event, §3 of DOMA, in my view, does not encroach on the prerogatives of the States. . . . Congress used marital status . . . in part, I assume, because it viewed

⁴⁰ [Court’s footnote 7] The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth v. Perry*, ante, p.____. . . .

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. . . .

marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. . . .

NOTE

California's Proposition 8. In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Court held that the proponents of California's Proposition 8 lacked standing to defend the law in court. Proposition 8 was a voter ballot initiative which amended the California Constitution to define marriage as a union between a man and a woman. This prevented same-sex couples from marrying. In an earlier, unrelated decision, the California Supreme Court stated that homosexual and heterosexual couples receive basically the same benefits after Proposition 8; the only difference was that the use of the term " 'marriage' " was reserved for the " 'union of opposite-sex couples as a matter of state constitutional law.' " 46 Cal. 4th, at 388. Relying on the California Supreme Court, Chief Justice Roberts stated: "Under California law, same-sex couples have a right to enter into relationships recognized by the State as 'domestic partnerships,' which carry 'the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses.' Cal. Fam. Code Ann. §297.5(a) (West 2004)."

Two same-sex couples challenged Proposition 8 in federal court and named various state officials as defendants; however, the state officials refused to defend Proposition 8. Therefore, the District Court allowed the official proponents of Proposition 8 to intervene to defend it. The District Court subsequently found that Proposition 8 violated the US Constitution. The elected officials chose not to appeal, but the initiative proponents did. In response to a certified question by the Ninth Circuit, the California Supreme Court stated that California law permitted the proponents of an initiative to appear in court and represent the state if elected officials declined to do so. Based on the opinion of the California Supreme Court, the Ninth Circuit granted standing. Chief Justice Roberts reversed, denying standing to the initiative proponents. Writing for a 5-4 majority, Chief Justice Roberts stated that standing to proceed in a federal court was a question of federal law. Once the initiative measure passed, the initiative proponents had only a generalized grievance, which was insufficient to establish standing to appeal. The Court has never afforded standing to private litigants to defend the constitutionality of a state statute when state officials have declined to do so.

Justice Kennedy dissented, joined by Justices Thomas, Alito, and Sotomayor. Justice Kennedy maintained that the decision of the California Supreme Court specifying the powers of an official initiative proponent was binding on the US Supreme Court for purposes of establishing standing. As ballot initiatives (which are utilized by 27 states) are designed "to control and to bypass public officials," their official proponents are better suited to defend them in court than are the elected officials who are being bypassed. *Hollingsworth* is discussed in greater detail in Chapter §1.07 of this Supplement.

OBERGEFELL v. HODGES

576 U.S.____, ___ S. Ct.____, ___L.Ed.____(2015)

JUSTICE KENNEDY delivered the opinion of the Court

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from . . . States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition. . . .

. . . This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II. . .

A

. . . Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. . . . Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

. . . Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—

and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. . . . Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

. . . Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. . . . In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. . . . Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. . . . Three months later, Arthur died. . . . Obergefell. . . . brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse . . . celebrated a commitment ceremony to honor their permanent relation in 2007. . . . In 2009, DeBoer and Rowse . . . adopted a baby boy. Later that same year, they welcomed another son into their family. . . . The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt . . . If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. . . .

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. . . . When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. . . . The cases now before the Court involve other petitioners as well. . . . Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory. . . .

B

The ancient origins of marriage confirm its centrality. . . . The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as

society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . A greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.

...

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned

by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U.S.C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State’s Constitution guaranteed same-sex couples the right to marry. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. . . . [I]n *United States v. Windsor*, this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. . . . With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.

III

Under the Due Process Clause of the Fourteenth Amendment, [t]he fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections

and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed that holding in *Zablocki v. Redhail*, 430 U.S. 374 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

. . . The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, . . . other, more instructive precedents. . . have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

. . . The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. . . . Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. . . .

. . . As the Supreme Judicial Court of Massachusetts has explained, “. . . the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge*, [440 Mass. 309, 322 (2003)].

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. . . .

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. . . . *Griswold* described marriage this way:

“Marriage. . . promotes a way of life, not causes; a harmony in living, not political

faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” [381 U.S.], at 486.

. . . Marriage responds to the universal fear that a lonely person might call out only to find no one there. . . .

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer [v. Nebraska]*, 262 U.S. 390, 399 (1923)]. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U.S., at 384, *Meyer, supra* at 399. Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor, supra*, at ___ (slip op., at 23). Marriage also affords the permanency and stability important to children’s best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. . . .

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth . . .

There is no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace [H]e afterwards carries [that image] with him into public affairs.” 1 *Democracy in America* 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill*, 125 U.S. 190, 211 (1888), the Court . . . explain[ed] that marriage is “the foundation of the family and of society. . . .” Marriage. . . has long been “a great public institution, giving character to our whole civil polity.” *Id.*, at 213. . . . Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

. . . [S]ame-sex couples are denied . . . more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. . . . [E]xclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. . . . Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but . . . laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

. . . [R]espondents . . . assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” [*Washington v. Glucksberg*, 521 U.S. 702 (1997)] did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense. . . .

. . . If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U.S., at 12; *Lawrence*, 539 U.S., at 566-567.

The right to marry is fundamental as a matter of history and tradition, but rights

come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. . . . In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. . . . "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." [388 U.S., at 12]. . . .

. . . [I]n *Zablocki*. . . [t]he equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383. . . .

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. . . . [I]nvidious sex-based classifications in marriage remained common through the mid-20th century. . . . Responding to a new awareness, the Court invoked equal protection to invalidate laws imposing sex-based inequality on marriage. . . .

. . . In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119-124. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446-454. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538-543.

. . . *Lawrence* . . . drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control

their destiny by making their private sexual conduct a crime.” *Id.*, 539 U.S., at 578.

This dynamic also applies to same-sex marriage. . . . Especially against a long history of disapproval of their relationships, . . . [t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses . . . couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. . . . *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

. . . The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. . . .

Yet there . . . have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. . . . As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. . . .

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . [W]hen the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. [*Schuetz v. BAMN*, 572 U.S. __ (2014)] (slip op., at 17).

. . . It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. . . .

. . . *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. . . . That is why *Lawrence* held *Bowers* was “not correct when it was decided.” 539 U.S., at 578. . . . [A]nd the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. . . .

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court

granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. . . . Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. . . . Indeed, with respect to . . . excluding same-sex couples from the right to marry, . . . these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. . . .

. . . The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. . . . [T]hese men and women . . . hope . . . not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. . . .

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

. . . [O]ver the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature. . . .

. . . The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. . . . Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). . . . The majority . . . seizes for itself a question the Constitution leaves to the people. . . . And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." . . .

I

. . . There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"? . . .

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." For all those millennia, across all those civilizations, "marriage" referred to

only one relationship: the union of a man and a woman. See ante, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). . . .

This universal definition of marriage as the union of a man and a woman is no historical coincidence. . . . It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. . . .

. . . The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. . . . [F]or the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

. . . And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. . . .

This singular understanding of marriage has prevailed in the United States throughout our history. . . . Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between “husband and wife” as one of the “great relations in private life,” and philosophers like John Locke, who described marriage as “a voluntary compact between man and woman” centered on “its chief end, procreation” and the “nourishment and support” of children. 1 W. Blackstone, *Commentaries* *410; J. Locke, *Second Treatise of Civil Government* §§78-79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family “was a given: its structure, its stability, roles, and values accepted by all.” Forte, *The Framers’ Idea of Marriage and Family*, in *The Meaning of Marriage* 100, 102 (R. George & J. Elstain eds. 2006).

. . . There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. . . .

. . . In his first American dictionary, Noah Webster defined marriage as “the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children.” 1 *An American Dictionary of the English Language* (1828). . . . The first edition of Black’s *Law Dictionary* defined marriage as “the civil status of one man and one woman united in law for life.” *Black’s Law Dictionary* 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

. . . Early cases on the subject referred to marriage as “the union for life of one man and one woman,” *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). . . . More recent cases have directly connected the right to marry with the “right to procreate.” *Zablocki v. Redhail*, *supra* at 386 (1978). . . .

. . . The majority may be right that the “history of marriage is one of both continuity and change,” but the core meaning of marriage has endured.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson*, 409 U.S. 810 (1972). . . .

Over the last few years, public opinion on marriage has shifted rapidly. . . .

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage. . . .

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

. . . [T]he majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45. Stripped of its shiny rhetorical gloss, the majority’s argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. . . . [A]s a judge, I find the majority’s position indefensible as a matter of constitutional law.

A. . .

This Court has interpreted the Due Process Clause to include a “substantive” component that protects certain liberty interests against state deprivation “no matter what process is provided.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). The theory is that some liberties are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). . . .

. . . The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court asserted that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.” *Id.*, at 450. . . .

Dred Scott’s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented “meddlesome interferences with the rights of the individual,” and “undue interference with liberty of person and freedom of contract.” 198 U.S., at 60, 61. . . .

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty. . . . By empowering judges to elevate their own policy judgments to the status of constitutionally protected “liberty,” the *Lochner* line of cases left “no alternative to regarding the court as a . . . legislative chamber.” L. Hand, *The Bill of Rights* 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. . . . *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“we do not sit as a super-legislature to weigh the wisdom of legislation”). . . .

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But [o]ur precedents have required that implied fundamental rights be “objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U.S., at 720-721. . . .

. . . The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority’s driving themes are that marriage is desirable and petitioners desire it. . . .

When the majority turns to the law, it relies primarily on precedents discussing the fundamental “right to marry.” *Turner v. Safley*; *Zablocki*; see *Loving*. . . .

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. . . . Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. . . .

In short, the “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. . . .

2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. . . .

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneliness” by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the “right to be let alone.” . . .

In sum, the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. . . .

3

. . . It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. . . .

Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*. . . . This freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor.” *Lochner*, 198 U.S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own “reasoned judgment,” informed by its “new insight” into the “nature of injustice”. . . .

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority

randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. . . .

. . . If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, *Polyamory: The Next Sexual Revolution?* Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” This argument again echoes *Lochner*. . . .

Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.”. . .

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. . . .

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. . . . The central point seems to be that there is a “synergy between” the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. . . .

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. . . . In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.” *Lawrence*, 539 U.S., at 585 (O’Connor, J., concurring in judgment). . . .

IV

. . . Over and over, the majority exalts the role of the judiciary in delivering social change. . . .

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. . . .

. . . People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 385-386 (1985) (footnote omitted). . . .

Federal courts are blunt instruments when it comes to creating rights. . . . Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt.

1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. The First Amendment guarantees, however, the freedom to “*exercise*” religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . .

Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority . . . explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. . . .

. . .[A] much different view of the Court’s role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. . . . But do not celebrate the Constitution. It had nothing to do with it. . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join The Chief Justice’s opinion in full. I write separately to call attention to this Court’s threat to American democracy.

. . . The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it. . . . [t]he electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. . . .

. . . When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. . . . We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. . . .

But the Court ends this debate, in an opinion lacking even a thin veneer of law. . . . No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect. . . . because “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions” . . .

This is a naked judicial claim to legislative—indeed, *super*-legislative—power A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. . . . Not a single evangelical Christian (a group that comprises about one quarter of Americans¹), or even a Protestant of any denomination. . . .

II

But what really astounds is the hubris reflected in today’s judicial Putsch. The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriages in 2003. . . .

. . . (. . . What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. . . .)

. . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

. . . Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. . . .

I

¹ 19 See Pew Research Center, *America’s Changing Religious Landscape* 4 (May 12, 2015).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. . . .

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. . . .

A

1

As used in the Due Process Clauses, “liberty” most likely refers to “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1769) (Blackstone). . . .

Both of the Constitution’s Due Process Clauses reach back to Magna Carta. Chapter 39 of the original Magna Carta provided, “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” . . . In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words “by the law of the land” to mean the same thing as “by due process of the common law.” *Id.*, at 50.

. . . William Blackstone . . . defined “the right of personal liberty” as “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” [1 Blackstone] 125, 130.

The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to “life, liberty, or property.” State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word “liberty” to refer only to freedom from physical restraint. . . .

In enacting the Fifth Amendment’s Due Process Clause, the Framers similarly chose to employ the “life, liberty, or property” formulation, though they otherwise deviated substantially from the States’ use of Magna Carta’s language in the Clause. . . .

If the Fifth Amendment uses “liberty” in this narrow sense, then the Fourteenth Amendment likely does as well. . . . And this Court’s earliest Fourteenth Amendment decisions appear to interpret the Clause as using “liberty” to mean freedom from physical restraint. . . .

Even assuming that the “liberty” in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke. . . . Locke described men as existing in a state of nature, possessed of the “perfect freedom to order their actions and dispose of their possessions and persons as they think fit” J. Locke, *Second Treatise of Civil Government*, §4, p. 4 (J. Gough ed. 1947) (Locke). . . .

. . . “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power.” J. Reid, *The Concept of Liberty in the Age of the American Revolution* 56 (1988). . . .

B

Whether we define “liberty” as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

. . . Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. . . . They want, for example, to receive the State’s *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of “liberty” that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. . . .

. . . [O]ur precedents . . . all involved absolute prohibitions on private actions associated with marriage. . . . *Loving v. Virginia*, 388 U.S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and

cohabiting in Virginia.² They were each sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.³ In a similar vein, *Zablocki v. Redhail*, 434 U.S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377-378. And *Turner v. Safley*, 482 U.S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission. . . . that could not be granted absent compelling reasons. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage. . . .

III

The majority’s inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. . . .

The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter. . . , and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. . . .

B

Aside from undermining the political processes that protect our liberty, the majority’s decision threatens. . . religious liberty. . . .

. . . [T]he Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.*, Religious Freedom Restoration Act of 1993.

. . . In our society, marriage is not simply a governmental institution; it is a religious

² The suggestion . . . that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America’s earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 19 (2009). . . .

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. . . .

³ The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment’s Free Exercise Clause. . . .

institution as well. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples. . . .⁴

IV

. . . [T]he majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. The . . . Constitution contains no “dignity” Clause. . . .

Human dignity has long been understood in this country to be innate. . . .

. . . The government cannot bestow dignity, and it cannot take it away. . . .

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. . . .

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. . . . The Constitution leaves that question to be decided by the people of each State.

I

. . . For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The . . . majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

. . . For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate. . . .

⁴ . . . During the hey-day of antimiscegenation laws . . . , for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies.

. . . Here, the States. . . formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. . . .

III

. . . [T]he majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools. . . .

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. . . .

[5] Other Autonomy Issues

Page 523: Insert the following after Whalen v. Roe

NAT'L AERONAUTICS & SPACE ADMIN. v. NELSON, 131 S. Ct. 746 (2011). In *Nelson*, the Court upheld the application to NASA contract employees of a Homeland Security Presidential Directive requiring them to submit to standard background checks. The Court chose to “assume, without deciding, that the Constitution protects a privacy right” and held that the “Government’s interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974, satisfy any ‘interest in avoiding disclosure’ that may ‘arguably ha[ve] its roots in the Constitution.’ ”

The Jet Propulsion Laboratory (JPL), a NASA owned facility in Pasadena, California, was operated by the California Institute of Technology under a Government contract. The JPL was the “lead NASA center for deep-space robotics and communications” and was “staffed exclusively by contract employees.” When the university employees were hired, some individual federal contracts required background checks; however, “background checks were standard only for federal civil servants.” The Department of Commerce implemented the new Directive by “mandating that contract employees with long-term access to federal facilities complete a standard background check.”

First, the JPL employees were required to complete a Standard Form 85 (SF-85) where most of the questions sought “basic biographical information.” However, the form’s final question asked “whether the employee has ‘used, possessed, supplied, or manufactured illegal drugs’ in the last year.” The form did note that a truthful response could not “be used as evidence against the employee in a criminal proceeding.” Once a

completed SF-85 was on file, a Form 42 was sent to the employee's former landlords and references. The two-page document asked "if the reference has 'any reason to question' the employee's 'honesty or trustworthiness.'" It also asked "if the reference knows of any 'adverse information' concerning the employee's 'violations of the law,' 'financial integrity,' 'abuse of alcohol and/or drugs,' 'mental or emotional stability,' 'general behavior or conduct,' or 'other matters.'" If the reference had checked yes, the form called for an "explanation in the space below" and also provided space for any "additional information" ('derogatory' or 'favorable') that may bear on 'suitability for government employment or a security clearance.'" Finally, all SF-85 and Form 42 responses were "subject to the protections of the Privacy Act."

Writing for the Court (8-0), Justice Alito stated that *Whalen v. Roe*, (casebook, p. 521), considered a similar question concerning informational privacy. *Whalen* "concerned New York's practice of collecting 'the names and addresses of all persons' prescribed dangerous drugs with both 'legitimate and illegitimate uses.'" Privacy precedents involve at least two different interests: "one, an 'interest in avoiding disclosure of personal matters'; the other, an interest in 'making certain kinds of important decisions' free from government interference." In *Nixon v. Adm'r of Gen. Services*, (casebook, p. 318), the Supreme Court "referred again to a constitutional 'interest in avoiding disclosure.'" In *Nixon*, former President Nixon challenged the Presidential Recordings and Materials Preservation Act which required him to "turn over his presidential papers and tape recordings for archival review and screening." The Court rejected President Nixon's claim that "the review required by this Act violated the former President's 'Fourth and Fifth Amendmen[t] rights.'" Instead, "the Act at issue, like the statute in *Whalen*, contained protections against 'undue dissemination of private materials.'" President Nixon's claim was even weaker than the one in *Whalen*, and "the public interest in preserving presidential papers outweighed any 'legitimate expectation of privacy.'" Besides *Whalen* and *Nixon*, "no other decision has squarely addressed a constitutional right to informational privacy."⁴¹

As in *Whalen*, the *Nelson* Court assumed that "the Government's challenged inquiries implicate a privacy interest of constitutional significance."⁴² Nevertheless, "whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure." Putting the challenged questions into context, the Government was not exercising "its sovereign power 'to regulate or license,'" but was instead conducting the "challenged background checks in its capacity 'as proprietor' and manager of its 'internal operation.'" The Government's inquiry was "part of a standard employment background

⁴¹ "State and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years. Many courts hold that disclosure of at least some kinds of personal information should be subject to a test that balances the government's interest against the individual's interest in avoiding disclosure."

⁴² Justice Alito noted that Justice Scalia's concurring opinion "provides no support for his claim that our approach in this case will 'dramatically increase the number of lawsuits claiming violations of the right to informational privacy'" and the Court is simply taking "the same approach here that the Court took more than three decades ago in *Whalen* and *Nixon*, and there is no evidence that those decisions have caused the sky to fall."

check of the sort used by millions of private employers.” The Government has been conducting employment investigations since the days of George Washington. “Since 1871, the President has enjoyed statutory authority to ‘ascertain the fitness of applicants for the civil service,’ ” and “[s]tandard background investigations similar to those at issue here became mandatory for all candidates for the federal civil service in 1953.” Historically, “the Government has an interest in conducting basis employment background checks” in order to ensure the “security of its facilities” and “emplo[y] a competent, reliable workforce.” The record demonstrated that “as a ‘practical matter,’ there are no ‘[r]elevant distinctions’ between the duties performed by NASA’s civil-service workforce and its contractor workforce.” Thus, the questions at issue are “reasonable, employment-related inquires” that furthered the Government’s proprietary interest.

Moreover, the SF-85 follow up question regarding treatment for illegal-drug use was a “reasonable, employment-related inquiry.” The Government used the treatment inquiry as a “mitigating factor” for “illegal-drug users who are taking steps to address and overcome their problems.” Justice Alito rejected the plaintiffs’ argument that the drug treatment question should be optional if only used to mitigate, as Government does not have “a constitutional burden to demonstrate that its questions are ‘necessary.’ ”

The open-ended questions on Form 42 for references were, “like the drug-treatment question on SF-85, reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.” Such questions were reasonable in light of “their pervasiveness in the public and private sectors.”

Besides being “reasonable in light of the Government interests at stake,” both Government forms were “subject to substantial protections against disclosures to the public.” In *Nelson*, “no less than in *Whalen* and *Nixon*, the information collected [was] shielded by statute from ‘unwarranted disclosur[e].’ ” The Privacy Act protected “all information collected during the background-check process” and allowed the Government to “maintain records ‘about an individual’ only to the extent the records are ‘relevant and necessary to accomplish’ a purpose authorized by law.” Moreover, the Privacy Act required “written consent before the Government may disclose records pertaining to any individual” and imposed “criminal liability for willful violations.”

Finally, the respondents pointed to “what they described as a ‘broad’ exception” in the Privacy Act’s disclosure bar for “ ‘routine use[s],’ ” which were “defined as uses that are ‘compatible with the purpose for which the record was collected.’ ” However, the routine use exception did not authorize public release of background check information. Moreover, Cal Tech was “not given access to any adverse information uncovered.” Justice Alito stated that a “ ‘remote possibility’ of public disclosure created by these narrow ‘routine use[s]’ does not undermine the Privacy Act’s substantial protections.” An exception to Form-85 did permit “public disclosure ‘[t]o the news media or the general public.’ ” However, this exception applied “where release is ‘in the public interest’ and would not result in ‘unwarranted invasion of personal privacy.’ ” Moreover, the “[r]espondents have not cited any example of such a disclosure.”

Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Scalia wrote that “ ‘informational privacy’ ” is one of many “desirable things not included in the Constitution.” Justice Scalia believed “[a] federal constitutional right to ‘informational privacy’ does not exist” and therefore, it is “up to the People to enact those

laws.” Respondents’ own brief to the Court did not identify which provision of the Constitution the Government violated. Only at oral argument did the respondents assert that “the right to informational privacy emerged from the Due Process Clause of the Fifth Amendment.” Respondents’ case failed on the “simple ground that the Due Process Clause does not ‘guarante[e] certain (unspecified) liberties’; rather it ‘merely guarantees certain procedures as a prerequisite to deprivation of liberty.’ ” The Due Process Clause should not be used by Courts as “putty to fill up gaps they deem unsightly in the protections provided by other constitutional provisions.”

The majority’s opinion would “dramatically increase the number of lawsuits claiming violations of the right to informational privacy.” The Court based its denial of respondents’ claim on many factors: the respondents were “Government contractor employees” who were “working with highly expensive scientific equipment.” The Government was seeking “only information about drug treatment and information from third parties that is standard in background checks,” which the Government was held liable for if revealed. Finally, NASA’s Privacy Act regulations were “very protective of private information.” As the Court cited “*all* of these factors as the basis for its decision,” future cases that lack one or more of these factors could yet succeed.

Justice Thomas opined that “the Constitution does not protect a right to informational privacy” and the “notion that the Due Process Clause of the Fifth Amendment is a wellspring of unenumerated rights against the Federal Government ‘strains credulity for even the most casual user of words.’ ”

Chapter VIII

RACIAL EQUALITY

§ 8.03 OTHER FORMS OF RACIAL DISCRIMINATION

[5] The Criminal Justice System

Page 616: Insert the following new Note 5(e)

In *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Court reversed a trial court's determination of lack of discriminatory intent as clearly erroneous and found that the trial court had committed clear error in its ruling. Defendant Wilson was charged with first degree murder. Thirty-six potential jurors survived being challenged for cause. Of those thirty-six, five were black. The prosecution used preemptory strikes to strike all five black jurors. The Court held that one of these strikes violated *Batson*.

When reviewing a *Batson* claim, appellate courts must consider all of the circumstances that bear upon the issue of racial animosity. Justice Alito found the explanation given for the strike of Mr. Brooks unconvincing. The trial court in *Snyder* was given two explanations for the strike. The main reason offered by the prosecution was that Mr. Brooks looked nervous throughout the questioning. The trial judge did not make a finding on or otherwise indicate agreement with the first explanation, but rather allowed the prosecutor's challenge to stand without explanation.

Second, the prosecutor stated that as a student teacher, Mr. Brooks might be concerned about missing class, and therefore he might vote for a lesser sentence in order to avoid the penalty phase of the trial. This second rationale also failed under the highly deferential clearly erroneous test. After Mr. Brooks expressed his concern for missing class, Mr. Brooks' dean assured the trial court that jury service would not be a problem, as he would help him to make up missed classes. The record contains no evidence that Mr. Brooks appeared to be troubled after hearing the dean's remarks. Moreover, while the prosecutor seemed troubled by Mr. Brooks' obligation, he declined to use a preemptory strike on a white juror with a more pressing time commitment.

Justice Thomas dissented, joined by Justice Scalia, stating, only "paying lip service" to the deferential clearly erroneous standard, the majority interfered with the trial judge's "pivotal role" in determining the question of discriminatory intent.

Chapter X

AFFIRMATIVE ACTION

§ 10.01 EDUCATION

Page 681: Insert the following before § 10.02 EMPLOYMENT

FISHER v. UNIVERSITY OF TEXAS AT AUSTIN, 133 S. Ct. 2411 (2013).

In *Fisher*, the Court considered whether the Fifth Circuit’s decision affirming the District Court’s grant of summary judgment in favor of the University of Texas at Austin “was consistent with ‘this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment.’ ” The Court invalidated the Fifth Circuit’s decision because it “did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter v. Bollinger* [casebook, p. 660] and *Regents of Univ. of Cal. v. Bakke* (casebook, p. 647).”

Plaintiff, who is Caucasian, was denied admission to the University of Texas at Austin. When plaintiff sought entrance into the University “she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled.” Following the Court’s decisions in *Grutter* and *Gratz v. Bollinger*, (casebook, p. 678), the University instituted a new admissions program in which for that portion of the class not admitted under the top 10% program,⁴³ it once again introduced the “explicit consideration of race.”⁴⁴ To implement this program the University began including a student’s race as a component of the “Personal Achievement Index” (PAI) score.⁴⁵ “Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.”

⁴³ Much of the class was admitted under the top 10% program in which the tax Legislature mandated that that students graduating in the top 10% of Texas high school classes receive automatic admissions to the University of Texas.

⁴⁴ Prior to the admissions program under consideration in this case, the University had employed two different programs to evaluate candidates for admission. In the first program “the University considered two factors: a numerical score reflecting an applicant’s test scores and academic performance in high school (Academic Index or AI), and the applicant’s race.” In the second program the University stopped considering race and instead employed a “new holistic metric of a candidate’s potential contribution to the University, to be used in conjunction with the Academic Index.” Under the first program which *did* consider race, “the entering freshman class was 4.1% African-American and 14.5% Hispanic.” Under the second program which *did not* consider race, the “entering class was 4.5% African-American and 16.9% Hispanic.”

⁴⁵ “ ‘Personal Achievement Index’ (PAI) measures a student’s leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student’s background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student’s family.”

Justice Kennedy wrote for a 7-1 majority.⁴⁶ In *Bakke*, Justice Powell's principal point "was that this interest in securing diversity's benefits, although a permissible objective, is complex. 'It is not an interest in simple ethnic diversity.'" Justice Kennedy, quoting Justice Powell, continued: " 'The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.' *Bakke*." The *Grutter* Court affirmed Justice Powell's conclusion "that obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" Justice Kennedy stressed, however, that *Gratz* and *Grutter* do not allow race to "be considered unless the admissions process can withstand strict scrutiny." To survive strict scrutiny, the university must "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.' *Bakke*." As *Richmond v. J. A. Croson Co.* makes clear: "Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,'" *Croson*."

Applying strict scrutiny, the *Grutter* court upheld the admissions program of the University of Michigan Law School. The *Grutter* Court opined that the decision to pursue " 'the educational benefits that flow from student body diversity,' that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision." Justice Kennedy noted: "There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity." However, "the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding."

Establishing the goal of academic diversity does not end the inquiry, however. "Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." As specified "in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each application is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" The Court continued: "Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." In practice, " '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.'" Nevertheless, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."

⁴⁶ Justice Kagan took no part in the consideration or decision of the case.

The Court in *Grutter* “approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’ ” In the present case, “the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.” The Court concluded that “a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that ‘encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’ *Bakke*.”

Concurring, Justice Scalia reiterated his position in *Grutter*: “ ‘The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.’ ”

Justice Thomas also wrote a concurring opinion stating that he “would overrule *Grutter*” as it is “a radical departure from our strict-scrutiny precedents.” He argued that “there is nothing ‘pressing’ or ‘necessary’ about obtaining whatever educational benefits may flow from racial diversity.” Recalling the history of legally mandated school segregation, he maintained that “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today.” In addition, the Court’s desegregation cases “establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools’ survival.” In *Davis v. School Bd. Of Prince Edward Cty.*, 347 U.S. 483 (1954), “the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools.” This argument became actuality: “After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964.”

Justice Thomas emphasized that “in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today.” For example, the University claimed “that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society.” Similarly, in *Sweatt v. Painter*, 339 U.S. 629 (1950), which also involved the University of Texas, the University “defended segregation on the ground that it provided more leadership opportunities for blacks.” Justice Thomas rejected this argument: “It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders.” The University also argued “that student body diversity improves interracial relations.” This is another argument that was “once marshaled in support of segregation.” Although “the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key.” Nevertheless, “[e]ducational benefits are a far cry from the truly compelling state interests that we previously required to justify use of racial classifications.”

Justice Thomas maintained that his “view of the Constitution is the one advanced by the plaintiffs in *Brown*: “ ‘[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.’ ” He continued: “This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.”

The University’s “use of race has little to do with the alleged educational benefits of diversity.” The “insidious consequences” of these policies are that “Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates.”⁴⁷ Placed at such a disadvantage when race-based preferences have helped to determine admission, “ ‘the majority of [black] students end up in the lower quarter of their class.’ ” In addition to “the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared.”⁴⁸

Justice Ginsburg filed a dissenting opinion. For her, “only an ostrich could regard the supposedly neutral alternatives as race unconscious.” In this connection, Texas’ program to admit the top 10% of students graduating from Texas high schools “was adopted with racially segregated neighborhoods and schools front and center stage.” Justice Ginsburg concluded by noting that she had “several times explained why government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality.’ ”

SCHUETTE v. COALITION TO DEFEND AFFIRMATIVE ACTION, 134 S. Ct. 1623 (2014). In *Schuetzte*, the Court rejected an equal protection challenge to a Michigan constitutional amendment that broadly prohibited using race in a wide variety of government decisions including university admissions. Writing for a plurality, Justice Kennedy was joined by Chief Justice Roberts and Justice Alito. After the Supreme Court’s decisions in *Gratz v. Bollinger*, casebook p. 678 and *Grutter v. Bollinger*, casebook p. 660, Michigan passed a constitutional amendment broadly prohibiting preferences in State institutions based on race and certain other criteria, including gender and ethnicity, across a wide range of decisions and venues, including universities and government employment.⁴⁹ The measure, known as “Proposal 2,” passed 58% to 42%.

⁴⁷ In the University’s entering class of 2009: “Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.” For reference, the “lowest possible score on the SAT is 600, and the highest possible score is 2400.”

⁴⁸ “The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented.”

⁴⁹ In response to the Supreme Court’s decision in *Gratz* striking down the Michigan undergraduate program, the University had modified its race-based plan.

Justice Kennedy began by stating that this case does not involve the constitutionality of race-based admissions policies in universities that were reviewed just last term in *Fisher v. University of Texas*, see p. of this supplement. Recognizing the “innovation and experimentation” in our federal structure, the *Grutter* Court acknowledged that California, Florida and Texas had already banned affirmative action in admissions by state law. The U.S. Court of Appeals for the Sixth Circuit had upheld the referendum finding *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) controlling. The plurality disagreed. He distinguished *Reitman v. Mulkey*, 387 U.S. 369 (1967), because the constitutional amendment invalidated in that case was designed to permit private racial discrimination. Similarly, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court invalidated a referendum which had overturned a city ordinance prohibiting discrimination in selling and renting housing. Central to the Court’s holding was that the referendum singled out ordinances banning discrimination in a context of widespread racial discrimination in housing, which resulted in substandard housing conditions for minorities. This placed a special burden on racial minorities in the political process. Thus both *Reitman* and *Hunter* involved demonstrated racial injury aggravated by the referenda at issue.

In *Seattle*, the voter initiative overturned a mandatory busing program adopted by the school board. The school board had adopted the mandatory busing as part of the settlement with the Office of Civil Rights in which complainants alleged that the state had enacted school policies that were racially discriminatory. The remedy was adopted prior to the Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, requiring a finding of *de jure* discrimination to justify such remedial action. As that was not the law when *Seattle* was decided, that case can only be understood as prohibiting voter initiatives which interfere with a state’s remedying racial discrimination in which it was complicit.

The Sixth Circuit, however, adopted language in *Seattle* that went well beyond what was necessary to the holding. “In essence, according to the broad reading of *Seattle*, any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest’ is subject to strict scrutiny.” The plurality explicitly rejected this language in *Seattle*.

In any event, this broad language would not invalidate Proposal 2.

“The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court’s settled equal protection jurisprudence.” The plurality specifically rejected this approach, as it would “contradict central equal protection principles.” *Shaw v. Reno*, casebook, p. 597, rejected racial stereotyping based on assumptions that “members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”⁵⁰

⁵⁰ The Court also cited *Metro Broadcasting, Inc. v. FCC*, casebook, p. 693.

Racial lines are increasingly blurring. “Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend.” If anything, “racial antagonisms and conflict” would increase if courts were to announce “what particular issues of public policy should be classified as advantageous to some group defined by race.” The ability of voters to determine policy could be seriously impaired. “Tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects. Racial division would be validated, not discouraged” if the approach articulated in *Seattle* and the Court of Appeals were adopted.

Voters can decide within constitutional limits which racial preferences to adopt without “the invitation or insistence” of courts. “The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.” In this case, there is no specific injury of the kind inflicted in *Mulkey*, *Hunter*, or *Seattle*. The debate of whether to continue or end racial preferences has been going on in the political arena for over 15 years. The plurality's holding was not limited to university admissions; it permitted the political processes to decide racial preferences across a broad range of areas including public contracting.

The Constitution protects individual rights against government incursion. “Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.” In addition to the serious First Amendment problems of taking electoral questions away from voters, that approach “is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this.”

In *Mulkey*, *Hunter*, and *Seattle* “the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can

be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.”

“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”

In his concurrence, Chief Justice Roberts focused on the dissent: “People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.”

Justice Scalia concurred in the judgment, joined by Justice Thomas. This case involves the rhetorical question: “Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly *requires*?” The people of Michigan are merely adopting the correct understanding of the Fourteenth Amendment prescribing all governmental discrimination based on race.

This case does not involve the constitutionality of race-based preferences, but instead “the so-called political-process doctrine, derived from this Court's opinions in *Washington v. Seattle School Dist. No. 1*, and *Hunter v. Erickson*. I agree with those parts of the plurality opinion that repudiate this doctrine. But I do not agree with its reinterpretation of *Seattle* and *Hunter*, which makes them stand in part for the cloudy and doctrinally anomalous proposition that whenever state action poses ‘the serious risk . . . of causing specific injuries on account of race,’ it denies equal protection. I would instead reaffirm that the ‘ordinary principles of our law [and] of our democratic heritage’ require ‘plaintiffs alleging equal protection violations’ stemming from facially neutral acts to ‘prove intent and causation and not merely the existence of racial disparity.’ I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution. Section 26 of the Michigan Constitution (formerly Proposal 2) rightly stands.”

The plurality interprets these cases “beyond recognition.” Justice Scalia would simply overrule them. “The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining whether a law that reallocates policymaking authority concerns a racial issue.” The first problem lies in defining “a racial issue.” At one point, *Seattle* appears to suggest that this would include any issue in which taking one side would benefit minorities. The plurality recognizes two problems with this exercise. First, “it involves judges in the dirty business of dividing the Nation ‘into racial blocs.’” Second, it assumes that members of minority groups share

common views and interests. “Whether done by a judge or a school board, such ‘racial stereotyping [is] at odds with equal protection mandates.’”

For many years, “we have repeatedly rejected ‘a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process.’” The Fourteenth Amendment was designed to “obliterate” racial classifications. The Equal Protection Clause applies to all races. In this connection, Justice Scalia directly took issue with the concept of “discrete and insular minorities” articulated in the *Carolene Products* footnote. Indeed, “a group’s discreteness and insularity” could be a political advantage rather than a liability.

Another problem with the process theory is that “part of the inquiry directs a court to determine whether the challenged act ‘place[s] effective decisionmaking authority over [the] racial issue at a different level of government.’” This part of the *Seattle-Hunter* approach is at odds with another line of Supreme Court precedents establishing the “rule of structural state sovereignty.” This allows each state to vest state government authority at whatever level it wishes within the state.

Finally, Justice Scalia disagreed with the plurality insofar as it seems to state that “a facially neutral law may deny equal protection solely because it has a disparate racial impact.” This is at odds with all equal protection precedent, which requires a discriminatory purpose. In any event, as the District Court already found in this case, the constitutional amendment at issue could not possibly have a disparate impact. Hence the decision should not be remanded.

“As Justice Harlan observed over a century ago, ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’”

Justice Breyer, concurred in the judgment. First, the Court does not address the Michigan constitutional amendment “insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination.” That may demand a different answer. The Court only address the kind of program at issue in *Grutter*. Second, in his dissent in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, Justice Breyer stated that “race-conscious programs of this kind are constitutional, whether implemented by law schools, universities, high schools, or elementary schools.” He “concluded that the Constitution does not ‘authorize judges’ either to forbid or to require the adoption of diversity-seeking race-conscious ‘solutions’ (of the kind at issue here) to such serious problems as ‘how best to administer America’s schools’ to help ‘create a society that includes all Americans.’” Justice Breyer recounted studies demonstrating the serious problems faced by the American educational system and other studies which found that “low educational achievement continues to be correlated with income and race.” The U.S. “Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for

resolving differences and debates about the merits of these programs.” Third, *Hunter* and *Seattle* “involved a restructuring of the political process that changed the political level at which policies were enacted.” In this case, effective decision-making authority was moved from unelected faculty members and administrative staff⁵¹ to the voters deciding on a constitutional amendment. “Finally, the principle that underlies *Hunter* and *Seattle*” goes against the competing ideal that decision-making should occur through the democratic process.

Justice Sotomayor, dissented, joined by Justice Ginsburg. While we live in a democratic society, “to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.” For many years, the majority openly and invidiously prevented minorities from voting. Then it uses less direct methods such as literacy tests and poll taxes. Then it used the methods which occurred in this case by changing “the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose,” minorities have the right “to participate meaningfully and equally in the political process.”⁵²

In contrast to the course they pursued, the voters of Michigan have alternatives to influence those policies. “For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies.” Instead, by enacting the referendum, “the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities.”

This resulted in “two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admissions policies and one for everyone else.”

Those who wish to influence the board to adopt admissions policies based on legacy, athleticism, geography, etc. may do so. The only exception to this is race; to change that policy, they have to amend the Michigan Constitution. “Our precedents do not permit political restructurings that create one process for racial minorities and a

⁵¹ The boards of trustees delegated decision-making authority over admissions to faculty and administrators.

⁵² Justice Sotomayor termed these programs “race-sensitive admissions policies,” in contrast to affirmative action. “To comport with *Grutter*, colleges and universities must use race flexibly, and must not maintain a quota, *ibid*. And even this limited sensitivity to race must be limited in time, and must be employed only after “serious, good faith consideration of workable race-neutral alternatives,” *Grutter*-compliant admissions plans, like the ones in place at Michigan’s institutions, are thus a far cry from affirmative action plans that confer preferential treatment intentionally and solely on the basis of race.”

separate, less burdensome process for everyone else.” The Court effectively overrules *Seattle* and *Hunter*. “While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process.” Judges must be involved in “policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection.”

Justice Sotomayor recounted various incidences of state and local government altering the political decision-making processes to avoid complying with the desegregation decisions of the Supreme Court in education and other areas. *Hunter* was decided against this historical backdrop. The *Hunter* Court characterized the constitutional amendment at issue in that case “as ‘no more permissible’ than denying racial minorities the right to vote on an equal basis with the majority.” *Seattle* reaffirmed *Hunter* stating: “while ‘laws structuring political institutions or allocating political power according to neutral principles’ do not violate the Constitution, ‘a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.’” Specifically, “‘the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.’ Thus, the initiative required those in favor of racial integration in public schools to ‘surmount a considerably higher hurdle than persons seeking comparable legislative action’ in different contexts.” In summary, “*Hunter* and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority’s right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that “inures primarily to the benefit of the minority,” and (2) alters the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents’ favor.”

Race-sensitive policies benefit minorities and advance the compelling state interest of furthering diversity in higher education. The constitutional amendment at issue in this case only falls on admissions policies that complied with *Grutter*. Such a policy “must use race flexibly, not maintain a quota; must be limited in time; and must be employed only after ‘serious, good faith consideration of workable race-neutral alternatives.’”

In turn, the constitutional amendment places burdens on minorities in the political process. Enacting race-sensitive policies now required a constitutional amendment. Such amendment required at least 320,000 signatures in Michigan.⁵³ Moreover, the cost of “state-level initiative and referendum campaigns in 2008 eclipsed the \$740.6 million spent by President Obama in his 2008 presidential campaign.” At bottom, the parents

⁵³ Actually, a constitutional referendum required between 25 and 50% more signatures as approximately that many would be invalidated.

seeking to influence change in the legacy policy for admissions of children of alumni only had to influence the governing board of the University, while the minority parent had to go through the constitutional amendment process. So altering the political process to the detriment of racial minorities subjected the government action to strict scrutiny. As Michigan asserted no compelling state interest, the Court should hold against it.

The plurality tries to avoid this resolved by maintaining that the political process doctrine requires discriminatory intent. It does not; it only protects a process. The plurality's attempt to rewrite the political process leaves little left.

Turning to Justice Breyer's opinion, "the issue of race-sensitive admissions policies often dominated board elections." Moreover, boards "remain actively involved in setting admissions policies and procedures."

Equal protection in general and the political process document in particular affords each citizen an equal opportunity to shape the laws which govern that citizen. "The minority plainly does not have a right to prevail over majority groups in any given political contest. But the minority does have a right to play by the same rules as the majority." In this way, the political process doctrine has its roots in the *Carolene Products* case.

Turning to Justice Scalia's opinion, he "is troubled that the political-process doctrine has not been applied to trigger strict scrutiny for political restructurings that burden the majority. But the doctrine is inapplicable to the majority. The minority cannot achieve such restructurings against the majority, for the majority is, well, the majority." Rejecting Justice Scalia's concerns that "the political-process doctrine would create supposed 'affirmative-action safe havens' in places where the ordinary political process has thus far produced race-sensitive admissions policies," she reiterated that citizens retain many options to alter race-sensitive admissions policies, for example, influencing boards of trustees.

She rejected the view expressed by Justice Scalia that race should be left out of the decision-making process altogether. "Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process." It "also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities." It "matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up." It "matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" Stopping racial discrimination entails the willingness "to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."

For well over a century Michigan institutions of public higher education discriminated against minorities. For over a century, racial minorities in Michigan fought to bring diversity to their State's public colleges and universities. The amendment turns

back the clock on what had been considerable improvements in the diversity of Michigan's higher education for some time. It has already had a devastating effect on the representation of minorities in Michigan universities. “In 2006 (before §26 took effect), underrepresented minorities made up 12.15 percent of the University of Michigan’s freshman class, compared to 9.54 percent in 2012—a roughly 25 percent decline.” Moreover, “between 2006 and 2011, the proportion of black freshmen among those enrolled at the University of Michigan declined from 7 percent to 5 percent, even though the proportion of black college-aged persons in Michigan increased from 16 to 19 percent.” Justice Kagan took no part in the consideration of this case.

§ 10.02 EMPLOYMENT

Page 694: Insert the following before Adarand Constructors, Inc. v. Pena

RICCI v. DESTEFANO, 557 U.S. 557 (2009). In *Ricci v. DeStefano*, the Court held that discarding promotional examinations taken by New Haven firefighters, on the basis of racially disparate results, violated Title VII by discriminating against those “who had performed well.” Writing for a majority of five, Justice Kennedy stated that “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” Since the City did not meet the necessary threshold standard, “the City’s action in discarding the tests was a violation of Title VII.” As the Court found a statutory violation, it did not consider “whether respondents’ actions may have violated the *Equal Protection Clause*.”

Following its contract with the union, New Haven, Connecticut implemented a promotion examination, designed by an outside consultant. Based on the examinations, 10 white candidates were eligible for promotion to 8 lieutenant positions, and 7 whites and 2 Hispanics were eligible for promotion to 7 captain positions. The City “threw out the examinations” to avoid a disparate impact lawsuit by minority groups. Subsequently, 17 white firefighters and 1 Hispanic firefighter who were denied a chance at promotion brought this lawsuit.

The Court of Appeals affirmed the District Court’s opinion granting summary judgment. By a 7 to 6 vote, the Court of Appeals denied rehearing en banc. In reversing the Court of Appeals decision, the Supreme Court granted summary judgment for plaintiff firefighters. “Without some other justification,” the City’s “express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.”

The “Court has considered cases similar to this one, albeit in the context of the *Equal Protection Clause of the Fourteenth Amendment*. The Court has held that certain government actions to remedy past racial discrimination — actions that are themselves based on race — are constitutional only where there is a “ ‘strong basis in evidence’ ” that the remedial actions were necessary. This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution. That does not mean the constitutional authorities are irrelevant, however. Our cases discussing constitutional principles can provide helpful guidance in this

statutory context.” For example, in *Wygant v. Jackson Bd. Of Ed.* [476 U.S. 267 (1986)] and *Richmond v. J. A. Croson Co.*, (casebook, p. 683), the Court applied the “strong basis in evidence” standard, “observ[ing] that ‘an amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota.’ ”

“The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII. Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of ‘practices that are fair in form, but discriminatory in operation.’ *Griggs*” [*v. Duke Power Co.*, 401 U.S. 424, 431 (1971)]. Employers’ discretion is limited “to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.”

As “an employer cannot rescore a test based on the candidates’ race, then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates — absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations.”⁵⁴

The “statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the *Equal Protection Clause* in a future case.” As the defendants “have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.”

Employers have significant discretion in developing an inclusive promotion process. “But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e-2(j).” In contrast, “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”

Even if the City “were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.”

“On this basis, we conclude that petitioners have met their obligation to

⁵⁴ 42 U.S.C. § 2000e-2(h) “(‘[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race’).”

demonstrate that there is ‘no genuine issue as to any material fact’ and that they are ‘entitled to judgment as a matter of law.’ *Fed. Rule Civ. Proc. 56(c)*.”

For “the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII,” which a plurality of the Court stated was a “‘rule of thumb for the courts.’” *Watson v. Fort Worth Bank & Trust*, [487 U.S. 977, 995–996 (1988)]. Had the City certified the examinations, “the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions.”

Nevertheless, the City’s problem “is that a prima facie case of disparate-impact liability — essentially, a threshold showing of a significant statistical disparity ... and nothing more — is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt. We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects.”

On the first point, “no genuine dispute that the examinations were job-related and consistent with business necessity” exists. Second, the City “lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt.” When the “strong-basis-in-evidence standard applies, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record,” especially when such statements are made by an individual who admitted to not having “‘stud[ie]d the test at length or in detail.’” Moreover, the individual is “a ‘direct competitor’” of the consultant company that designed the examination, whom the City has now hired.

Justice Kennedy cautioned: “Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City’s discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.”

The Court credited defendants with thinking “about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair.” Many firefighters seeking promotion “had studied for months, at considerable personal and financial expense, and thus the injury caused by the City’s reliance on raw racial statistics at the end of the process was all the more severe.”

Justice Kennedy concluded: “Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact

provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.”

Concurring, Justice Scalia added that the Court’s “resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” Regarding “ ‘remedial’ race-based actions,” clearly, “Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race then surely it is also prohibited from enacting laws mandating that third parties — *e.g.* employers, whether private, State, or municipal — discriminate on the basis of race.” Disparate-impact theory might be defended “by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination — to ‘smoke out,’ as it were, disparate treatment.” One reason for accepting proof of disparate impact is to “free plaintiffs from proving an employer’s illicit intent, but [it is] quite another to preclude the employer from proving that its motives were pure and its actions reasonable.”

Justice Alito’s concurrence, joined by Justices Scalia and Thomas, agreed with the Court “that concern about disparate-impact liability is a legitimate reason for a decision of the type involved here only if there was a ‘substantial basis in evidence to find the tests inadequate.’ ” As “the Court correctly holds that respondents cannot satisfy this objective component, the Court has no need to discuss the question of the respondents’ actual intent.”

Considering the entire “summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation.” The City then acted to have the test thrown out. “Taking this view of the evidence, a reasonable jury could easily find that the City’s real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.”

Justice Alito discussed the dissenting opinion “that efforts by the Mayor and his staff to scuttle the test results are irrelevant because the ultimate decision was made by the” New Haven Civil Service Board (CSB). The dissent maintains that “there is ‘scant cause to suspect’ that anything done by the opponents of certification, including the Mayor and his staff, ‘prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification.’ ”

“Adoption of the dissent’s argument would implicitly decide an important question of Title VII law that this Court has never resolved — the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate

employees who influence but do not make the ultimate employment decision.”⁵⁵

Dissenting, Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, argued that the majority “ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.”

After “a lawsuit and settlement agreement, the City initiated efforts to increase minority representation in the New Haven Fire Department,” which produced some positive change. Today, 40 percent of the population is African-American and 20 percent is Hispanic. At the entry level, “minorities are still underrepresented, but not starkly so.” However, “the senior officer ranks (captain and higher) are nine percent African-American and nine percent Hispanic. Only one of the Department’s 21 fire captains is African-American. It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed.”

Justice Ginsberg focused on the disparate examination passage rates: “On the lieutenant exam, the pass rate for African-American candidates was about one-half the rate for Caucasian candidates; the pass rate for Hispanic candidates was even lower. On the captain exam, both African-American and Hispanic candidates passed at about half the rate of their Caucasian counterparts. More striking still, although nearly half of the 77 lieutenant candidates were African-American or Hispanic, none would have been eligible for promotion to the eight positions then vacant.”

Griggs v. Duke Power Co. [401 U.S. 424 (1971)], “addressed Duke Power Company’s policy that applicants for positions, save in the company’s labor department, be high school graduates and score satisfactorily on two professionally prepared aptitude tests. ‘[T]here was no showing of a discriminatory purpose in the adoption of the diploma and test requirements.’ The policy, however, ‘operated to render ineligible a markedly disproportionate number of [African-Americans].’ At the time of the litigation, in North Carolina, where the Duke Power plant was located, 34 percent of white males, but only 12 percent of African-American males, had high school diplomas. African-Americans also failed the aptitude tests at a significantly higher rate than whites. Neither requirement had been ‘shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.’ ”

“The Court unanimously held that the company’s diploma and test requirements violated Title VII.” *Griggs* was among cases that set principles, applied by federal courts, “to disallow a host of hiring and promotion practices that ‘operate[d] as “built in headwinds” for minority groups.’ Practices discriminatory in effect, courts repeatedly emphasized, could be maintained only upon an employer’s showing of ‘an overriding and

⁵⁵ Plaintiffs made sacrifices in preparing for the examination: “Frank Ricci, who is dyslexic, found it necessary to ‘hir[e] someone, at considerable expense, to read onto audiotape the content of the books and study materials.’ He ‘studied an average of eight to thirteen hours a day ... , even listening to audio tapes while driving his car.’ Petitioner Benjamin Vargas, who is Hispanic, had to ‘give up a part-time job,’ and his wife had to ‘take leave from her own job in order to take care of their three young children while Vargas studied.’ ”

compelling business purpose.’ ” When the Supreme Court in *Wards Cove Packing Co. v. Atonio*, [490 U.S. 642 (1989)] began moving away from *Griggs*’ disparate impact approach, Congress quickly responded by enacting the Civil Rights Act of 1991, which “formally codified the disparate-impact component of Title VII” and other principles from *Griggs*. “Once a complaining party demonstrates that an employment practice causes a disparate impact, amended Title VII states, the burden is on the employer ‘to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.’ If the employer carries that substantial burden, the complainant may respond by identifying ‘an alternative employment practice’ which the employer ‘refuses to adopt.’ ”

Justice Ginsberg “would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII’s disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.”

For Justice Ginsberg, “equal protection doctrine is of limited utility” in interpreting Title VII. “The *Equal Protection Clause*, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component.”

Importantly, the majority “underplays a dominant Title VII theme. This Court has repeatedly emphasized that the statute ‘should not be read to thwart’ efforts at voluntary compliance.”

Notably, the consultant who prepared the test “never discussed with the City the propriety of the 60/40 weighting and ‘was not asked to consider the possibility of an assessment center.’ ” In summary, “the record solidly establishes that the City had good cause to fear disparate-impact liability. Moreover, the Court supplies no tenable explanation why the evidence of the tests’ multiple deficiencies does not create at least a triable issue under a strong-basis-in-evidence standard.”

Justice Ginsberg also criticized Justice Alito’s analysis as equating “political considerations with unlawful discrimination.” Under Justice Alito’s analysis “if the mayor and his staff were motivated by their desire ‘to placate a . . . racial constituency,’ then they engaged in unlawful discrimination.” However, “there are many ways in which a politician can attempt to win over a constituency — including a racial constituency — without engaging in unlawful discrimination.” In Justice Ginsberg’s view, “when employers endeavor to avoid exposure to disparate-impact liability, they do not thereby encounter liability for disparate treatment.”

New Haven might have avoided this case by establishing “a better selection process in the first place.” Nevertheless, the majority rests “on the false premise that respondents showed ‘a significant statistical disparity,’ but ‘nothing more.’ ”

Chapter XI

EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS

§ 11.01 DISCRETE AND INSULAR MINORITIES

Page 705: Insert the following at the end of Note (6)

[1] Aliens

Arizona v. The Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) (Arizona law requiring proof of citizenship for eligibility to vote in federal elections preempted by federal voting form developed under National Voter Registration Act).

[2] Illegitimate Children

Page 707: Insert the following after Lalli v. Lalli.

In *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012), the Court denied Social Security survivors benefits for the biological, twin children conceived through in vitro fertilization after the death of their father. Congress did not contemplate the technology that made the birth possible when it passed the Social Security Act (“Act”) in 1939, or when it amended the Act in 1965. Congress intended the Act “to benefit primarily those supported by the deceased wage earner in his or her lifetime.”

In 1999, Karen and Robert Capato were married and Robert was later diagnosed with esophageal cancer. Robert passed away in 2002. In 2003, using her husband’s frozen sperm, Karen conceived and gave birth to twins. When Karen applied for survivors benefits for the twins, she was denied by the Social Security Administration.

The respondent argued that the SSA’s denial of benefits violated equal protection because “ ‘posthumously conceived children are treated as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception.’ ” The Court responded that it applied an intermediate level of scrutiny to laws that burdened illegitimate children as a way to punish the parents for their illicit sexual relations, but here there was no showing that Congress had this purpose in mind. The Court applied a rational basis test to uphold the denial of benefits.

§ 11.03 EQUALITY IN THE POLITICAL PROCESS

[2] Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties, Gerrymandering

Page 730: Insert the following after Reynolds v. Sims

In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court determined that § 2 of the Voting Rights Act of 1965 could not be used to draw a voting “district that is not a majority-minority district” just so that a “racial minority could elect its candidate of

choice with support from crossover majority voters” at least when the African-Americans do not “‘constitute a numerical majority.’” The “Whole County Provision” of North Carolina’s constitution prohibits the General Assembly from “dividing counties when drawing legislative districts.”

When the African-American voting populations in Pender County fell to 35.33%, the North Carolina General Assembly forged District 18 by combining portions of Pender and New Hanover Counties to attain an African-American voting population of 39.36%. State officials thought that their action was necessary to avoid a § 2 voter dilution claim.

Writing for a plurality of three, Justice Kennedy stated that a minority-minority legislative district did not meet the first requirement for § 2 liability under *Thornburg v. Gingles*, 478 U.S. 30 (1986). Specifically, § 2 does not require “a so called crossover district,” that is, a district with a minority population that is potentially “large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.” The plurality’s opinion did not, however, extend to instances of “intentional discrimination against a racial minority.”

Serious equal protection concerns also undercut interpreting § 2 to require cross-over districting. In this connection, “the ‘moral imperative of racial neutrality is the driving force of the Equal Protection Clause,’ and racial classifications are permitted only ‘as a last resort.’” Gerrymandering based on race, “even for remedial purposes, may balkanize us into competing racial factions.” Interpreting § 2 broadly to require crossover districts “‘would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’”

The plurality also does not “entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns.” Moreover, states may choose to draw crossover districts when not otherwise prohibited. “Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances.” On the other hand, if a state intentionally destroyed “otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.”

Concurring in the judgment, Justice Thomas, joined by Justice Scalia, stated that he “continue[d] to disagree” with the *Thornburg v. Gingles*’ “framework.” In a dissent, joined by Justices Ginsburg, Stevens, and Breyer, Justice Souter stated that : “a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.” The plurality’s approach requires states “to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation.”

Page 748: Insert the following before Vieth v. Jubelirer

CRAWFORD v. MARION COUNTY ELECTION BD., 553 U.S. 181 (2008). In *Crawford*, the Court upheld an Indiana statute “requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to

election day, to present photo identification issued by the government.” The provision “does not apply to absentee ballots submitted by mail” and “contains an exception for persons living and voting in a state-licensed facility such as a nursing home.” Also, “the State offers free photo identification to qualified voters able to establish their residence and identity.” Writing for the plurality, Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, states that the “District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute.”

Justice Stevens began his analysis by looking at *Harper v. Virginia Bd. of Elections* (casebook, p. 734). *Harper* held that a state “could not condition the right to vote in a state election on the payment of a poll tax of \$1.50.” The *Harper* Court applied a “stricter standard.” *Harper* found that “a State ‘violates the *Equal Protection Clause of the Fourteenth Amendment* whenever it makes the affluence of the voter or payment of any fee an electoral standard.’ ” In *Anderson v. Celebrezze*,⁵⁶ the Court confirmed the “general rule that ‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in *Harper*.” *Burdick v. Takushi*, 505 U.S. 428 (1992), continued to follow *Anderson*’s balancing approach. In *Burdick*, the Court applied *Anderson* to uphold a prohibition on write-in votes “despite the fact that it prevented a significant number of ‘voters from participating in Hawaii elections in a meaningful manner.’ ” There is no “litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters.” Though a burden may seem slight, such as the nominal poll tax in *Harper*, “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’ ”

The plurality evaluated four interests identified by the State and whether they justified the burdens created by the new law. These interests include: “moderniz[ing] election” methods, “detering and detecting voter fraud,” correcting voter registration rolls, and “safeguarding voter confidence.” First, “[t]he State has a valid interest in participating in a nationwide effort to improve and modernize election procedures,” including “[t]wo recently enacted federal statutes.” These “contain provisions consistent with a State’s choice to use government-issued photo identification.” The National Commission on Federal Election Reform (the Carter-Baker Report) made a similar recommendation. Though neither statute required the particular action taken by Indiana, “they do indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”

Indiana has a valid interest in preventing in-person voting fraud. “The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history,” and petitioners claim that making voter fraud a felony under Indiana law is sufficient to prevent future in-person fraud. “While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.” Correcting inflated voter rolls further supported the “State’s decision to require photo identification.”

⁵⁶ 460 U.S. 780 (1983).

Though similar to the prevention of voter fraud, maintaining “public confidence in the integrity of the electoral process has independent significance.”⁵⁷ While Indiana’s requirement “imposes some burdens on voters that other methods of identification do not share,” such as the risk that voters may lose their photo IDs, “the right to cast a provisional ballot provides an adequate remedy for” such problems. Of greater concern are the burdens imposed on eligible voters who do not already possess the required identification. “The fact that most voters already possess a valid driver’s license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification.” Indiana’s Bureau of Motor Vehicles (BMV) offers free photo ID cards, and “the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”

A limited number of citizens must bear a “somewhat heavier burden.” These groups “include elderly persons born out-of-state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.” This burden is lessened by eligible voters’ ability to cast “provisional ballots that will ultimately be counted,” but the voter must then “travel to the circuit court clerk’s office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified.” As petitioners seek to “invalidate the statute in all its applications, they bear a heavy burden of persuasion,” as indicated by *Washington State Grange v. Washington State Republican Party*, (supplement, p. 181). Moreover, “although it may not be a completely acceptable alternative, the elderly” can “vote absentee without presenting photo identification.”

The plurality held that “on the basis of the record,” it could not “conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” The statute “‘imposes only a limited burden on voters’ rights.’ The “‘precise interests’” advanced by the State are therefore sufficient to defeat petitioners’ facial challenge.” Lastly, the “petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.”

The plurality also refused to invalidate the statute because it resulted from a partisan dispute: Specifically, “all of the Republicans in the General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it.” When “a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”

Justice Scalia concurred in the judgment joined by Justices Thomas and Alito. “The lead opinion assumes petitioners’ premise that the voter-identification law ‘may

⁵⁷ Methods of safeguarding the electoral process vary among States and range from simply “check[ing] off the names of registered voters,” to requiring presentation of documentation or a signature to compare with one already on file.

have imposed a special burden on some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified."

Burdick v. Takushi "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." He continued: "Ordinary and widespread burdens, such as those requiring 'nominal effort' for everyone, are not severe. Burdens are severe if they go beyond the merely inconvenient." This statute "is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of" its burden. "A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The *Fourteenth Amendment* does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori*, it does not do so when, as here, the classes complaining of disparate impact are not even protected."

Utilizing the "case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless." Indeed, "one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting." Such "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." Moreover, the plurality's "record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned."

Dissenting, Justice Souter, joined by Justice Ginsburg, found that the statute creates "nontrivial burdens on the voting right of tens of thousands of the State's citizens." The law "is unconstitutional under the balancing standard of *Burdick*." Under *Burdick*, "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."

In analyzing the burden on *First Amendment* rights, the Court first assessed "the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot." In Indiana, "the BMV has far fewer license branches in each county than there are voting precincts," which will burden "[p]oor, old, and disabled voters." The availability of "the more convenient but less reliable absentee ballot" does not permit depriving "the elderly and disabled of the option of voting in person." In fact, "21 of Indiana's 92 counties have no public transportation system at all."

Assuming a voter "can afford the roundtrip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present 'a birth certificate, a certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.'" A birth certificate costs between \$3 and \$12 in Indiana.

The State has created a “provisional-ballot exception to the ID requirement for individuals the State considers ‘indigent’ as well as those with religious objection to being photographed.” This provisional- ballot may be cast at a normal polling place, but requires that the voter “appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed.” As the affidavit does not “count in successive elections,” this trip “must be taken every time a poor person or religious objector wishes to vote.”

Under *Burdick*, “the number of individuals likely to be affected is significant.” Justice Souter accepted the District Court’s estimate that “43,000 voting-age residents lack the kind of identification card required by Indiana’s law.” This figure represents “about 1% of the State’s voting-age population,” with “national surveys showing roughly 6-10% of voting-age Americans without a state-issued photo-identification card.”

Moreover, “Indiana’s photo identification requirement is one of the most restrictive in the country.” Under *Burdick*, these burdens require that the State “show particularized interests addressed by the law,” and that those interests “ ‘make it necessary to burden the plaintiff’s rights.’ ” Electoral modernization involving “useless technology has no constitutional value.” While preventing voter fraud is important, “[n]either the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud.”

The State’s “interest in safeguarding voter confidence similarly collapses” as Indiana “has come up with nothing to suggest that its citizens doubt the integrity of the State’s electoral process, except its own failure to maintain its rolls.” Justice Souter concluded: “It is impossible to say, on this record, that the State’s interest in adopting its signally inhibiting photo identification requirement has been shown to outweigh the serious burdens it imposes on the right to vote.” The statute “targets the poor and the weak.” As stated in *Harper*, “being poor has nothing to do with being qualified to vote.”

Justice Breyer also dissented. He would invalidate the statute because “it imposes a disproportionate burden upon those eligible voters who lack a driver’s license or other statutorily valid form of photo ID.” “In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).’ ”

The Constitution does not “*automatically* forbid Indiana from enacting a photo ID requirement.” He would reject a facial challenge if he believed, “as Justice Stevens believes, that the burden imposed by the Indiana statute on eligible voters who lack photo IDs is indeterminate ‘on the basis of the record that has been made in this litigation,’ ” or if he believed “as Justice Scalia believes, that the burden the statute imposes is ‘minimal’ or ‘justified.’ ” Moreover, Indiana failed to comply with the Federal report recommending implementation of a photo ID system which “*conditioned* its recommendation upon the States’ willingness to ensure that the requisite photo IDs ‘be easily available and issued free of charge’ and that the requirement be ‘phased in’ over two federal election cycles, to ease the transition.” Finally, “an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles,” especially considering the lack of public transportation

available throughout Indiana.

Page 753: Insert the following after League of United Latin Am. Citizens v. Perry

In *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam), the Court rejected an interim redistricting plan from a three-judge Federal District Court sitting in Texas. The 2010 census found that the population of Texas increased by over four million people. The four additional congressional seats required Texas to redraw its voting districts. The preclearance process in Section 5 of the Voting Rights Act of 1965 requires that the United States Federal District Court for the District of Columbia, or the Attorney General, approve all voter redistricting. This preclearance proceeding was still before the D.C. District Court.

It became increasingly apparent that Texas' new plans would not be precleared before Texas' 2012 primary elections. Nor could the old district lines be used because they were inconsistent with the Constitution's one-person, one-vote requirement. Thus, the Federal District Court in Texas created an interim voting district plan for the 2012 primaries and elections. Texas disputed the plan fashioned by the U.S. District Court in Texas as being inconsistent with the plan submitted by the Texas legislature.

Although Section 5 can prevent a state plan from being implemented if it has not been precleared, it does not mean that a Federal Court fashioning an interim plan should disregard the state plan. To avoid displacing legitimate state policy, a court should treat a state plan as "a starting point" which provides guidance. The court should be focused only on modifying the map submitted by the state to comply with the Constitution and the Voting Rights Act. When a plan is challenged "under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits."

Appellees argue that the federal court should ignore any state plan that has not received preclearance under § 5 of the Voting Rights Act. The Court rejected this argument as it had previously held a district court should "defer to the unobjectionable aspects of a State's plan even though that plan had already been *denied* preclearance." In this case, for example, although there were no allegations that the district lines in North and East Texas had any discriminatory intent, the Federal District Court in Texas altered those voting districts from the State's plan. Moreover, the district court in Texas redrew a voting district in response to alleged constitutional violations, but did not say that those allegations were likely to succeed. As it is unclear if the district court "followed the appropriate standards" in creating the interim plan, the orders implementing these maps were vacated, and the case was remanded.

Justice Thomas concurred in the judgment.

Page 753: Insert the following before § 11.04 THE RIGHT TO TRAVEL

SHELBY COUNTY v. HOLDER

133 S. Ct. 2612 (2013)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting. . . . Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. . . .

I

A

The Fifteenth Amendment. . . . provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” and it gives Congress the “power to enforce this article by appropriate legislation.” . . .

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 79 Stat. 437. . . .

Other sections targeted only some parts of the country. At the time of the Act's passage, these “covered” jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. §4(b). Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. §4(c). . . . In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona.

In those jurisdictions, §4 of the Act banned all such tests or devices. §4(a). Section 5

provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C.—either the Attorney General or a court of three judges. *Id.*, at 439. A jurisdiction could obtain such “preclearance” only by proving that the change had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.” *Ibid.*

. . . In *South Carolina v. Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address “voting discrimination where it persists on a pervasive scale.” 383 U.S., at 308. . . .

In 2006, Congress again reauthorized the Voting Rights Act for 25 years. . . . Congress also amended §5 to prohibit more conduct than before. . . .

. . . *Northwest Austin*[557 U.S. 193, 207 (2009)]. . . . expressed serious doubts about the Act’s continued constitutionality.

We explained that §5 “imposes substantial federalism costs” and “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.” *Id.*, at 202, 203. We also noted that “[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Id.*, at 202. Finally, we questioned whether the problems that §5 meant to address were still “concentrated in the jurisdictions singled out for preclearance.” *Id.*, at 203.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court’s construction of the bailout provision left the constitutional issues for another day. . . .

II

In *Northwest Austin*, we stated that “the Act imposes current burdens and must be justified by current needs.” And we concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Ibid.* These basic principles guide our review of the question before us.

A

. . . State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to “negative” state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.

. . . [T]he Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. . . .

More specifically, “ ‘the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.’ ” *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991). . . .

. . . [T]here is also a “fundamental principle of *equal* sovereignty” among the States. *Northwest Austin, supra*, at 203. . . .

The Voting Rights Act sharply departs from these basic principles. It suspends “*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C.” *Id.* at 202. . . . The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, . . . the preclearance proceeding “not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.” 679 F. 3d, at 884 (Williams, J., dissenting) (case below). . . .

B

In 1966, we found these departures from the basic features of our system of government justified. . . . *Katzenbach*, 383 U.S., at 308. . . . Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting. . . . Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites. . . .

C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Northwest Austin.*, 557 U.S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” §2(b)(1), 120 Stat. 577. . . .

The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolin	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

. . . Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. The preclearance statistics are also illuminating. In the first decade after enactment of §5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.

. . . Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. . . . When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. . . . Congress amended §5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose. . . . In addition, Congress expanded §5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." . . .

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin*, 557 U.S., at 203. . . .

III

A

. . . *Northwest Austin*. . . explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*, at 203. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. . . .

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines. . . .

B

The Government's defense of the formula is limited. First, the Government contends that the formula is “reverse-engineered”: Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Under that reasoning, . . . all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

. . . *Katzenbach* reasoned that the coverage formula was rational because the “formula . . . was relevant to the problem”: “Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” 383 U.S., at 329, 330. . . .

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. This argument does not look to “current political conditions,” *Northwest Austin, supra*, at 203. . . .

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. . . . Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. . . .

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. . . . [N]o one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra*, at 308, 315, 331; *Northwest Austin, supra*, 557 U.S., at 201.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The

dissent relies on “second-generation barriers,” which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. . . . Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. . . .

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. . . . The county was selected based on that formula, and may challenge it in court.

D

. . . [T]he dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. . . .

. . . We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. . . .

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full but write separately to explain that I would find §5 of the Voting Rights Act unconstitutional as well. . . .

In spite of these improvements, however, Congress *increased* the already significant burdens of §5. . . .

While the Court claims to “issue no holding on §5 itself,” its own opinion compellingly demonstrates that Congress has failed to justify “ ‘current burdens’ ” with a record demonstrating “ ‘current needs.’ ” By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court’s opinion, I would find §5 unconstitutional.

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy. . . . Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make. . . .

. . . “The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.” Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (B. Grofman & C. Davidson eds. 1992). . . .

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination. . . . Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. Congress also found that as “registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength.” *Ibid.* (quoting H. R. Rep. No. 94-196, p. 10 (1975)). . . . Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as “second-generation barriers” to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering. . . . Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. . . . A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits. . . .

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. . . .

. . . In . . . 2006. . . the House . . . passed the reauthorization by a vote of 390 yeas to 33 nays. . . . [I]n the Senate, . . . it passed by a vote of 98 to 0. President Bush signed it a week later. . . .

In the long course of the legislative process, Congress “amassed a sizable record.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 205 (2009). . . . more than 15,000 pages. . . .

. . . The overall record demonstrated to the federal lawmakers that, “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.” §2(b)(9), *id.*, at 578. . . .

II

. . . It is well established that Congress' judgment regarding exercise of its power to

enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. . . . When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height. . . .

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. . . .

. . . *South Carolina v. Katzenbach* supplies the standard of review: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” 383 U.S., at 324. . . .

For three reasons, legislation *reauthorizing* an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First. . . Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. . . .

Second, . . . Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. . . .

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. . . . If the statute was working, there would be less evidence of discrimination. . . .

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*, 17 U.S. 316: Congress may choose any means “appropriate” and “plainly adapted to” a legitimate constitutional end. . . .

A

. . . [T]here were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). . . .

. . . On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements.

. . . Congress also received empirical studies finding that DOJ's requests for more information had a significant effect on the degree to which covered jurisdictions “compl[ie]d with their obligatio[n]” to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. . . .

B . . .

Of particular importance, . . . conditions in the covered jurisdictions demonstrated that the formula was still justified by “current needs.” *Northwest Austin*, 557 U.S., at 203.

Congress learned of these conditions through a report, known as the Katz study, that looked at §2 suits between 1982 and 2004. . . .

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful §2 litigation since 1982. Controlling for population, there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions. The Katz study further found that §2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. . . .

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. . . .

. . . [P]laces where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. . . .

. . . The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there.

. . . Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. . . . Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. . . .

IV

. . . The Court. . . . relies on increases in voter registration and turnout as if that were the whole story. . . .

A

Shelby County launched a purely facial challenge. . . . “A facial challenge to a legislative Act,” . . . “is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

“. . . [A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally

to others, in other situations not before the Court.” *Broadrick*, 413 U.S., at 610. . . . [A]s applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

. . . Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered neighbor Mississippi. . . . [E]ven while subject to the restraining effect of §5. . . .

. . . [R]ecent episodes forcefully demonstrate that §5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions. . . .

The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§4(b) and 5. . . .

“If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.” 42 U.S.C. §1973p.

In other words, even if the VRA could not constitutionally be applied to certain States . . . §1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits. . . .

B

The Court stops any application of §5 by holding that §4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to “the fundamental principle of equal sovereignty.” In *Katzenbach*, however, the Court held, in no uncertain terms, that the principle “*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared.” 383 U.S., at 328-329 (emphasis added). . . .

Today's unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. . . . 26 U.S.C. §142(l) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. §3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with “a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997”). . . . Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. . . .

C . . .

Consider . . . the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision. . . . In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. . . .

. . . [T]he evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding. . . .

. . . After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA. . . . That determination of the body empowered to enforce the Civil War Amendments “by appropriate legislation” merits this Court's utmost respect. . . .

NOTE

In *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), Justice Breyer reversed and remanded the judgment of a three-judge District Court upholding Alabama's redistricting under the Equal Protection Clause. In its 2012 redistricting, required under the Alabama Constitution, Alabama endeavored to meet many “traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents.” However, two goals were overarching. First, the State tried to limit population deviations between electoral districts to 1%. Second, it sought to avoid retrogression in the ability of racial minorities to elect candidates of their choice. Alabama believes this entailed maintaining “roughly the same black population percentage in existing majority-minority districts.” These goals proved to be in tension with each other. Plaintiffs, the Alabama Black Legislative Caucus and the Alabama Democratic Conference, alleged that the state went too far in preserving majority-minority districts to the detriment of minorities.

In adjudicating the case, the District Court committed several errors of law. First, the District Court considered the racial gerrymandering of the state taken as a whole. The Court held that it had to assess racial gerrymandering in “one or more *specific electoral districts*.” Racial gerrymandering claims involve both voters “being personally... subjected to [a] racial classification” and voters “being represented by a legislator who believes his ‘primary obligation is to represent only the members’ of a particular racial group.” By their very nature, these claims apply personally to voters in that district, not in other districts. Statewide evidence can help to support a claim of racial gerrymandering in a particular district. However, it was error for the District Court in this case to evaluate gerrymandering on a statewide basis to exonerate the state rather than focus on individual districts. *Miller v. Johnson*, (casebook p. 602), stated that “plaintiff’s burden in a racial gerrymandering case is ‘to show, either through circumstantial evidence of a district’s shape and demographics

or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.”

The Court also rejected the argument that the plaintiffs had waived the claim that districting had to be considered on an individual district basis. While this claim did not appear clearly in the complaint, plaintiffs revised their theory of the case during discovery and presented evidence to this effect thereby negating any waiver concerns. Examining the transcript of the oral argument on appeal, Justice Breyer also rejected the argument that plaintiffs had waived individual districting claims on appeal.

Second, Justice Breyer found erroneous the District Court's holding that the Alabama Democratic Conference lacked standing as there was no proof that any plaintiffs resided in each of the four majority-minority districts at issue. While the District Court had an obligation to confirm its jurisdiction *sua sponte*, it should have afforded the Alabama Democratic Conference the opportunity to present its membership list before it dismissed the Conference. On remand, the District Court will give the Conference the opportunity to present its membership list and for the State to respond before making a determination on standing.

Third, the District Court erred in finding that “[r]ace was not the predominant motivating factor” in districting. Factors used to make this determination include: “compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation.” Instead, it found that equal population, or “one person, one vote,” was the predominant motivating factor. The majority held that equal population should not be weighed against racial motivation. “Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator’s determination as to *how* equal population objectives will be met.” Indeed, if equal population is used as a background principle, then overwhelming evidence suggests that racial motivations did predominate in the districting. The state's expert believed that preserving majority-minority districts was the primary task. The Court did not express a view on “whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny.”

Fourth, the District Court erred in holding that §5 of the Voting Rights Act required that the redistricting plan maintain the proportion of minorities and nonminorities in majority-minority districts. Instead, “§5 is satisfied if minority voters retain the ability to elect their preferred candidates.” The Court did “not insist that a legislature guess precisely what percentage reduction a court or the Justice Department (DOJ) might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands. The standards of §5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few.” The legislature's determination need only have

“ a strong basis in evidence.” This is a “purpose-oriented view” rather than the District Court’s “mechanically numerical” one. The correct question for a court to ask is: “To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?”

Narrow tailoring is satisfied “when the race-based action taken was *reasonably necessary*’ to achieve a compelling interest.” In light of *Shelby County v. Holder*, (supplement p.), the Court did not decide whether compliance with Section 5 of the Voting Rights Act constituted a compelling state interest.

Justice Scalia dissented, joined by the Chief Justice, and Justices Thomas and Alito. The Alabama Democratic Conference lacked standing as it presented no “evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them.” The majority gives “the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial.” Even if the Alabama Democratic Congress had standing, the complaint failed to allege which districts were racially gerrymandered. Nor, as the majority insists, did the Conference rectify this problem during discovery or at trial. From its opening brief, the Conference unequivocally stated: “Appellants challenge Alabama’s race-based statewide redistricting policy, *not* the design of any one particular election district.”

While the majority does not treat the claims of the Alabama Black Legislative Caucus separately, its focus on individual electoral districts is even weaker. At bottom, “the fair reading of the Black Caucus’s filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.” Unfortunately, the Court’s approach both “discourages careful litigation and punishes defendants who are denied both notice and repose.”

Justice Thomas filed a separate dissent that said that race conscious districting exacerbates racial tension by trying to fine tune districts “to achieve some ‘optimal’ result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the ‘best’ racial quota.”

Plaintiffs claim that voter districts are too heavily packed with black voters thereby diluting the overall voting power of blacks in the State. However, these heavily packed black districts are a product of Section 5 of the Voting Rights Act, in particular the “max-black’ policy that the DOJ itself applied to §5 throughout the 1990’s and early 2000’s.” So rather than Alabama, the real culprits were the Court’s “jurisprudence requiring segregated districts,” DOJ’s max black policy, and the 2006 amendments to the Voting Rights Act prohibiting retrogression which effectively locked in place districts created under the max-black policy. The underlying premise of race-based districting is that racial groups think alike and that their interests are so distinct that they require separate representatives. While the Court rejected DOJ’s max-black policy in *Miller v. Johnson*, the damage had already been done.

The majority's approach is an even more exhaustive analysis of race “by accounting for black voter registration and turnout statistics.” This approach “does nothing to ease the conflict between our color-blind Constitution and the ‘consciously segregated districting system’ the Court has required in the name of equality.” While he dissents on procedural grounds, Justice Thomas remains critical of the Court’s jurisprudence in this area.

§ 11.05 “ECONOMIC AND SOCIAL LEGISLATION”

Page 764: Insert the following after Vacco v. Quill

ENGQUIST v. OR. DEP’T OF AGRIC., 553 U.S. 591 (2008). In *Engquist v. Or. Dept. of Agric.*, the Court held that the “class-of-one” theory of equal protection did not extend to the public employment context. The class-of-one equal protection claim “alleg[ed] that [plaintiff] was fired, not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for ‘arbitrary, vindictive, and malicious reasons.’”³⁹ Chief Justice Roberts stated: “Our traditional view of the core concern of the *Equal Protection Clause* as a shield against arbitrary classifications combined with unique considerations applicable when the government acts as employer as opposed to sovereign” render the “class-of-one theory of equal protection” inapplicable “in the public employment context.” Moreover, the Court has “often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.” The Court’s precedent in the public employment area establishes “two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.”

The Court distinguished this case from *Village of Willowbrook v. Olech*.⁴⁰ In *Olech*, the Court upheld a class-of-one equal protection claim against “the government’s regulation of property.” *Olech* relied on precedent “concern[ing] property assessment and taxation schemes.”⁴¹ Quoting from the judicial oath, the Chief Justice stated that “such legislative or regulatory classifications” should apply “‘without respect to persons.’”⁴² When persons “who appear similarly situated are nevertheless treated differently, the *Equal Protection Clause* requires at least a rational reason for the difference.” *Olech* involved a “clear standard against which departures, even for a single plaintiff, could be readily assessed.” The clear standard in *Olech* was a 15-foot easement requirement for all individuals in the community. Specifically, “the complaint alleged that the board

³⁹ The jury “rejected [her] claims of discrimination for membership in a suspect class — her race, sex, and national origin claims — but found in her favor on the class-of-one claim.”

⁴⁰ 528 U.S. 562 (2000) (per curiam).

⁴¹ The Court also relied on *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

⁴² See 28 U.S.C. § 453.

consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.”

In contrast, “some forms of state action” inherently “involve discretionary decision-making based on a vast array of subjective, individualized assessments.” This discretionary state action “most clearly” involves employment decisions, which are “quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” Chief Justice Roberts further reasoned that, in the public employment context, a class-of-one theory of equal protection is “simply contrary to the concept of at-will employment,” under which “an employee may be terminated for a ‘good reason, bad reason, or no reason at all.’ ” Of course, “Congress and all the States have, for the most part, replaced at-will employment with various statutory schemes protecting public employees from discharge for impermissible reasons.” Nevertheless, the Court concluded that its decision is guided by the “ ‘common sense realization that government offices could not function if every employment decision became a constitutional matter.’ ”

Justice Stevens dissented, joined by Justices Souter and Ginsburg. While government “employers must be free to exercise discretionary authority,” there exists “a clear distinction between an exercise of discretion and an arbitrary decision. A discretionary decision represents a choice of one among two or more rational alternatives.” Proscribable decisions are “unsupported by any rational basis — not [simply] unwise ones. Accordingly, a discretionary decision with any ‘reasonably conceivable’ rational justification will not support an equal protection claim; only a truly arbitrary one will.”

Turning to the employment at will doctrine, today “ ‘the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.’ ” For Justice Stevens, “recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine.”

Chapter XII

POLITICAL SPEECH AND ASSOCIATION

§ 12.02 ADVOCACY OF UNLAWFUL OBJECTIVES

Page 788: Insert the following after McIntyre v. Ohio Elections Commission

DOE v. REED, 561 U.S. 186 (2010). In *Doe v. Reed*, the Court held disclosure of referendum petitions does not violate the *First Amendment*. “The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents,” which the State construes to include submitted referendum petitions. A law was enacted to expand certain benefits of state-registered domestic partners, including same-sex domestic partnerships. A referendum petition was filed to put that law to a popular vote and the PRA was used to obtain the names and addresses of those who signed the petition.

As “plaintiffs’ claim and the relief that would follow -- an injunction barring the secretary of state ‘from making referendum petitions available to the public’ -- reach[es] beyond the particular circumstances of these plaintiffs,” plaintiffs “must therefore satisfy our standards for a facial challenge.” *Buckley v. Valeo*, (casebook, p. 1056), requires that “*First Amendment* challenges to disclosure requirements in the electoral context” are reviewed under “ ‘exacting scrutiny,’ ” which “ ‘requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest,’ ” *Citizens United v. FEC*. Writing for the Court, Chief Justice Roberts noted “that the State’s interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, [therefore] we need not, and do not, address the State’s ‘informational’ interest.” The State’s interest in electoral integrity “is not limited to combating fraud,” but also extends to avoiding errors caused by “simple mistake.” Furthermore, “[t]hat interest also extends more generally to promoting transparency and accountability in the electoral process.”

Under *Buckley*, “those resisting disclosure can prevail under the *First Amendment* if they can show a “ ‘reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.’ ” However, “typical referendum petitions ‘concern tax policy, revenue, budget, or other state law issues.’ ” In light of “[t]he State’s un rebutted arguments that only modest burdens attend the disclosure of a typical petition” we must reject plaintiffs’ broad challenge to the PRA.” However, “upholding the law against a broad-based challenge does not foreclose a litigant’s success in a narrower” challenge.

Concurring, Justice Breyer would inquire “ ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others.’ ” With that, he joined the opinion of the Court and Justice Stevens’ opinion.

Justice Alito filed a concurring opinion. “Were we to accept respondent’s asserted informational interest, the State would be free to require petition signers to

disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships." However, such required disclosures would run "headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association." Moreover, "anyone with access to a computer could compile a wealth of information" about anyone who signed the petition. "To give speech the breathing room it needs to flourish, prompt judicial remedies must be available well before the relevant speech occurs and the burden of proof must be low."

Justice Sotomayor concurred, joined by Justices Stevens and Ginsberg. "Public disclosure of the identity of petition signers" is required by law in an "overwhelming majority of states that use initiative and referenda." Anyone "attempting to challenge particular applications of the State's regulations will bear a heavy burden." Lastly, "courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process."

Concurring in part and concurring in the judgment, Justice Stevens, joined by Justice Breyer, opined: "For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition that cannot be mitigated by the law enforcement measures. Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can become just as heated as debates about domestic partnerships."

Concurring, Justice Scalia warned about expanding the mistake of *McIntyre v. Ohio Elections Comm'n*, (casebook, p. 786), in which "the Court invalidated a form of election regulation that had been widely used by the States since the end of the 19th century." The centuries-old practice of legislating and voting publically "contradicts plaintiffs' claim that disclosure of petition signatures having legislative effect violated the *First Amendment*." In so far as plaintiffs are concerned about threats and intimidation stemming from disclosure, "nothing prevents the people of Washington from keeping petition signatures secret to avoid" the concerns plaintiffs have that disclosure will lead to threats and intimidation.

Dissenting, Justice Thomas viewed "compelled disclosure of signed referendum and initiative petitions" as a harsh burden on the First Amendment rights of political speech and association which "chills citizen participation in the referendum process." He "would hold that Washington's decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process." Although the "Court correctly concludes that 'an individual expresses' a 'political view' by signing a referendum petition," it fails to acknowledge that "signing a referendum petition amounts to 'political association' protected by the *First Amendment*." Accordingly, "a disclosure requirement passes constitutional muster only if it is narrowly tailored -- *i.e.*, the least restrictive means -- to serve a compelling state interest." See *Buckley v. American Constitutional Law Foundation, Inc.*, (casebook, p. 800). Washington's disclosure fails this strict scrutiny test as "Washington can

vindicate its stated interest in ‘transparency and accountability’ through a number of more narrowly tailored means than wholesale public disclosure.”

§ 12.04.A ASSOCIATIONAL RIGHTS TO ASSIST OTHER ORGANIZATIONS

Page 797: Insert the following at the end of §12.04 Compulsory Disclosure of Political Affiliations or Membership

HOLDER v. HUMANITARIAN LAW PROJECT

561 U.S. 1, 130 S. Ct. 2705, 177 L.Ed.2d 355 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress has prohibited the provision of “material support or resources” to certain foreign organizations that engage in terrorist activity. *18 U.S.C. § 2339B(a)(1)*. That prohibition is based on a finding that the specified organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the *Fifth Amendment*, and that it infringes their rights to freedom of speech and association, in violation of the *First Amendment*. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

I

. . . *18 U.S.C. § 2339B* . . . makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.”⁶² . . . “[M]aterial support or resources” . . . is defined as follows:

“. . . any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial

⁶² [Court’s footnote 1] . . . Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .

services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

The authority to designate . . . a “foreign terrorist organization” rests with the Secretary of State. She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in “terrorist activity” or “terrorism,” and thereby “threatens the security of United States nationals or the national security of the United States.” “‘[N]ational security’ means the national defense, foreign relations, or economic interests of the United States.” An entity designated a foreign terrorist organization may seek review of that designation before the C. C. Circuit within 30 days of that designation.

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. Two of those groups are . . . the Partiya Karkeran Kurdistan, or PKK and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization . . . with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE is an organization founded . . . for the purpose of creating an independent Tamil state in Sri Lanka. The District Court in this action found that the PKK and the LTTE engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. The LTTE sought judicial review of its designation as a foreign terrorist organization; the D. C. Circuit upheld that designation. . . .

Plaintiffs in this litigation are two U.S. citizens and six domestic organizations. . . . In 1998, plaintiffs filed suit. . . . Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B. . . .

II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge § 2339B’s prohibition on four types of material support -- “training,” “expert advice or assistance,” “service,” and “personnel.” They raise three constitutional claims. First, plaintiffs claim that § 2339B violates the *Due Process Clause of the Fifth Amendment* because these four statutory terms are impermissibly vague. Second, plaintiffs claim that § 2339B violates their freedom of speech. . . . Third, plaintiffs claim that § 2339B violates their *First Amendment* freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities. With respect to the HLP and Judge Fertig, those activities are: (1) “train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engag[ing] in political advocacy on behalf of Kurds who live in Turkey”; and (3) “teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.” . . .

. . . Plaintiffs seek preenforcement review of a criminal statute. . . . Plaintiffs face “a credible threat of prosecution” and “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). . . .

. . . The Government tells us that it has charged about 150 persons with violating § 2339B, and that several of those prosecutions involved the enforcement of the statutory terms at issue here. The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do. Based on these considerations, we conclude that plaintiffs’ claims are suitable for judicial review (as one might hope after 12 years of litigation).

III

Plaintiffs claim . . . that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization’s illegal activities. That interpretation, they say, would end the litigation because plaintiffs’ proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or the LTTE.

We reject plaintiffs’ interpretation of § 2339B because it is inconsistent with the text of the statute. . . . Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.

Plaintiffs’ interpretation is also untenable in light of the sections immediately surrounding § 2339B, both of which do refer to intent to further terrorist activity. . . .

Finally, plaintiffs give the game away when they argue that a specific intent requirement should apply only when the material-support statute applies to speech. There is no basis whatever in the text of § 2339B to read the same provisions in that statute as requiring intent in some circumstances but not others. It is therefore clear that plaintiffs are asking us not to interpret § 2339B, but to revise it. “Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.” *Scales v. United States*, 367 U.S. 203, 211 (1961).

Scales is the case on which plaintiffs most heavily rely, but it is readily distinguishable. That case involved the Smith Act, which prohibited membership in a group advocating the violent overthrow of the government. The Court held that a person could not be convicted under the statute unless he had knowledge of the group’s illegal advocacy and a specific intent to bring about violent overthrow. *Id.* at 220-222, 229. This action is different: *Section 2339B* does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing “material support” to such a group.⁶³

⁶³ [Court’s footnote 3] . . . Congress explained what “knowingly” means in § 2339B, and it did not choose the dissent’s interpretation of that term. In fact, the dissent proposes a mental-state requirement indistinguishable from the one Congress adopted in §§ 2339A and 2339C, even though Congress used markedly different language in § 2339B.

IV

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the *Due Process Clause of the Fifth Amendment*. . . . We have said that when a statute “interferes with the right of free speech or of association, a more stringent vagueness test should apply.” [*Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)]. “But ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’ ” [*United States v. Williams*, 553 U.S. 285, 304 (2008)]. . . .

. . . [E]ven to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the *Due Process Clause of the Fifth Amendment* for lack of notice. And he certainly cannot do so based on the speech of others. Such a plaintiff may have a valid overbreadth claim under the *First Amendment*. . . .

Under a proper analysis, plaintiffs’ claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute “provide[s] a person of ordinary intelligence fair notice of what is prohibited.” *Williams*, 553 U.S., at 304.

. . . We have in the past “struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’ -- wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” *Id.*, at 306. Applying the statutory terms in this action -- “training,” “expert advice or assistance,” “service,” and “personnel” -- does not require similarly untethered, subjective judgments.

Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute’s terms. See § 2339A(b)(2) (“ ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge”); § 2339A(b)(3) (“ ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge”); § 2339B(h) (clarifying the scope of “personnel”). And the knowledge requirement of the statute further reduces any potential for vagueness. . . .

Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs’ proposed conduct, which means that plaintiffs’ vagueness challenge must fail. . . .

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms “training” and “expert advice or assistance.” . . . A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute’s definition of “training” because it imparts a “specific skill,” not “general knowledge.” Plaintiffs’ activities also fall comfortably within the scope of “expert advice or assistance”: A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, “specialized knowledge.” In fact, plaintiffs themselves

have repeatedly used the terms “training” and “expert advice” throughout this litigation to describe their own proposed activities, demonstrating that these common terms readily and naturally cover plaintiffs’ conduct.

Plaintiffs . . . argue that the statutory definitions of these terms use words of degree -- like “specific,” “general,” and “specialized” -- and that it is difficult to apply those definitions in particular cases. . . .

Whatever force these arguments might have in the abstract, they are beside the point here. Plaintiffs . . . cannot seek refuge in imaginary cases that straddle the boundary between “specific skills” and “general knowledge.” See *Parker v. Levy*, 417 U.S., [733,] 756 [(1974)]. . . .

Plaintiffs also contend that they want to engage in “political advocacy” on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. They are concerned that such advocacy might be regarded as “material support” in the form of providing “personnel” or “service[s],” and assert that the statute is unconstitutionally vague because they cannot tell.

. . . Providing material support that constitutes “personnel” is defined as knowingly providing a person “to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.” § 2339B(h). The statute makes clear that “personnel” does not cover *independent* advocacy. . . .

“[S]ervice” similarly refers to concerted activity, not independent advocacy. Context confirms that ordinary meaning here. . . .

Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a “service.” See Reply Brief for Petitioners (“Would any communication with any member be sufficient? With a leader? Must the ‘relationship’ have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?”). The problem with these questions is that they are entirely hypothetical. Plaintiffs have not provided any specific articulation of the degree to which *they* seek to coordinate their advocacy with the PKK and the LTTE. They have instead described the form of their intended advocacy only in the most general terms.

. . . [P]laintiffs cannot prevail in their preenforcement challenge. . . .

V

A

We next consider whether the material-support statute, as applied to plaintiffs, violates . . . freedom of speech. . . . Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their “pure political speech.” It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE. . . . *Section 2339B* also “does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.” . . . Congress has prohibited

“material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. *Section 2339B* is directed at the fact of plaintiffs’ interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States v. O’Brien*, 391 U.S. 367 (1968). In that case, the Court rejected a *First Amendment* challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O’Brien had burned his card in protest against the draft. We applied what we have since called “intermediate scrutiny,” under which a “content-neutral regulation will be sustained under the *First Amendment* if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189(1997) (citing *O’Brien*, *supra*, at 377).

. . . *O’Brien* does not provide the applicable standard for reviewing a content-based regulation of speech. . . . § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE. . . . If plaintiffs’ speech to those groups imparts a “specific skill” or communicates advice derived from “specialized knowledge” -- for example, training on the use of international law or advice on petitioning the United Nations -- then it is barred. On the other hand, plaintiffs’ speech is not barred if it imparts only general or unspecialized knowledge. . . .

. . . The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. . . . [T]hen we are outside of *O’Brien*’s test, and we must [apply] a more demanding standard.” [*Texas v. Johnson*,] 491 U.S., [397,] 403 (1989) (citation omitted).

B

The *First Amendment* issue before us is . . . whether the Government may prohibit what plaintiffs want to do -- provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order. Plaintiffs’ complaint is that the ban on material support, applied to what they wish to do, is not “necessary to further that interest.” . . .

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs’ contention that their support would not further the terrorist activities of the PKK and LTTE: “[F]oreign

organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.”

. . . Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. The PKK and the LTTE are deadly groups. “The PKK’s insurgency has claimed more than 22,000 lives.” The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. “On January 31, 1996, the LTTE exploded a truck bomb filled with an estimated 1,000 pounds of explosives at the Central Bank in Colombo, killing 100 people and injuring more than 1,400. This bombing was the most deadly terrorist incident in the world in 1996.” . . .

. . . “Material support” . . . frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups -- legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds -- all of which facilitate more terrorist attacks. “Terrorist organizations do not maintain *organizational* ‘firewalls’ that would prevent or deter . . . sharing and commingling of support and benefits.” McKune Affidavit, App. 135, P11. “[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts.” M. Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* 2-3 (2006). “Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists. . . .

Money is fungible, and “[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.” . . . There is evidence that the PKK and the LTTE, in particular, have not “respected the line between humanitarian and violent activities.”

The dissent argues that there is “no natural stopping place” for the proposition that aiding a foreign terrorist organization’s lawful activity promotes the terrorist organization as a whole. But Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States’ relationships with its allies. . . . We see no reason to question Congress’s finding that “international cooperation is required for an effective response to terrorism. . . . The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States’ partners abroad. . . .

For example, the Republic of Turkey -- a fellow member of NATO -- is defending itself against a violent insurgency waged by the PKK. . . .

C

. . . The State Department informs us that “[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly support[t]” Congress’s finding that all contributions to foreign terrorist organizations further their terrorism. In the Executive’s view:

“Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions -- regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.”

That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. . . . The PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation’s allies. . . .

. . . [C]oncerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government’s reading of the *First Amendment*, even when such interests are at stake. We are one with the dissent that the Government’s “authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.” But when it comes to collecting evidence and drawing factual inferences in this area . . . respect for the Government’s conclusions is appropriate.

One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof -- with “detail,” “specific facts,” and “specific evidence” -- that plaintiffs’ proposed activities will support terrorist attacks. . . . The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions. . . .

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, § 2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts’ holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms “training,” “personnel,” and “expert advice or assistance,” as well as an explanation of the knowledge required to violate § 2339B. Third, . . . Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. . . . Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups. .

..

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes.” Congress can, consistent with the *First Amendment*, prohibit this direct training. It is wholly foreseeable that the PKK could use the “specific skill[s]” that plaintiffs propose to impart as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. See generally A. Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* 286-295 (2007) (describing the PKK’s suspension of armed struggle and subsequent return to violence). A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. . . .

Second, plaintiffs propose to “teach PKK members how to petition various representative bodies such as the United Nations for relief.” . . . [E]arlier in this litigation, plaintiffs sought to teach the LTTE “to present claims for tsunami-related aid to mediators and international bodies,” which naturally included monetary relief. Money is fungible and . . . could be redirected to funding the group’s violent activities.

Finally, plaintiffs propose to “engage in political advocacy on behalf of Kurds who live in Turkey,” and “engage in political advocacy on behalf of Tamils who live in Sri Lanka.” . . . [P]laintiffs do not specify their expected level of coordination with the PKK or LTTE or suggest what exactly their “advocacy” would consist of. Plaintiffs’ proposals are phrased at such a high level of generality that they cannot prevail in this pre-enforcement challenge.

In responding to the foregoing, the dissent fails to address the real dangers at stake. . . . [F]or example, “the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its ‘neutral and humanitarian nature.’ ” Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities. . . .

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive *First Amendment* scrutiny. . . . [W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.

VI

Plaintiffs’ final claim is that the material-support statute violates their freedom of association under the *First Amendment*. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and the LTTE. . . .

. . . As the Ninth Circuit put it: “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support. . . .” . . .

* * *

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to “provide for the common defence.” As Madison explained, “[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union.” The Federalist No. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the *First* and *Fifth Amendments*. . . .

It is so ordered.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope. . . .

I

. . . The plaintiffs, all United States citizens or associations, now seek an injunction and declaration providing that, without violating the statute, they can (1) “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engage in political advocacy on behalf of Kurds who live in Turkey”; (3) “teach PKK members how to petition various representative bodies such as the United Nations for relief”; and (4) “engage in political advocacy on behalf of Tamils who live in Sri Lanka.” . . .

. . . All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach -- using international law to resolve disputes peacefully or petitioning the United Nations, for instance -- concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in *this* country directed to *our* government and *its* policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress.

That this speech and association for political purposes is the *kind* of activity to which the *First Amendment* ordinarily offers its strongest protection is elementary. . . .

Although in the Court’s view the statute applies only where the PKK helps to coordinate a defendant’s activities. . . . “[c]oordination” with a political group, like membership, involves association.

“Coordination” with a group that engages in unlawful activity also does not deprive the plaintiffs of the *First Amendment’s* protection under any traditional “categorical” exception to its protection. The plaintiffs do not propose to solicit a crime. . . . And the *First Amendment* protects advocacy even of *unlawful* action so long as that advocacy is not “directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. . . .

Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the *First Amendment’s* protection for freedom of association. *See Scales v. United States*, 367 U.S. at 229. Rather, the Court has pointed out in respect to associating with a group advocating overthrow of the Government through force and violence: “If the persons assembling have committed crimes elsewhere . . . , they may be prosecuted. . . . But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.” *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)].

Not even the “serious and deadly problem” of international terrorism can require *automatic* forfeiture of *First Amendment* rights. After all, this Court has recognized that not “ ‘[e]ven the war power . . . remove[s] constitutional limitations safeguarding essential liberties.’ ” *United States v. Robel*, 389 U.S. 258, 264 (1967). . . .

. . . [W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications “strictly” -- to determine whether the prohibition is justified by a “compelling” need that cannot be “less restrictively” accommodated.

But, even if we assume for argument’s sake that “strict scrutiny” does not apply, no one can deny that we must at the very least “measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the *First Amendment*.” *Robel*, [389 U.S.] at 268, n. 20. . . .

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. . . . [P]recisely how does application of the statute to the protected activities before us *help achieve* that important security-related end?

The Government makes two efforts to answer this question. *First*, the Government says that the plaintiffs’ support for these organizations is “fungible” in the same sense as other forms of banned support. . . .

. . . There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more

sinister ends in the way that donations of money, food, or computer training are fungible.
...

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the “fungible” nature in general of resources, predominately money and material goods. . . . [T]he Government refers to a State Department official’s affidavit describing how ostensibly charitable contributions have either been “redirected” to terrorist ends or . . . have “unencumber[ed] *funds* . . . for use in facilitating violent, terrorist activities. . . .”

. . . The statements do not, however, explain in any detail how the plaintiffs’ political-advocacy-related activities might actually be “fungible” and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with “support” of this kind. The affidavit refers to “funds,” “financing,” and “goods” -- none of which encompasses the plaintiffs’ activities. . . .

Second, the Government says that the plaintiffs’ proposed activities will “bolste[r] a terrorist organization’s efficacy and strength in a community” and “undermin[e] this nation’s efforts to *delegitimize and weaken* those groups.” . . . The Court suggests that, armed with this greater “legitimacy,” these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban -- money, arms, lodging, and the like.

. . . Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. . . . Once one accepts this argument, there is no natural stopping place. . . .

Regardless, the “legitimacy” justification itself is inconsistent with critically important *First Amendment* case law. . . . The Court had previously accepted Congress’ determinations that the American Communist Party was a “Communist action organization” which (1) acted under the “control, direction, and discipline” of the world Communist movement, a movement that sought to employ “espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship,” and (2) “endeavor[ed]” to bring about “the overthrow of existing governments by . . . force if necessary.” *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 5-6, (1961).

Nonetheless, the Court held that the *First Amendment* protected an American’s right to belong to that party -- despite whatever “legitimizing” effect membership might have had -- as long as the person did not share the party’s unlawful purposes. . . .

Nor can the Government overcome these considerations simply by narrowing the covered activities to those that involve *coordinated*, rather than *independent*, advocacy. Conversations, discussions, or logistical arrangements might well prove necessary to carry out the speech-related activities here at issue (just as conversations and discussions are a necessary part of *membership* in any organization). . . .

What is one to say about . . . arguments that would deny *First Amendment* protection to the peaceful teaching of international human rights law on the ground that a

little knowledge about “the international legal system” is too dangerous a thing; that an opponent’s subsequent willingness to negotiate might be faked . . . ? . . .

In my own view, the majority’s arguments stretch the concept of “fungibility” beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical claims. I am not aware of any case in this Court -- . . . not the later Communist Party cases decided during the heat of the Cold War -- in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e.g.*, buy negotiating time for an opponent who would put that time to bad use.

. . . [T]o accept this kind of argument without more . . . would automatically forbid the teaching of any subject in a case where national security interests conflict with the *First Amendment*. . . .

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity *as long as it is not “coordinated.”* That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without “*coordination.*” . . .

Second, the majority discusses the plaintiffs’ proposal to “ ‘teach PKK members how to petition various representative bodies such as the United Nations *for relief.*’ ” The majority’s only argument with respect to this proposal is that the relief obtained “could readily include monetary aid,” which the PKK might use to buy guns. . . .

. . . “[W]henver the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open [for judicial determination] whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.” *Whitney [v. California]*, 274 U.S. 357, 378-379 (1927) (Brandeis, J., concurring). . . .

I concede that the Government’s expertise in foreign affairs may warrant deference in respect to many matters, *e.g.*, our relations with Turkey. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the *First Amendment*. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day. . . .

II

. . . Thus, there is “a serious doubt” as to the statute’s constitutionality. *Crowell [v. Benson]*, 285 U.S. 22, 62 (1932)]. And where that is so, we must “ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Ibid.*

. . . I would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions. . . .

A person acts with the requisite knowledge if he is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization’s terrorist ends. A person also acts with the requisite intent if it is his “conscious objective” (or purpose) to further those same terrorist ends. . . .

. . . Normally we read a criminal statute as applying a *mens rea* requirement to all of the subsequently listed elements of the crime. . . .

I need not decide whether this is the only possible reading of the statute in cases where “material support” takes the form of “currency,” “property,” “monetary instruments,” “financial securities,” “financial services,” “lodging,” “safehouses,” “false documentation or identification,” “weapons,” “lethal substances,” or “explosives,” and the like. Those kinds of aid are inherently more likely to help an organization’s terrorist activities, either directly or because they are fungible in nature. Thus, to show that an individual has provided support of those kinds will normally prove sufficient for conviction (assuming the statute’s other requirements are met). But where support consists of pure speech or association, I would indulge in no such presumption. . . .

The statute’s history. . . . makes clear that Congress primarily sought to end assistance that takes the form of fungible donations of money or goods. . . .

. . . [T]he statute itself says:

“Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the *First Amendment to the Constitution of the United States.*” § 2339B(i).

In any event, the principle of constitutional avoidance demands this interpretation.

. . .

. . . Our consequent reading is consistent with the statute’s text; it is consistent with Congress’ basic intent; it interprets but does not significantly add to what the statute otherwise contains. . . .

III

Having interpreted the statute to impose the *mens rea* requirement just described, I would remand the cases so that the lower courts could consider more specifically the precise activities in which the plaintiffs still wish to engage and determine whether and to what extent a grant of declaratory and injunctive relief were warranted. . . .

§ 12.05 ASSOCIATIONAL RIGHTS IN OTHER CONTEXTS

Page 801: Insert the following at the end of Note (7)

In *Washington State Grange v. Washington Republican Party*, 552 U.S. 442 (2008), the Court rejected a facial challenge against a statute (I-872) that provided that “candidates for office shall be identified on the ballot by their self-designated ‘party preference’; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election.” Writing for the majority, Justice Thomas argued that the statute did not “on its face impose a severe burden on political parties’ associational rights,” and that all the arguments presented to the contrary “rest on factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge.”

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Court invalidated a nonpartisan “‘blanket primary’” in which “‘any person, regardless of party affiliation, may vote for a party’s nominee.’” In contrast, I-872 required a candidate to “file a ‘declaration of candidacy’ form, on which he declares his ‘major or minor party preference, or independent status.’” The Washington State Republican Party filed a facial challenge arguing that I-872 violated its associational rights “by usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse.”

The Court disfavors facial challenges as they often “rest on speculation,” and consequently risk “‘premature interpretation of statutes.’” Additionally, facial challenges undermine judicial restraint. Finally, they stop “laws embodying the will of the people from being implemented.” The Constitution affords states broad powers over congressional elections; they also have broad power over state elections.

Unlike the California primary, I-872 did not purport to select a party’s nominees, which a party can do in any way it wants, but only to reduce the number of candidates to two for the general elections. The parties argue that voters will mistakenly assume that these final candidates are the nominees and the parties may have self-designated, or at least that the party approves of them. The Court refused to strike down the statute on the “mere possibility of voter confusion.” It is conceivable that the ballot could be designed to eliminate any such confusion. For example, ballots could include disclaimers explaining that party preference does not reflect an “official endorsement by the party”, but only “the self-designation of the candidate.” As I-872 did not severely burden the parties, Washington did not need a “compelling interest” to structure its primaries in this manner. Its interest of “providing voters with relevant information about the candidates” was sufficient to sustain the statute.

Concurring, Chief Justice Roberts, joined by Justice Alito, stated that if the ballots are designed so that no reasonable voter would think that that the candidates listed “are nominees or members of, or otherwise associated with, the parties” they claim to “‘prefer,’” then the new Washington system would likely be upheld. The record did not suggest that Washington would be unable to design such a ballot.

Justice Scalia dissented, joined by Justice Kennedy. Justice Scalia argued that selecting a candidate and advocating that candidate’s election by endorsing them as a nominee is the defining act of a political party. Furthermore, Washington’s process severely burdened the parties’ associational rights without a compelling interest. The statute enabled the state “to use its monopoly power over the ballot to undermine the expressive activities of the political parties.”

Page 801: Insert the following as new Note (8)

(8) In *New York State Bd. of Elections v. López Torres*, 552 U.S. 196 (2008), the Court upheld a New York statute prescribing the nomination process for State trial court judges appearing on the general-election ballot. The 1921 statute requires that nominees for the Supreme Court of New York, the State’s trial court of general jurisdiction, be

selected by political parties “at a convention of delegates chosen by party members in a primary election.” Nominees chosen by the party delegates are automatically listed on the general-election ballot. Independent candidates and candidates of political organizations that do not meet the 50,000 vote requirement for designation as a political party may appear on the ballot if they submit a nomination petition and signatures from voters in that district. Respondent López Torres claimed that opposition by party leaders prevented her nomination in 1997, 2002, and 2003.

Writing for the Court, Justice Scalia held that respondent did not present a valid constitutional claim suitable for judicial resolution. Under the *First Amendment*, a political party may “limit its membership as it wishes,” and may use its own discretion to “choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.” Respondents’ real complaint was that the delegate election process “does not give them a realistic chance” to gain the party’s nomination. Rather, the party leadership “effectively determines the nominees.” Justice Scalia opined there is no “constitutional right to have a ‘fair-shot’ at winning the party’s nomination.” There was no “manageable constitutional question” for it to decide. The process of selecting judicial nominees by party convention is a “traditional means of choosing party nominees” and is not unconstitutional.

Respondents further argued that the Court should use the *First Amendment* to increase the competitiveness of the nominee-selection process and to combat the “‘one-party rule’” existent in parts of the state. Justice Scalia rejected this argument, stating “‘one-party rule’” may simply be a sign of the voters’ general approval of candidates chosen by the party.

Justice Stevens, joined by Justice Souter, concurred emphasizing the Court was not endorsing the electoral system at issue or disagreeing with the lower court’s finding “glaring deficiencies” in the system or even supporting judicial elections.

Justice Kennedy concurred stating that respondents’ objection to the statutory scheme may have been valid were it not for the alternate process candidates may follow to appear on the ballot. Specifically, a judicial candidate may be included in the election without any party’s nomination if they submit a petition signed by 4,000 or fewer voters depending on the district. Finally, Justice Kennedy noted the very nature of campaigning and fundraising may impair “the perception and the reality of judicial independence and judicial excellence.”

[5] Judicial Electioneering

Page 839: Insert the following notes after Republican Party of Minnesota v. White. Caperton v. A.T. Massey can also be read in § 7.02 The Rights of the Accused: The “Incorporation Controversy” at page 386, right before § 7.03 Regulation of Business and Other Property Interests

CAPERTON v. A. T. MASSEY COAL CO., 556 U.S. 868 (2009). In *Caperton v. A.T. Massey Coal Co.*, the Court required the recusal of a state supreme justice under the Due Process Clause. A jury had found defendant A.T. Massey Coal Co. liable for fraudulent misrepresentation, concealment, and tortious interference with existing

contractual relations and awarded plaintiff Caperton \$50 million in compensatory and punitive damages. After the verdict but before the appeal to the Supreme Court of Appeals of West Virginia, Massey's CEO, chairman, and president, Blankenship, decided to support an attorney who sought to run against Justice McGraw of the state Supreme Court in his bid for reelection to that court. The attorney who eventually beat Justice McGraw was Brent Benjamin. While the appeal of his company's case was pending, Blankenship donated almost \$2.5 million to a political organization that opposed McGraw and supported Benjamin. In addition, Blankenship spent "just over \$ 500,000 on independent expenditures" including direct mailings and advertisements urging Benjamin's election.

Caperton moved to recuse Justice Benjamin from hearing the appeal in *Caperton v. Massey*, based on both the Due Process Clause and the West Virginia Code of Judicial Conduct. Caperton alleged that Justice Benjamin had a conflict of interest based on Blankenship's support of Justice Benjamin's campaign. Justice Benjamin denied Caperton's recusal motion and the West Virginia Supreme Court of Appeals set aside Caperton's jury verdict in a 3-2 decision.

Seeking rehearing, Caperton petitioned to recuse one Justice who had decided the first appeal based on photographs of "Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending." Justice Maynard recused himself. Likewise, "Justice Starcher granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 elections." Presiding over rehearing, "Justice Benjamin, now in the capacity of acting chief justice," selected two judges to replace the two recused justices. The court once again reversed the jury verdict in a 3-2 decision.

Writing for the U.S. Supreme Court, Justice Kennedy first noted that " 'most matters relating to judicial disqualification [do] not rise to a constitutional level.' " He continued: "Personal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.' " A few new circumstances have emerged that "as an objective matter, require recusal." Sometimes, " 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' "

One circumstance involved a judge of a local tribunal with "a financial interest in the outcome of a case." In *Tumey v. Ohio* [273 U.S. 510 (1927)], a mayor had authority "to try those accused of violating a state law prohibiting the possession of alcoholic beverages." The Court cited "two potential conflicts." First, "the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal." The second conflict was that "sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs." The *Tumey* "Court held that the Due Process Clause required disqualification 'both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help' " the village financially. The problem extended beyond the traditional common-law prohibition on direct pecuniary interest to "a more general concept of interests that tempt adjudicators to disregard neutrality."

Aetna Life Ins. Co. v. Lavoie [475 U.S. 813 (1986)] articulated another

new example of a judicial financial interest attracting due process scrutiny. In that case, a state Supreme Court justice cast the deciding vote in a case when “the justice was the lead plaintiff in a nearly identical lawsuit.” In contrast, due process does not require recusal when “ ‘justices might conceivably have had a slight pecuniary interest’ due to their potential membership in a class-action suit against their own insurance companies,” as the “interest is ‘too remote and insubstantial.’ ”

Another new example of recusal not involving pecuniary interests can occur when a judge participates in an earlier proceeding. For example in one case, the judge charged two parties before him with perjury and criminal contempt respectively. “The judge proceeded to try and convict both petitioners.” The Court set aside the convictions. The judge had a conflict of interest “because of his earlier participation followed by his decision to charge them.”

The Court has also set aside a criminal contempt conviction tried by the judge who had been “ ‘the one reviled by the contemnor.’ ” Importantly, “ ‘not every attack on a judge disqualifies him from sitting.’ ” For example, in another case, “a lawyer’s challenge, though ‘disruptive, recalcitrant and disagreeable commentary,’ was still not ‘an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.’ ” The Court “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’ ”

Justice Benjamin wrote “four separate opinions issued during the course of the appeal,” to explain “why no actual bias had been established.” The Court did not “question his subjective findings of impartiality and propriety,” or “determine whether there was actual bias.” Justice Benjamin’s “own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief.” Instead, the Court applied an objective standard, inquiring “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden.’ ”

Justice Kennedy rejected the position that “every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.” The question “centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”

The Court emphasized that “Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee” The Court did not require that “Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory.” Instead, Justice Kennedy simply found “that Blankenship’s significant and disproportionate influence — coupled with the temporal relationship between the election and the pending case — “offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” ” On these extreme facts the probability of actual bias rises to an unconstitutional level.” The

Court reiterated that these facts are extreme making a flood of recusal motions unlikely. “ ‘Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.’ Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.”⁵⁵

Dissenting, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, stated that the Court historically “recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.” The majority’s “ ‘probability of bias’ ” standard will “lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”

Chief Justice Roberts continued: “In any given case, there are a number of factors that could give rise to a ‘probability’ or ‘appearance’ of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a ‘probability of bias.’ Many state *statutes* require recusal based on a probability or appearance of bias, but ‘that alone would not be sufficient basis for imposing a *constitutional* requirement under the Due Process Clause.’ ” The “ ‘probability of bias’ ” standard “fails to provide clear, workable guidance for future cases.” For example, “it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.”

Under the majority’s holding, courts will have to ask: “How much money is too much money?” For how much time “does the probability of bias last?” Does the majority opinion apply “if the judge voted against the supporter in many other cases?” What are the implications of “personal friendship between a judge and a party . . . ?” Predictably, “all future litigants will assert that their case is *really* the most extreme thus far.”

Chief Justice Roberts also asked, “why is the Court so convinced that this is an extreme case?” Beyond “a \$1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent.*” Moreover, another independent group received \$2 million from the plaintiffs’ bar. Finally, “Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was ‘intended to influence the outcome’ of particular pending litigation.”

⁵ “The ABA Model Code’s test for appearance of impropriety is ‘whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.’ ”

Justice Scalia also filed a separate dissent. He agreed with the Chief Justice that “the principal consequence of today’s decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges.” Moreover, there is no “discernable rule” in this case.

WILLIAMS-YULEE v. FLA. BAR, 135 S. Ct. 1656 (2015). In *Yulee*, the Court upheld a Florida ethical canon banning judicial candidates from personally soliciting campaign funds. Chief Justice Roberts delivered the opinion of the Court, except as to Part II. Justices Breyer, Sotomayor, and Kagan, joined that opinion in full. Justice Ginsburg joined except as to Part II. In 39 states, trial judges or appellate judges are elected. Many of those states prohibit judicial candidates from personally soliciting campaign funds. “Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.”

In Florida, the governor selects appellate judges from a group proposed by a nominating committee; they then must run for retention in office every six years. This is called “merit selection.” Trial judges are elected every six years unless the local jurisdiction chooses merit selection. Canon 7C(1) of the Florida Code of Judicial Ethics prohibits judicial candidates from personally soliciting funds. This Canon is “based on a provision in the American Bar Association’s Model Code of Judicial Conduct.” In addition Florida statutes limit contributions to trial judge candidates to \$1000 per election and \$3000 for candidates for the Supreme Court.

Plaintiff Yulee was a candidate for trial court. At the beginning of her campaign, she signed a letter to prospective donors asking for contributions. After she lost the election, the Florida Bar disciplined Yulee for soliciting funds. The referee appointed by the Florida Supreme Court recommended that she be publicly reprimanded and assessed the cost of the proceeding (\$1860). The Florida Supreme Court adopted these recommendations.

Yulee asserted that the restriction violated the First Amendment. The Court stated it would adopt the rule that it had “assumed in [*Republican Party v.*] *White* [casebook p. 836]: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.”⁶ Chief Justice Roberts held that this was one of the “rare cases” that passed this high level of scrutiny. Canon 7C(1) serves the state interests of “protecting the integrity of the judiciary’ and ‘maintaining the public’s confidence in an impartial judiciary.’” In “exercising strict neutrality and independence,” judges “cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, ‘To no one will we sell, to no one will we refuse or delay, right or justice.’ Cl.

⁶ While Justice Ginsburg did not join this part of the opinion and would not apply strict scrutiny, the four dissenters would. Thus, a clear majority was of the Court applied strict scrutiny.

40 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 395 (2d ed. 1914).”

Caperton v. A. T. Massey Coal Co., (supplement p.), emphasizes the “vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges.’” As Alexander Hamilton noted in *Federalist No. 78*, the judiciary lacks the power of “the sword or the purse.” Hence it must rely on public confidence and “the appearance of justice.”

As the principal dissent observes, restrictions on judicial candidates soliciting contributions lack deep historical roots; however, this inquiry is relevant in defining “new categories of unprotected speech.” The speech here is clearly protected. Nevertheless, Florida may restrict such personal solicitations to preserve the integrity and independence of the judiciary.

Unlike candidates for political office, judges should not be responsive to the interests of those who elected them. Instead, they must be fair, neutral, and independent. A state is also entitled to preserve the appearance of such independence. The “risk” to that appearance of independence “is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.” And, if they refuse a personal solicitations by a judicial candidate, “[p]otential litigants then fear that “the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.”

Yulee recognizes that preserving judicial integrity comprises a compelling interest but says that the law is not narrowly tailored to serve that interest: first, it permits campaign committees to solicit such contributions. Second, it permits judicial candidates to write thank you notes to contributors ensuring knowledge about who contributed.

“It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech.” While “a law’s underinclusivity raises a red flag, the First Amendment imposes no freestanding ‘underinclusiveness limitation.’ A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.”

Canon 7C(1) “aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates.” It pertains equitably to all candidates regardless of their viewpoint or solicitation method. Moreover, it contains no exceptions.

While campaign committees can still solicit funds, the stakes are higher when the judicial candidate does so personally. “[T]he same person who signed the fundraising letter might one day sign the judgment.” Permitting candidates to sign thank you notes is less central to the state's interest in the actual solicitation. It represents an accommodation between preserving judicial integrity and the realities of electoral politics.

The principal dissent also complains that Florida permits judicial candidates to solicit personal loans or gifts. However, Florida will not permit candidates to solicit such loans or gifts if the donor's intention is to influence the election. "Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*."

Brought to its logical conclusion, the principal dissent would have put a complete ban on campaign solicitations in this context but not a partial one. "The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive."

Paradoxically, Yulee then argues that Canon 7C(1) restricts too much speech. However, it actually restricts only a "narrow slice of speech." It "leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, 'Please give me money.' They can, however, direct their campaign committees to do so."

Yulee and the principal dissent concede the constitutionality of Canon 7C(1) across a broad swath of applications. For example, "Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them." Additionally, "the State 'might' be able to ban 'direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate.' She also suggests that the Bar could forbid 'in person' solicitation by judicial candidates." She narrows her argument to "a letter posted online and distributed via mass mailing."

These concessions misperceive "the breadth" of Florida's compelling state interest. The Chief Justice also noted the workability of the exceptions. For example, while she would accept a ban on in person solicitation, would that extend to a telephone call or text message? "We decline to wade into this swamp." The First Amendment requires narrow tailoring, not perfect tailoring. This is particularly true when the state is seeking to preserve an interest as intangible as public confidence in judicial integrity. In assessing narrow tailoring, the Court considered that most states have drawn a line between personal solicitation and solicitation by committees.

The Chief Justice also rejected the proffered "less restrictive means of recusal rules and campaign contribution limits." Even if Florida lowered campaign contribution limits, judges personally soliciting them would still give off the appearance of impropriety.

"A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could 'erode public confidence in judicial impartiality' and thereby exacerbate the very appearance problem the State is trying to solve." And,

expanding recusal motions in this way “could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of preemptive strike against a judge that would enable transparent forum shopping.”

Hamilton thought judges should be appointed for life. “Jefferson thought that making judges ‘dependent on none but themselves’ ran counter to the principle of ‘a government founded on the public will.’” The Court was not here to solve the debate about the efficacy of judicial elections but only to answer the narrow question before it.

Justice Breyer concurred. As he has stated before, Justice Breyer viewed “tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied.”

Justice Ginsburg wrote an opinion joined by Justice Breyer. She concurred in the Court's opinion except as to Part II. Justice Ginsburg would not apply exacting scrutiny to the State's sensible rules differentiating between judicial and political elections. The states possess “substantial latitude” to fashion campaign finance rules to regulate such elections. As judges “‘are not politicians,’” the Court’s campaign financing cases have little bearing here.

While she dissented from *Citizens United v. Federal Election Comm’n*, (supplement p.), and *McCutcheon v. Federal Election Comm’n*, (supplement p.), those cases have little bearing to judicial elections. “‘Favoritism,’ *i.e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary’s domain.” Judges should be indifferent to constituent concerns and to popularity. “In recent years, moreover, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion.” She cited as examples campaign spending to oppose judges who have supported same-sex marriage and the rights of criminal defendants. “Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence. Numerous studies report that the money pressure groups spend on judicial elections ‘can affect judicial decision-making across a broad range of cases.’” On the appearance of impropriety, one survey found that “87% of voters stated that advertisements purchased by interest groups during judicial elections can have either ‘some’ or ‘a great deal of influence’ on an elected ‘judge’s later decisions.’”

The Constitution does not put states to the choice of treating judicial and popular elections the same or abandoning judicial elections. “Instead, States should have leeway to ‘balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.’”

Justice Scalia dissented joined by Justice Thomas. “Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. No such tradition looms here.” While judicial electioneering has taken place in the United States since 1812, the American Bar Association “first proposed a canon advising against it in 1972, and a canon prohibiting it only in 1990.” Today, of the 39 states that have judicial elections, 9 permit judicial candidates to solicit

contributions. “When a candidate asks someone for a campaign contribution, he tends (as the principal opinion acknowledges) also to talk about his qualifications for office and his views on public issues. This expression lies at the heart of what the First Amendment is meant to protect.” Also, the ban favors well-connected candidates who can readily secure committees to fund raise for them, incumbents, and well-to-do candidates. “This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.”

Even if the state has a compelling interest in the perception of judicial impartiality and even assuming that a judicial candidate’s request to a litigant or attorney risks coercion, “Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate’s court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure.”

The majority’s analysis does not actually apply strict scrutiny. It uses Florida’s “ill-defined interest in ‘public confidence in judicial integrity’” in different ways in different parts of the opinion. Moreover, the Court does not show how Florida’s ban on personal solicitations “substantially advances” Florida’s proffered interest. “Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges.” For most of our history, judicial elections existed without bans on personal solicitations for campaign contributions.

In addition, Florida fails to “show that the ban restricts no more speech than necessary to achieve the objective.” The ban extends to soliciting contributions from anyone, “even from someone who (because of recusal rules) cannot possibly appear before the candidate as lawyer or litigant. Yulee thus may not call up an old friend, a cousin, or even her parents to ask for a donation to her campaign.”

Instead, “the Court could have chosen from a whole spectrum of workable rules. It could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate’s court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online).” For example, the Supreme Court of Florida “allows sitting judges to solicit memberships in civic organizations if (among other things) the solicitee is not ‘likely ever to appear before the court on which the judge serves.’”

Moreover, the majority leaves open many important questions. “Does the First Amendment permit restricting a candidate’s appearing at an event where somebody *else* asks for campaign funds on his behalf? Does it permit prohibiting the candidate’s *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate’s name does not appear next to the request? More broadly, could Florida ban thank-you notes to donors? Cap a candidate’s campaign spending? Restrict independent spending by people

other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by ‘judicial integrity’?”

Finally, the ban discriminates between different types of speech based on its content. For example, while the ban “prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm’s luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar’s charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not. Could anyone say with a straight face that it looks *worse* for a candidate to say ‘please give my campaign \$25’ than to say ‘please give *me* \$25’?”

Because of the First Amendment's ban on content discrimination, “lawmakers may *not* target a problem only in certain messages.” The ban evidences “hostility toward judicial campaigning. How else to explain the Florida Supreme Court’s decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)?”

While the Court professes no bias for or against judicial elections, its opinion suggests otherwise. “One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them.”

Judicial elections are the public's reaction to exerting control over a judiciary that could rule them. “A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution.” In contrast to recent decisions protecting “depictions of animal torture, sale of violent video games to children, and lies about having won military medals” this decision stands in stark contrast. “The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.”

Justice Kennedy dissented. He began by largely agreeing with the Justice Scalia’s analysis of how the Court's analysis contradicts settled First Amendment doctrine. Ironically, the majority lessens free speech protection for judicial candidates who must ultimately enforce those very protections. “The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech.”

The Court's decision turns on two premises. One is “that in certain elections—here an election to choose the best qualified judge—the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would

be unacceptable in other elections."

To the extent that the context of judicial electioneering presents legitimate concerns, disclosure laws about campaign solicitations, contributions, and financing can address those concerns. Finally, the law is nowhere close to being narrowly tailored. For precedential purposes, it eviscerates strict scrutiny.

Justice Alito dissented. "Florida has a compelling interest" in its courts deciding cases "impartially and in accordance with the law," and in preserving citizen confidence in the courts. However, the "rule is about as narrowly tailored as a burlap bag." It applies to solicitations made by the candidate in mass mailings or newspaper ads – even if made to a person who has no prospect of ever appearing before the judicial candidate. If this rule is "narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired."

§ 12.06 FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES

Page 823: Insert the following before [3] Employee's Right to Criticize Government

NOTES

(1) In *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), the Court upheld Idaho's law allowing a public employee to "have a portion of his wages deducted by his employer and remitted to his union to pay union dues" but prohibiting any deduction for "the union's political action committee, because Idaho law prohibits payroll deductions for political activities." Chief Justice Roberts found that the law "does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities."

Justice Ginsburg concurred in part and concurred in the judgment. Justice Breyer dissented, noting that the "exception affects speech, albeit indirectly," by stopping one avenue of funding. Consequently, he would ask "whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve." Justice Souter also dissented, as the statute raised a "reasonable suspicion of viewpoint discrimination" against union speech. Justice Stevens dissented on statutory grounds.

(2) In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court refused to extend the rule in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), to home caregivers funded by the State of Illinois and Medicare. *Abood* "held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process." The Court distinguished "between, on the one hand, a union's expenditures for 'collective-bargaining, contract administration, and grievance-adjustment purposes,' and, on the other, expenditures for political or ideological purposes." *Abood* underestimated the

difficulty of distinguishing between the union’s ideological and collective bargaining activities because in the public sector, both are directed at the government. The Court refused to extend *Abood* to personal caregivers funded by Illinois and Medicare. These individuals are hired, supervised, and fired by the individual customer to whom they give care. In light of the flaws that he saw in the *Abood* rule, Justice Alito declined to extend it to these individuals who are not “full-fledged” state employees. It is a “bedrock” First Amendment principle that “except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” If a personal assistant does not wish to join or support a union, the First Amendment prohibits a state from compelling her to do so.

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan maintained that employees should pay for collective bargaining activities that the union undertook on their behalf. She characterized the personal caregivers as joint public employees to whom *Abood* should apply. “What justifies the agency fee, the majority notes, is ‘the fact that the State compels the union to promote and protect the interests of nonmembers.’” At least the majority did not find the basis to overrule this long-established precedent. The extensive dicta in the majority opinion critiquing *Abood* is “off-base.”

[3] Employee’s Right to Criticize Government

Page 829: Insert the following after Connick v. Myers

BOROUGH OF DURYEYEA v. GUARNIERI, 131 S. Ct. 2488 (2011). The First Amendment’s Petition Clause “protects ‘the right of the people . . . to petition the Government for a redress of grievances.’” However, “[w]hen a public employee sues a government employer under the First Amendment’s Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern. *Connick v. Myers*, (casebook, p. 823). In *Guarnieri*, the issue before the Court was “whether that [public concern] test applies when the employee invokes the Petition Clause.”

Charles Guarnieri filed a union grievance to reverse the Duryea City Council’s decision to terminate him as chief of police. When he returned, the Council issued 11 directives for the performance of his duties, including prohibiting overtime, limiting his police car use to “official business” and requiring the police department to work in a “smoke free building.” Guarnieri filed a lawsuit claiming that his union grievance was a petition protected by the Petition Clause, and that the 11 directives issued “were retaliation for that protected activity.” After being denied overtime, Guarnieri further “alleged that his § 1983 lawsuit was a petition and that the denial of overtime constituted retaliation for his having filed the lawsuit.”

Justice Kennedy wrote for the Court. “This Court’s precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” This claim

could also have invoked freedom of speech and that claim “would have been subject to the public concern test already described.” While the Court did not find the Speech and Petition Clauses “identical,” they did “share substantial common ground” and “are ‘cognate rights.’ ” The difference is that “the right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.” Thus, while “both speech and petition advance personal expression,” the “right to petition is generally concerned with expression directed to the government.”

To preserve efficiency and effectiveness, “government must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve.” Recognizing government’s “significant interest in disciplining public employees who abuse the judicial process,” Justice Kennedy opined that “[un]restrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence.” Budgets, personnel decisions, and substantive policies might all be laid before the jury, raising “serious federalism and separation-of-powers concerns.” Were the Petition Clause to apply even where matters of public concern are not involved, it would be unnecessary, or even disruptive, as the public can already file grievances and court claims. “The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.”

Even beyond limiting the speech of government employees, “ ‘government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.’ ” The government has an interest in “managing its internal affairs” and “[t]he public concern test was developed to protect these substantial government interests.” At this country’s founding, “[p]etitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence.” While these were largely private concerns, the proper scope and application of the Petition Clause “cannot be determined merely by tallying up petitions to the colonial legislatures.” Instead, courts must “identify the historic and fundamental principles that led to the enumeration of the right to petition.” For example, “the right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King.”

Applying the Court’s analysis for “Speech Clause claims by public employees” to their Petition Clause claims “will protect both the interests of the government and the First Amendment right.” Thus, “[i]f a public employee petitions as an employee on a matter of purely private concern, the employee’s First Amendment interest must give way, as it does in speech cases. [*San Diego*] v. *Roe*, 543 U.S., at 82-83. When a public employee petitions as a citizen on a matter of public concern, the employee’s First Amendment interest must be balanced against the countervailing interests of the government in the effective and efficient management of its internal affairs.”

As with free speech claims, “whether an employee’s petition relates to a matter of public concern will depend on ‘the content, form, and context of [the petition], as

revealed by the whole record.’ ” Moreover, “the forum in which a petition is lodged will be relevant to the determination of whether the petition relates to a matter of public concern.” For example, “[a] petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context.” Finally, Justice Kennedy limited the scope of what constitutes “public concern,” stating that “[t]he right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.” The Court remanded the case to apply the public concern analysis.

Justice Thomas concurred in the judgment, but stated that “[f]or the reasons set forth by Justice Scalia, I seriously doubt that lawsuits are ‘petitions’ within the original meaning of the Petition Clause of the First Amendment.” However, Justice Thomas, like the majority, did not decide that question. “ ‘The parties litigated the case on the premise that Guarnieri’s grievances and lawsuit are petitions protected by the Petition Clause.’ ” Justice Thomas opined that “[e]ven where a public employee petitions the government in its capacity as sovereign, I would balance the employee’s right to petition the sovereign against the government’s interest as an employer in the effective and efficient management of its internal affairs.”

Justice Scalia concurred in the judgment in part and dissented in part. “The Court has never actually *held* that a lawsuit is a constitutionally protected ‘Petition,’ nor does today’s opinion” so hold. “There is abundant historical evidence that ‘Petitions’ were directed to the executive and legislative branches of government, not to the courts.”

Justice Scalia also disagreed “with the Court’s decision to apply the ‘public concern’ framework of *Connick v. Myers*.” He noted that “petitions to redress *private* grievances were such a high proportion of petitions at the founding” whose proportion becomes “infinitely higher if lawsuits are considered to be petitions.” Moreover, “[t]he text of the Petition Clause does not distinguish petitions of public concern from petitions of private concern.” The majority’s opinion is “contrary to this Court’s historical treatment of the Petition Clause” since the Court has “decided innumerable cases establishing constitutional rights with respect to litigation, and until today not a one of them has so much as hinted that litigation of public concern enjoys more of those rights than litigation of private concern.” Instead of “shoehorning the ‘public concern’ doctrine into a Clause where it does not fit, we should hold that the Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners’ employer, rather than its capacity as their sovereign.”

NOTE

(1) *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (declining to treat fee shifting legislation as having a chilling effect on patent suits which therefore did not violate the First Amendment right to petition the government for redress of grievances.)

Page 833: Insert the following after *GARCETTI v. CEBALLOS* as Note (1)

(1) *Testifying*. In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court held that the First Amendment “protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.” A government employee alleged that he was fired in retaliation for testifying in a criminal proceeding about another employee at a public college where he had worked. Writing for the majority, Justice Sotomayor said that the First Amendment protected his right to testify on a matter of public concern, even though the employee learned the information in the course of performing his official duties as a public employee. As the Court has frequently noted, government may not force public employees to relinquish their constitutional rights as a condition of employment. Speech by public employees should be encouraged rather than inhibited. After all, government employees are frequently in the best position to know the problems in their workplace. Not only does the employee have an interest here in conveying information, but the public has an interest in receiving information about government workplaces. Countervailing these considerations is the government’s interest in maintaining the efficient operation of its workplace.

Garcetti v. Ceballos, casebook p. 831, used a two-part test to determine whether a public employee has a First Amendment retaliation claim for speech that produced adverse employment action. The first inquiry is “whether the employee spoke as a citizen on a matter of public concern.” Under *Garcetti*, the First Amendment does not protect speech made by a public employee pursuant to his job responsibilities as he is acting as an employee rather than a citizen. “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes,” even if “the testimony relates to his public employment or concerns information learned during that employment.”

It was undisputed that testifying in court was not part of the public employee’s official responsibilities. Justice Sotomayor reserved the question of “whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee’s ordinary job duties.” Whether the speech concerns information that was acquired in the public employee’s workplace does not render the speech employee speech rather than citizen speech. “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”

The speech of public employees is frequently critical to the over 1000 corruption prosecutions that occur in the United States annually. Prohibiting First Amendment retaliation claims for such speech would be against the government’s interest in policing corruption.

The public employee’s speech about corruption and misuse of funds involved

a matter of public concern, which the Court defines as “any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” The inquiry turns on the “content, form, and context’ of the speech.” The content of the speech clearly involves a matter of public concern. Moreover, “the form and context of this speech—sworn testimony in a judicial proceeding—fortify this conclusion.”

The second question under *Garcetti* and *Pickering v. Board of Education*, 391 U.S. 563 (1968), is whether “the government had ‘an adequate justification for treating the employee differently from any other member of the public’” based on its needs as an employer to maintain an efficient workplace. This is a balancing test. The need for information about corruption is obvious. On the opposite side of the balance, government can assert no legitimate interests. The testimony was not “false or erroneous.” Nor did the testimony involve unnecessary disclosure of “sensitive, confidential, or privileged information.” The Court left open the question of whether the employee could be disciplined if his testimony had admitted to wrongdoing.

Justice Thomas filed a concurring opinion joined by Justice Scalia. The Court leaves open the question “whether a public employee speaks ‘as a citizen’ when he testifies in the course of his ordinary job responsibilities.” Public employees, “such as police officers, crime scene technicians, and laboratory analysts” routinely testify “as a critical part of their employment duties.” Others may testify in a particular case “as the designated representatives of their employers” under Federal Rule of Civil Procedure 30(b)(6).

Chapter XIII

GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONIC

§ 13.03 ACCESS BY THE MEDIA TO GOVERNMENT ACTIVITY

Page 866: Insert the following after Press Enterprise Company v. Superior Court of California (“Press Enterprise II”)

In *Presley v. Georgia*, 558 U.S. 209 (2010), the Court held exclusion of the public from *voir dire* unconstitutional as a violation of defendant’s Sixth Amendment rights. The right to a public trial rests on both the Sixth and First Amendments. The Sixth Amendment provides “ ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.’ ” Under the First Amendment, the right to a public trial reaches beyond the accused to the general public. In *Press-Enterprise I* (casebook, p. 864), the Court held that the First Amendment requires that *voir dire* be open to the public. Relying on *Press Enterprise I*, the Court held in *Waller v. Georgia* (casebook, p. 865) that the right to a public trial exists in a pretrial hearing to suppress evidence under the Sixth Amendment. These precedents clearly provide defendant a Sixth Amendment right to a *voir dire* that is open to the public. Whether the First and Sixth Amendment rights to a public trial are “coextensive” remains “an open question.” The Court said that it was unnecessary to “speculate whether or in what circumstances the reach or protections of one might be greater than the other.” Nevertheless, the Court refused to afford “one who asserts a First Amendment privilege” a greater right to an open *voir dire* to the public than to the accused. The Court recognized some exceptions to open trials, for example, when it would interfere with “ ‘the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.’ ” Courts may also close *voir dire* if there are concrete “threats of improper communications with jurors or safety concerns.” To determine if closure is proper, there must be “ ‘an overriding interest that is likely to be prejudiced.’ ” Moreover, “ ‘closure must be no broader than necessary to protect that interest.’ ” Finally, trial courts must consider alternatives to closure, even if the parties themselves do not offer alternatives. Trial courts must make findings on each of these factors specific enough for an appellate court to review. Trial courts are required “to take every reasonable measure to accommodate public attendance at criminal trials.” If space in the courtroom is limited, trial courts could include: “reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.” As the trial court in this case failed to consider all reasonable alternatives to closure, its closure order was unwarranted.

Justice Thomas, joined by Justice Scalia, dissented. Justice Thomas would reject summary disposition. First, “neither *Waller* nor *Press-Enterprise I* expressly answers the question” at issue. Second, the majority should not summarily have defined “trial” as used in the Sixth Amendment to include *voir dire*. Third, requiring the judge to *sua sponte* suggest alternatives to closure was also a novel question inappropriate for summary disposition.

§ 13.08 DEFAMATION AND PRIVACY

(1) Public Figures versus Private Individuals

Page 921: Insert the following after Note 1

(1a) *Materially False.* In *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014), the Court interpreted the *New York Times* standard as requiring that the defamatory statement be materially false. Under the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 44901 et seq., Congress granted immunity against civil liability to airlines and their employees for reporting suspicious activity. For the immunity to attach, Congress required that the report had to comply with the *New York Times* standard for actual malice.

Writing for the Court, Justice Sotomayor interpreted the *New York Times* standard only to allow defamation suits for statements that are “materially false.” In assessing materiality, the Court has made clear that minor inaccuracies do not meet the test if the gist or the substance of the statement is correct. Moreover, to be considered materially false, the statement must “have a different effect on the mind of the reader from that which the pleaded truth would have produced.” The Court makes clear that while the standard for ATSA immunity is the same as the *New York Times* standard, a person making a false statement could be immunized under the ATSA, but not immunized from a defamation suit. For example, if a spouse reports that her adulterous husband was carrying a handgun on a plane, and he was carrying a gun but was not adulterous, the spouse is immunized from liability under ATSA but not from liability for defamation.

To give guidance to the lower courts, the Court applied the materially false standard itself. In this case, the Court assessed the impact of the statement on the mind of a reasonable security officer. A statement could not be material “absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat.” The Court did not decide whether the immunity determination was a legal question for the judge or a factual question for the jury. The facts of this case were so clear-cut that *Air Wisconsin* was entitled to immunity as matter of law.

The airline reported that Hoeper, a Federal Flight Desk Officer (FFDO), could have a gun, was angry and was fired. While the employee was not yet fired when the airline issued this report to TSA, he was fired later that day. Therefore the inaccuracy was not material to TSA’s decision-making process. Moreover, the fact that the airline said “that it was ‘concerned about (Hoeper’s) mental stability’” did not necessitate a finding of mental illness on their part; it was appropriate under the circumstances in which the employee had become angry and “blew up” after he failed the test. The employee was on his fourth attempt to pass the flight simulator test and by mutual agreement would be fired if he failed to pass that test. When the employee could not perform the action required by the test administrator, the employee tossed his headphones off, muttered an expletive, and said he was being railroaded. Congress intended to encourage reporting

threats to safety without worry of civil liability; providing just the ““breathing space”” that airlines and their employees need.

Justice Scalia dissented in part and concurred in part, joined by Justices Thomas and Kagan. Justice Scalia concurred that immunity under the ATSA could be lost only for false statements. He also agreed with the majority's definition of materiality as having “a natural tendency to influence a reasonable TSA officer's determination of an appropriate response to the report.” However, rather than apply the facts to this standard, Justice Scalia would remand the case to have the lower courts apply the facts to the standard. As a ““mixed question of law and fact””, materiality should be decided by the jury, and the reviewing court should only decide whether a reasonable jury could have found materiality existed. Similarly, qualified immunity should be decided by the jury.

The court below could only find a complete absence of false statements as a matter of law; viewing the facts in a light most favorable to the plaintiff, the jury was compelled to reach this conclusion. Such was not the case here. The jury found that Air Wisconsin reported to TSA that it was “concerned about [plaintiff's] mental stability” and that he was an “[u]nstable pilot”; the jury also found that both of these statements were false. The record presented many factual questions. Rather than pose a threat owing to mental instability, the jury could review plaintiff's anger as being quite rational in light of his allegations that the test was unfairly administered, thus placing him in imminent danger of being fired. Indeed the instructor against whom plaintiff directed his anger did not view plaintiff as being dangerous, as the instructor authorized plaintiff to fly even after his display of anger. Under this record, a reasonable jury could have found that Air Wisconsin's allegation of dangerous mental instability was materially false.

Chapter XIV

SPEECH IN PUBLIC PLACES

§ 14.01 OFFENSIVE SPEECH IN PUBLIC PLACES

[1] Defamation: General Principles

Page 958: Insert the following after Virginia v. Black

UNITED STATES v. ALVAREZ, 132 S. Ct. 2537 (2012). In *United States v. Alvarez*, the Court invalidated the Stolen Valor Act of 2005. Writing for the plurality, Justice Kennedy, joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, stated that the statute restricted free speech. Xavier Alvarez, the respondent, habitually lied about his past achievements, both personal and professional. He was charged with and admitted to violating the Stolen Valor Act of 2005 by falsely claiming to have won the Congressional Medal of Honor, America’s highest award for valor. The statements were not made to secure employment, financial benefit or any other privilege, but rather to earn respect. The plurality subjected the Act to “exacting scrutiny” as it was an attempt to regulate “content-based speech.”

The Stolen Valor Act of 2005 states that any person who falsely claims to have been “awarded any decoration or medal authorized by Congress for the Armed Forces. . . shall be fined under this title, imprisoned not more than six months, or both.’ ” If the offense involves the Congressional Medal of Honor, then the imprisonment can be increased up to one year. While the respondent claimed the statute suppressed free speech, the Government argued that the statute was “necessary to preserve the integrity and purpose of the Medal.” Disagreeing, the plurality stated that “content-based restrictions on speech have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories [of expression].’ ” These categories include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, “true threats, and speech presenting some grave and imminent threat the Government has the power to prevent, see *Near v. Minnesota*, although a restriction under the last category is most difficult to sustain.” However, the First Amendment allows no general exception for government to prohibit false statements, as “some false statements are inevitable if there is to be an open and vigorous expression of views.”

The plurality rejected the government’s argument that false statements have no value and, therefore, lack First Amendment protection. This government’s position rested on previous cases that involved “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.” Moreover, the “prohibition on false statements made to government officials, in communications concerning official matters, does not lead to the

broader proposition that false statements are unprotected when made to any person, at any time, in any context.” Further, the “unquestioned constitutionality of perjury statutes” does not entail a broad-based restriction on false speech. “Perjury undermines the function and province of the law and threatens the integrity of judgments.”⁶⁴ Sometimes the falsity of the speech may determine if the speech should be protected, but this does not mean that false speech should always be unprotected. Excluding an entire category of speech from the “normal prohibition on content-based restrictions,” requires “ ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’ ”

The statute “applies to a false statement made at any time, in any place, to any person.” It equally restricts speech whether the lie was made in public or during a personal conversation in the home, and “does so without regard to whether the lie was made for the purpose of material gain.” False statements made to commit fraud, secure money or other “valuable considerations” like employment, can be regulated.

While Government has an unquestionable interest in protecting the integrity of the Medal of Honor, the restriction must “be ‘actually necessary’ to achieve its interests.” The Government presented no evidence to show that false claims have diminished the public perception of the military honors the law is trying to protect. Moreover, the government has not demonstrated “why counterspeech would not suffice to achieve its interest,” as it did in Alvarez’s case. His lie was exposed before the authorities even began to investigate him. Subsequently “he was ridiculed online, his actions were reported in the press, and a fellow board member” asked him to resign. “The remedy for speech that is false is speech that is true.” The First Amendment ensures the right to respond. Moreover, “when the Government seeks to regulate protected speech, the restriction must be the ‘least restrictive means among available, effective alternatives.’ ” For example, the government could create a database of Congressional Medal of Honor recipients on the internet to help expose false claims.

Justice Breyer concurred in the judgment, joined by Justice Kagan. He disagreed with the plurality’s “strict categorical analysis.” Instead Justice Breyer believed that “the Government can achieve its legitimate objectives in less restrictive ways.” Penalizing purportedly false speech presents the danger that government may restrict truthful speech as well, including in “philosophy, religion, history, the social sciences, the arts,” etc., which frequently call for strict scrutiny. “The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do no concern such subject matter.” Even in such cases, regulation can still cause “speech-related harms.” Consequently, Justice Breyer applies “ ‘intermediate scrutiny.’ ”

That the statute covers only lies diminishes, but does not eliminate, the dangers against First Amendment values. “False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts,

⁶⁴ “Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes.”

where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth." In addition, "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart."

While the statute has substantial justification, the Court must "ask whether it is possible substantially to achieve the Government's objective in less burdensome ways." For example, the statute might have required "a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm." Several "lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts."

Justice Breyer also agrees with the plurality, that more true information will typically counteract false statements and endorses the idea of a publicly available register of military awards. However, "the statute as presently drafted works disproportionate constitutional harm. It consequently fails intermediate scrutiny."

Justice Alito, joined by Justice Scalia and Justice Thomas, dissented. "These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families." Protecting these lies "breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." In this connection, people "often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits."⁶⁵

The alternative of an online database of medal recipients would not achieve the Government's goal. "The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001."⁶⁶

In fact, "many kinds of false factual statements have long been proscribed without 'rais[ing] any Constitutional problem.'" Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted." The First Amendment also allows recovery in more modern torts, such as, intentional infliction of emotional distress, dating back to the 19th century, and the more recent "tort of false-light invasion of privacy." Further, it is a crime to " 'knowingly and willfully' make any 'materially false, fictitious, or fraudulent statement or representation' in 'any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.'" It is also a crime "to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government." Neither of these

⁶⁵ "For example, in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of Honor. An investigation of the 333 people listed in the online edition of *Who's Who* as having received a top military award revealed that fully a third of the claims could not be substantiated."

⁶⁶ This database would also have limited utility for more common names since the Department may not disclose Social Security numbers or birthdates of recipients.

crimes require a showing of “ ‘pecuniary or property loss to the government.’ ”

The false statements “covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope.” Sometimes false statements must be protected to “ensure sufficient ‘breathing space’ for protected speech.” To avoid the “chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity.” Rather than “prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.”⁶⁷

[2] Sexually Offensive Speech

Page 967: Insert the following after Federal Communications Commission v. Pacifica Foundation

In *FCC v. Fox*, 132 S. Ct. 2307 (2012), the Court held that, under the Due Process Clause, the FCC did not give fair notice to Fox and ABC networks when it retroactively sanctioned them under new obscenity standards. When Fox aired two live Billboard Awards broadcasts, each including an isolated obscenity, and ABC aired seven seconds of nude buttocks on one episode of *NYPD Blue*, the FCC held that these events had violated its new *Golden Globes* Order, even though all three broadcasts aired before the order was issued.

Writing for a unanimous court, Justice Kennedy stated: “clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.” Any regulation, related to speech or not, may be void for vagueness. Vagueness addresses the twin concerns that “regulated parties should know what is required of them so they may act accordingly” and that “those enforcing the law do not act in an arbitrary or capricious way.” Especially when speech is at issue, “rigorous adherence” to due process is necessary “to ensure that ambiguity does not chill protected speech.”

The FCC “changed course” when it ruled for the first time in its 2004 *Golden Globes* Order that even “fleeting expletives and a brief moment of indecency were actionably indecent.” Because the three broadcasts at issue aired before the new order, the networks had no notice that the isolated expletives or the brief nudity were actionable. Although the FCC did not fine Fox, the sanctions’ “adverse impact” on the network’s reputation entitled it to relief. ABC and its affiliates had been fined a total of \$1.24 million.

⁶⁷ The plurality and concurring opinions do not claim that the false statements prohibited by the Act “possess either intrinsic or instrumental value.” Instead, the opinions appear to be based on the law’s overbreadth. “But to strike down a statute on the basis that it is overbroad, it is necessary to show that the statute’s ‘overbreadth [is] substantial.’ ”

Noting that technological advances have provided “multiple other choices for listeners and viewers,” the networks urged that *Pacifica* and its “less rigorous standard of scrutiny” for broadcasters be overruled entirely. Having held the FCC’s rulings void for lack of proper notice under the Due Process Clause, the Court found it unnecessary “to address the constitutionality of the current indecency policy as expressed in the *Golden Globes Order*.” The FCC remains “free to modify” its current policy.

Justice Ginsburg concurred in the judgment, arguing that “the Court’s decision in *FCC v. Pacifica Foundation* was wrong when it was issued.”

§ 14.02 SPEECH IN TRADITIONAL PUBLIC FORUMS STREETS, SIDEWALKS, PARKS

Page 981: Insert the following after Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston

SNYDER v. PHELPS

131 S. Ct. 1207, 179 L.Ed.2d 172 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier’s funeral service. . . . The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

I

A

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church’s congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military. The church frequently communicates its views by picketing, often at military funerals. In . . . 20 years . . . the members of Westboro Baptist . . . have picketed nearly 600 funerals.

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder’s father selected the Catholic church in the Snyders’ hometown of Westminster, Maryland, as the site for his son’s funeral. Local newspapers provided notice of the time and location of the service.

Phelps became aware of Matthew Snyder’s funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro

congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11"

. . . The picketing took place within . . . public land adjacent to a public street approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.⁶⁸

B

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. . . .

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. . . . The District Court remitted the punitive damages award to \$2.1 million

. . . [T]he Court of Appeals, . . . concluded that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric⁶⁹

II

The Free Speech Clause of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988).

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern'

⁶⁸ [Court's footnote 1] A few weeks after the funeral, one of the picketers posted a message on Westboro's Web site discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations. Snyder discovered the posting, referred to by the parties as the "epic," during an Internet search for his son's name. The epic is not properly before us and does not factor in our analysis. Although the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari. . . .

⁶⁹ [Court's footnote 2] . . . Like the court below, we proceed on the unexamined premise that respondents' speech was tortious.

... is ‘at the heart of the First Amendment’s protection.’ ” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). . . . Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983).

“ ‘[N]ot all speech is of equal First Amendment importance,’ ” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. *Hustler, supra*, at 56 (quoting *Dun & Bradstreet, supra*, at 758); see *Connick, supra*, at 145-147. . . .

. . . “[T]he boundaries of the public concern test are not well defined.” *San Diego v. Roe*, 543 U.S. 77, 83 (2004). . . .

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” *Connick, supra*, at 146, or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” *San Diego, supra*, at 83-84. The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual’s credit report “concerns no public issue.” 472 U.S., at 762. The content of the report, we explained, “was speech solely in the individual interest of the speaker and its specific business audience.” *Ibid.* That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. *Ibid.* To cite another example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos “did nothing to inform the public about any aspect of the [employing agency’s] functioning or operation.” 543 U.S., at 84.

Deciding whether speech is of public or private concern requires us to examine the “ ‘content, form, and context’ ” of that speech, “ ‘as revealed by the whole record.’ ” *Dun & Bradstreet, supra*, at 761 (quoting *Connick, supra*, at 147-148). As in other First Amendment cases, the court is obligated “to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’ ” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” *Dun & Bradstreet, supra*, at 759. The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just

Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as “You’re Going to Hell” and “God Hates You”—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

. . . Snyder contends that the “context” of the speech—its connection with his son’s funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. . . .

. . . We are not concerned in this case that Westboro’s speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro’s picketing did not represent its “honestly believed” views on public issues. *Garrison*, 379 U.S., at 73. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro’s speech on public matters was intended to mask an attack on Snyder over a private matter. Contrast *Connick, supra*, at 153 (finding public employee speech a matter of private concern when it was “no coincidence that [the speech] followed upon the heels of [a] transfer notice” affecting the employee). . . .

Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially to Matthew’s father. . . . But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” *United States v. Grace*, 461 U.S. 171, 180 (1983). . . .

That said, “[e]ven protected speech is not equally permissible in all places and at all times.” *Id.*, at 479 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 799 (1985)). Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court’s precedents. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Maryland now has a law imposing restrictions on funeral picketing, Md. Crim. Law Code Ann. § 10-205 (Lexis Supp. 2010), as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland’s law, however, was not in effect at the time of

the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.⁷⁰

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing “before or about” a particular residence, 487 U.S., at 477. In *Madsen v. Women’s Health Center, Inc.*, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. 512 U.S. 753, 768 (1994). The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro . . . fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said “God Bless America” and “God Loves You,” would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro’s speech was at a public place on a matter of public concern, that speech . . . cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). . . .

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was “outrageous.” “Outrageousness,” however, is a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” *Hustler*, 485 U.S., at 55. . . . What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous. . . .

III

The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy. . . .

Snyder argues that even assuming Westboro’s speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son’s funeral.

⁷⁰ [Court’s footnote 5] The Maryland law prohibits picketing within 100 feet of a funeral service or funeral procession; Westboro’s picketing would have complied with that restriction.

We do not agree. In most circumstances, “the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 (1975) As a result, “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen v. California*, 403 U.S. 15, 21 (1971).

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970), and an ordinance prohibiting picketing “before or about” any individual’s residence, *Frisby*, 487 U.S., at 484-485.

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.

Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.

IV

Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. . . .

. . . Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. . . .

JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. That opinion restricts its analysis here to the matter raised in the petition for certiorari, namely, Westboro’s picketing activity. The opinion does not examine in depth the effect of television broadcasting. Nor does it say anything about Internet postings. . . .

While I agree with the Court’s conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern.

Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words").

The dissent recognizes that the means used here consist of speech. . . . The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm. . . .

As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. . . . To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. . . . As I read the Court's opinion, it holds no more.

JUSTICE ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church . . . launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. . . .

I

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, “most if not all jurisdictions” permit recovery in tort for the intentional infliction of emotional distress (or IIED). *Hustler*, 485 U.S. at 53.

This is a very narrow tort with requirements that “are rigorous, and difficult to satisfy.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 12, p. 61 (5th ed.1984). . . .

II

It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech. Indeed, what has been described as “[t]he leading case” recognizing this tort involved speech. Prosser and Keeton, *supra*, § 12, at 60 (citing *Wilkinson v. Downton*, [1897] 2 Q.B. 57); see also Restatement (Second) of Torts § 46, illustration 1. And although this Court has not decided the question, I think it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.

This Court has recognized that words may “by their very utterance inflict injury” and that the First Amendment does not shield utterances that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“[P]ersonal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution”). . . .

III

On the morning of Matthew Snyder’s funeral, respondents could have chosen to stage their protest at countless locations. . . .

The Westboro Baptist Church, however, has protested at nearly 600 military funerals. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. And in advance of these protests, they issue press releases to ensure that their protests will attract public attention.

This strategy works because it is expected that respondents’ verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. . . . Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson—proclaiming that she was “better off dead”—their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.

In this case, respondents implemented the Westboro Baptist Church’s publicity-seeking strategy. . . .

. . . Moreover, since a church funeral is an event that naturally brings to mind

thoughts about the afterlife, some of respondents' signs-*e.g.*, "God Hates You," "Not Blessed Just Cursed," and "You're Going to Hell"-would have likely been interpreted as referring to God's judgment of the deceased.

Other signs would most naturally have been understood as suggesting-falsely-that Matthew was gay. Homosexuality was the theme of many of the signs. . . .

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!" Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the United States military, the "epic" addressed the Snyder family directly:

"God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD-PERIOD! You did JUST THE OPPOSITE-you raised him for the devil.

. . .

"Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

. . .

"Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?"

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. . . .

IV

The Court concludes that respondents' speech was protected by the First Amendment for essentially three reasons, but none is sound.

First-and most important-the Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment

allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern. . . .

Second, the Court suggests that respondents' personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge, but I see no basis for the strange distinction that the Court appears to draw. Respondents' motivation—"to increase publicity for its views," *ibid.*—did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. . . .

Third, the Court finds it significant that respondents' protest occurred on a public street. . . . To be sure, statements made on a public street may be less likely to satisfy the elements of the IIED tort than statements made on private property. . . . Neither classic "fighting words" nor defamatory statements are immunized when they occur in a public place. . . .

. . . At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. . . . Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern. . . .

V

Hustler did involve an IIED claim, but the plaintiff there was a public figure, and the Court did not suggest that its holding would also apply in a case involving a private figure. Nor did the Court suggest that its holding applied across the board to all types of IIED claims. Instead, the holding was limited to "publications such as the one here at issue," namely, a caricature in a magazine. 485 U.S., at 56. . . .

VI

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. . . .

Page 1001: Insert the following after note (4)

(4a) In *United States v. Apel*, 134 S. Ct. 1144 (2014), a protester was arrested and fined after being excluded from a military base by the base commander under 18 U.S.C.S. § 1382. Because there was a road employed by the public, a middle school and other uses near the designated protest area, the protester claimed these parts of the base were not a "military installation" as defined by statute. Hence the base commander lacked legal authority to exclude him. Chief Justice Roberts held that 18 U.S.C.S. § 1382 defines the boundaries of a military base as the area of the base commander's responsibility. Opening part of the base to the public by allowing them to use the road for

establishing a school, a bus stop, or the protest area does not alter the boundaries of the base. Opinions in the U.S. Attorneys' Manual and by the Air Force Judge Advocate General defining a military base by exclusive possession did not alter the Court's construction of the statutory language.

Concurring, Justice Ginsburg joined by Justice Sotomayor, agreed that the Court should not reach the First Amendment issues because the Ninth Circuit had not reached the issue below. However, by opening up part of the base for protest, the government had created a limited public forum requiring that restrictions on protesting be narrowly tailored to serve a significant government interest. The Air Force's stated interest in base security might be impaired by the Air Force's permitting the public to traverse the road through the base and allowing access to the middle school, bus stop, and visitor center. All were located very near the designated protest area.

Justice Alito also concurred. The Court's failure to address First Amendment issues owing to the failure of the Ninth Circuit to address these issues demonstrates that the Court neither agrees nor disagrees with Justice Ginsburg's concurrence.

(4b) In *Wood v. Moss*, 134 S. Ct. 2056 (2014), the Supreme Court (9-0) reversed the District Court and Ninth Circuit to sustain a motion to dismiss a *Bivens* action by Secret Service agents. Plaintiffs allege that the Secret Service engaged in unconstitutional viewpoint discrimination by moving protesters out of earshot and sight of President George W. Bush while not moving supporters of President Bush.

As it had in prior decisions, the Court assumed without deciding that implied constitutional actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) applies to First Amendment violations. Nevertheless, Justice Ginsburg held that no *Bivens* action existed on the facts of this case. The agents had qualified immunity as their actions did not violate any statutory or constitutional right that "was 'clearly established' at the time of the challenged conduct." Court precedents have provided qualified immunity for Secret Service agents in view of the "overwhelming, interest in protecting the safety" of the President. The Supreme Court has never even hinted that during an unanticipated security situation, Secret Service agents had to keep protesters and supporters "equal distances from the President." Neither did any precedent suggest that the First Amendment requires Secret Service agents engaged in crowd control "to ensure that groups with different viewpoints are at comparable locations at all times."

Moreover, under the facts confronting the agents, equal access made no sense. While the agents moved the protesters but not the supporters of the president, the protesters were moved away from a position in which they had a clear sight line to the patio on which the president was having dinner. His supporters' sight was blocked by a large building. The existence of a valid security reason to move the protesters undermined plaintiff's argument that they were moved solely because of their viewpoint.

Justice Ginsburg also rejected plaintiff's argument that the Secret Service discriminated against them because they failed to even check the other guests at the inn at which the president made an impromptu stop to have dinner. Because the president made an impromptu stop, the other guests could not have anticipated his presence at the

restaurant. They therefore posed no significant security threat. Moreover, the Secret Service could easily keep the small group on the patio under surveillance in sharp contrast to the 200 to 300 protesters.

Finally, the Court refused to consider plaintiff's allegations that the Secret Service had at times discriminated against protesters based on viewpoint. Only the actions of the particular Secret Service before the Court were at issue.

Page 1008: Insert the following right before Arkansas Educational Television Commission v. Forbes

REED v. TOWN OF GILBERT, 576 U.S. ___(2015). The Town of Gilbert imposed more stringent restrictions on signs that directed people to meetings of nonprofit organizations, than it placed on other signs. The ordinance specifically described such signs as “Temporary Directional Sign Relating to a Qualifying Event.” Generally, the city prohibited signs without a permit; however, it exempted 23 categories of signs. Of the signs particularly relevant in this case, the city treated “Ideological Signs” best, allowing them to be up to 20 square feet. “Political Signs” for campaigns could be between 16 and 32 square feet and posted up to 60 days before an election and up to 15 days following an election. In contrast, “Temporary Directional Signs” could only be up to 6 square feet and displayed no more than 12 hours before an event and one hour following an event. Moreover, no more than four temporary event signs could be placed on a single property at any given time.

Before the present litigation, the city called the signs “Religious Assembly Temporary Direction Signs.” It amended this title during the pendency of the litigation. Moreover, before the litigation, the code only allowed displaying the signs two hours prior to the event and did not allow their display in public right of ways in contrast to political and ideological signs. These restrictions were redefined twice during the pendency of the litigation.

Justice Thomas delivered the opinion of the Court. The Court delineated a broad concept of content neutrality. Laws can facially violate content neutrality if they regulate based on “the topic discussed or the idea or message expressed.” A law can also more subtly violate content neutrality if it regulates speech based on “its function or purpose.” Even laws that are facially neutral can be unconstitutional if they cannot be “justified without reference to the content of the regulated speech,” or were adopted by the government “because of disagreement with the message [the speech] conveys.”

Justice Thomas held that the signage restrictions were facially content-based, as the type of regulations depended on the sign’s message. A regulation on speech can be content-based even if government has a benign motive for a distinction. A benign justification does not cure a content-based distinction. The Court applies strict scrutiny whether the statute is facially content-based or its motive is content-based. “Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute.”

While the ordinance did not discriminate against particular viewpoints, “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”

Justice Thomas called the distinction between ideological, political, and directional signs a “paradigmatic example of content-based discrimination.” While the law is not speaker-based as it would apply to both a business and a church advertising a church event, that is not enough to render it content neutral. The ordinance is event-based as “the Code singles out signs bearing a particular message: the time and location of a specific event.” Or, for example, during election time the law requires officials to make a content distinction based on whether the message is ideological or supports a specific candidate.

As it is content-based, the law must be narrowly tailored to advance a compelling state interest. Neither its rationale of aesthetics nor safety satisfies this test. Directional signs impose no greater burden on aesthetics or safety than political or ideological signs.

Content neutral restrictions on the signs would have been permissible; for example, restrictions on the sign’s “size, building materials, lighting, moving parts, and portability.” Justice Thomas cited *Members of City Council of Los Angeles v. Taxpayers for Vincent*, (casebook p.1000), as permitting government to broadly ban signs on public property. Moreover, “[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.”

Justice Alito wrote a concurring opinion joined by Justices Kennedy and Sotomayor. Justice Alito gave a list of content neutral restrictions on signs:

“Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

“Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

“Rules distinguishing between lighted and unlighted signs.

“Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

“Rules that distinguish between the placement of signs on private and public property.

“Rules distinguishing between the placement of signs on commercial and residential property.

“Rules distinguishing between on-premises and off-premises signs.

“Rules restricting the total number of signs allowed per mile of roadway.

“Rules imposing time restrictions on signs advertising a one-time event.”

To the extent that some of these restrictions are akin to time, place, and manner restrictions, they must be content neutral and narrowly tailored to advance a legitimate governmental interest.

Justice Breyer concurred in the judgment joined by Justice Kagan. While a viewpoint neutral law automatically triggers strict scrutiny, a content-based law does not. For him, “virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination.” Among the examples which would not trigger strict scrutiny were content-based

regulations: “ of securities (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient’s spouse or sexual partner); of income tax statements (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos,” recommending people wash their hands.

Content discrimination which is viewpoint-based or restricts speech in a traditional public forum should weigh heavily against the law. Other content-based regulations must be judged according to whether they are “disproportionate in light of the relevant regulatory objectives.”

In this case, regulation of signage along the roadside neither involves a traditional public forum nor is viewpoint-based. Consequently, Justice Breyer concurred in the judgment and would hold the law unconstitutional for reasons set forth in Justice Kagan’s opinion.

Justice Kagan concurred in the judgment joined by Justices Ginsburg and Breyer. Justice Kagan was concerned that the Court’s broad ranging opinion would jeopardize many laws – for example, laws marking historical landmarks, hidden driveways, or blind pedestrian crossings. The First Amendment is concerned with protecting the marketplace of ideas and protecting against viewpoint discrimination. The “concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when ‘that risk is inconsequential, . . . strict scrutiny is unwarranted.’”

The law at issue offers no basis for many of the distinctions that it makes. Consequently, it is unconstitutional without strict scrutiny. Justice Kagan would not have issued a broad-ranging restriction which jeopardizes every sign ordinance containing a content-based exception.

§ 14.04 THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY

[1] Public Property

Page 1024: Insert the following after Hill v. Colorado

MCCULLEN V. COAKLEY, 134 S. Ct. 2518 (2014). In *McCullen*, the Court unanimously invalidated a law dramatically limiting protests around abortion clinics. Massachusetts law extended to within 35 feet of any entryway or driveway of an abortion clinic the boundaries which protestors could not cross. A Massachusetts law passed in 2000 forbade, within 18 feet of an abortion facility certain persons from coming within 6 feet of anyone seeking an abortion at that facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” Massachusetts law made an exception if a person seeking an

abortion consented. A separate provision imposed criminal liability on “anyone who ‘knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.’” The Court had upheld a similar law in *Hill v. Colorado*, casebook, p. 1021.

Police complained that so many protesters occupied the 18-foot zone that the six-foot rule was difficult to enforce. Consequently, the Massachusetts legislature enacted the 35-foot zone “from which individuals are categorically excluded,” except: 1) those entering or leaving the abortion clinic; 2) the clinic’s employees and agents; 3) municipal officers such as police, firefighters, etc. and 4) others using the sidewalks to reach a destination other than the clinic. “A first violation of the statute is punishable by a fine of up to \$500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between \$500 and \$5,000, up to two and a half years in prison, or both.” As a result, at one clinic, the new law effectively excluded counseling or protesting on “a 56-foot-wide expanse of the public sidewalk in front of the clinic.” Another clinic whose geography made them 54 feet from the street excluded protesters over a 70 foot expanse of sidewalk. A third clinic’s posting and counseling free zone, under this law, was 100 feet wide in front of the clinic, which also extended well into the public street. The entryway of the third clinic consisted of 5 driveways. In the case of all three of these clinics, plaintiffs claim that the law hampers their counseling efforts. In addition, abortion clinics utilize the second exception to the law to have employee counselors greet potential patients and actively hinder the efforts and influence of the plaintiffs.

Regulating public ways and sidewalks entails regulating traditional public forums, which from time immemorial have been used for communication. In contrast to other forms of communication, an individual who sees or hears an uncomfortable message cannot simply “turn the page, change the channel, or leave the Web site.”

Even in a traditional public forum, government may impose content-neutral reasonable time, place, or manner restrictions, if “they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication.”⁷¹

Taking the first part of the test, the Chief Justice found the law content neutral. “Whether petitioners violate the Act ‘depends’ not ‘on what they say,’ but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.” While it has the “‘inevitable effect’ of restricting abortion-related speech more than” other speech, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” The key question is “whether the law is “‘justified without reference to the content of the regulated speech.’” The Massachusetts statute ensures “‘public safety, patient access to healthcare,’” and

⁷¹ “A different analysis would of course be required if the government property at issue were not a traditional public forum but instead ‘a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.’ *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).”

unobstructed sidewalks and roadways. Had the law sought to avoid offense to listeners, it would not have been content neutral. While the law did single out abortion clinics, the state had “a record of crowding, obstruction, and even violence outside” them which was unique to such clinics.⁷²

Plaintiffs also complained about discrimination in the act of allowing clinic escorts to speak about abortion within the buffers zone while disallowing others to do so. This exemption also applies to other clinic employees including maintenance workers, and only extends to behavior that is within the scope of their employment. To the extent that “escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways,” this would not amount to viewpoint discrimination to the extent that occurred outside the buffer zones, where both sides were equally free to express their viewpoints. If these activities occurred within the buffer zones and were beyond the scope of their employment, they would not go to a facial challenge but rather to selective enforcement in official viewpoint discrimination, which petitioners failed to allege.

The question would be different if “a clinic authorized escorts to speak about abortion inside the buffer zones.” The employee exemption in the Act would then clearly be facilitating viewpoint discrimination by allowing only one kind of abortion-related speech and thereby support an as-applied challenge.

As the Act was “neither content nor viewpoint based,” the Court refused to analyze it under strict scrutiny. Although the Act was content neutral, it was not “narrowly tailored to serve a significant governmental interest.” The Act pushed plaintiffs “well back from the clinics’ entrances and driveways. The zones thereby compromise petitioners’ ability to initiate the close, personal conversations that they view as essential to ‘sidewalk counseling.’”

One of the plaintiffs “explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear ‘untrustworthy’ or ‘suspicious.’” Consequently, she “is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey.” As a result, plaintiffs reported precipitous declines in their abilities to convince women not to have an abortion. One reported having convinced 100 women not to have an abortion before the passage of the Act in 2007, and not one since. Another plaintiff testified that only one in 100 women will cross the street to speak with her outside the buffer zone. Similar testimony also suggested a dramatically adverse effect on distributing handbills. Two of the buffer zones push the counselors so far back that they have no opportunity to distribute the handbills to drivers entering the clinics’ parking lots.

⁷² While Justice Scalia notes that these problems only beset one clinic, this goes to the question of narrow tailoring.

Although “the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.” In petition campaigns, “‘one-on-one communication’ is ‘the most effective, fundamental, and perhaps economical avenue of political discourse.’” The ability to chant slogans or display signs outside buffer zones is of no consequence.

“The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests.” Defendants identify no other state that has adopted fixed buffer zones around abortion clinics. As about a dozen other states have, Massachusetts could adopt a measure like the “federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), *18 U.S. C. § 248(a)(1)*, which subjects to both criminal and civil penalties anyone who ‘by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.’”⁷³ Without specifically approving any of the alternatives the majority discusses, one “could in principle constitute a permissible alternative.” Other alternatives that exist include Massachusetts’s statutes prohibiting solicitation on public streets and obstruction of the streets and sidewalks, and “generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.”

Many of these statutes can be enforced through civil action for injunctions. *Madsen v. Women's Health Ctr.*, casebook p. 1009, “noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures.” Injunctions regulate speech “only ‘because of the group’s past actions in the context of a specific dispute between real parties.’” Moreover, injunctions are equitable remedies, which courts can tailor to restrict “no more speech than necessary” to remedy a specific problem.

Massachusetts also asserts that some groups could obstruct access to abortion clinics inadvertently by simply congregating in large numbers; this problem could also be dealt with less restrictively. “Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period.”

In any event, the only place where Massachusetts actually cites congestion is the “Boston Planned Parenthood clinic on Saturday mornings.” This one example hardly justifies a prophylactic measure of 35-foot buffer zones.

⁷³ Massachusetts could also adopt a New York City ordinance “that not only prohibits obstructing access to a clinic, but also makes it a crime ‘to follow and harass another person within 15 feet of the premises of a reproductive health care facility.’ *N. Y. C. Admin. Code § 8-803(a)(3)* (2014).”

While Massachusetts claims that other alternatives simply have not worked, they do not identify any prosecutions brought under pre-existing laws for 17 years and no injunction since the 1990s. “In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.”

Rejecting Massachusetts’ assertion that the law was easier to enforce, the Court said that the First Amendment is not primarily concerned with efficiency. The Court also distinguished *Burson v. Freeman*, casebook, p. 1007, which upheld a 100-foot prophylactic buffer zone around polling places. This subtlety of “[v]oter intimidation and election fraud” made this law necessary. Moreover, “law enforcement officers” can generally not go near “the polls to avoid any appearance of coercion” in elections.

The Court did not need to consider plaintiff’s overbreadth challenge or “whether the Act leaves open ample alternative channels of communication.”

Justice Scalia concurred in the judgment, joined by Justices Kennedy and Thomas. “Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.” Justice Scalia called the majority’s discussion of content neutrality “unnecessary” because it was dicta. If the law did not pass the narrow tailoring test, it certainly would not have passed strict scrutiny that it breached content neutrality. As the Court invalidated the law under the narrow tailoring test, it was unnecessary to decide that the law was content neutral. The Court simply could have assumed that the law was content neutral without deciding it.

Justice Scalia also criticizes the majority for expressing opinions on the constitutionality of legislation not before the Court without the benefit of briefing or oral argument.⁷⁴ To begin with, “(e)very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion.” For example, the Court uses the fact that the problems the law addressed only occurred outside one abortion clinic as evidence of lack of narrow tailoring. This fact shows that the law “is not *directed* to those concerns at all, but to the suppression of antiabortion speech.” Demonstrating “that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based.”

The structure of the Act itself reinforces this view. “The goals of ‘public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways,’ are already achieved by an earlier-enacted subsection of the statute, which provides

⁷⁴ Justice Scalia expressed concern about the Court’s suggestion that Massachusetts followed the New York City statute prohibiting harassment within 15 feet of abortion clinic. “Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times?”

criminal penalties for “[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” Consequently, “the speech-free zones” created by the Act “add nothing to safety and access”; instead, they suppress “speech opposing abortion.”

Much like the provision in *Hill v. Colorado*, the law “here was indisputably meant to serve the same interest in protecting citizens’ supposed right to avoid speech that they would rather not hear.” Within the prescribed buffer zone, the statute at issue in *Hill* did not permit abortion protesters, counselors, or leafletters to approach within 6 feet of those those seeking abortions, without their consent. “Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.” By taking this position and then invalidating the law based on inadequate tailoring to safety concerns, the Court *sub silentio* overrules *Hill*.

“Is there any serious doubt that abortion-clinic employees or agents ‘acting within the scope of their employment’ near clinic entrances may—indeed, often will—speak in favor of abortion (‘You are doing the right thing’)? Or speak in opposition to the message of abortion opponents—saying, for example, that ‘this is a safe facility’ to rebut the statement that it is not? The Court’s contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic employee sent out to ‘escort’ prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor’s pleas.”

Unlike the majority’s narrow construction of “within the scope of the appointment” that require specific instructions from the employer, the common law construes an activity to meet this test even if the employer has given no specific instructions or sometimes even if the employer has given instructions to the contrary. Besides the impossibility of a clinic’s instructing its employees not to engage in the activities detailed above, “a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.”

The “Act is content based and does not withstand strict scrutiny.” While Justice Scalia agreed that the Act is not narrowly tailored, he did not need to reach this question just to create “specious unanimity,” as the Act is not content neutral and fails strict scrutiny. Obviously, the purpose of the provision at issue “is to ‘protect’ prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch.”

Justice Alito filed a separate opinion concurring in judgment. The law unconstitutionally discriminates based on the speaker’s viewpoint. “In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to

express speech in support of the clinic and its work.” For example, a clinic employee may say, “Come inside and we will give you honest answers to all your questions.” However, a sidewalk counselor saying something similar violates the statute. Even if “the issue is not abortion but the safety of a particular facility. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee may not enter the buffer zone to warn about the clinic’s health record, but an employee may enter and tell prospective clients that the clinic is safe.”

The majority “treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral.”

In light of the law’s blatant viewpoint discrimination, “as well as the overbreadth that the Court identifies, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth’s asserted interests.”

Page 1024: Insert the following after Hill v. Colorado

PLEASANT GROVE CITY, UTAH v. SUMMUM, 555 U.S. 460 (2009). In *Pleasant Grove City, Utah*, the Court unanimously held that even though “a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”

Summum, a religious organization, sought “to erect a ‘stone monument,’ which would contain ‘the Seven Aphorisms of SUMMUM’ and be similar in size and nature to the Ten Commandments monument” that was previously donated by a private group and already standing in the public park in Pleasant Grove City. After the City denied authorization to erect the monument, Summum brought suit alleging that the City violated the organization’s free speech rights “by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument.”

Justice Alito, writing for the Court, explained that “[t]he Free Speech Clause restricts governmental regulation of private speech; it does not regulate government speech.” Restraints do exist on government speech. “For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice.” Ultimately, the electorate oversees all government speech.

“Permanent monuments displayed on public property typically represent government speech.” Alito continued: “Just as government-commissioned and

government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.” The government’s selection of certain monuments considers “such content-based factors as esthetics, history, and local culture,” and thus conveys “a government message.”

The City did not open “up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.” The City has taken “ownership of most of the monuments in the Park, including the Ten Commandments monument.” A public park is considered to be a traditional public forum. However, this doctrine applies “in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations.”

Applying the viewpoint neutrality requirement in traditional public forums to monuments would require government to display either all or no donated monuments. Consequently, “if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations.”

Concurring, Justice Stevens, joined by Justice Ginsburg, stated that the decision does not afford “government free license to communicate offensive or partisan messages.” Specifically, “even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”

Concurring, Justice Scalia, joined by Justice Thomas, relied on *Van Orden v. Perry*, (casebook, p. 1250), to allay any City concern “that today’s victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire.” *Van Orden* rejected the Establishment Clause challenge to a “virtually identical Ten Commandments monument” with all the Justices agreeing “that government speech was at issue.”

Concurring, Justice Breyer maintained that the government speech doctrine had limits. “Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display’s theme, say solely on political grounds, its action might well violate the First Amendment.”

Concurring in the judgment, Justice Souter agreed that the monument at issue was government speech, but he refused to accept “the position that public monuments are government speech categorically.” He would “try to keep the inevitable issues open” at the intersection between the government speech doctrine and the Establishment Clause. “To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”

NOTE

License plate messages. In *Walker v. Tex. Division, Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), the Court held that a state could reject messages with which it disagrees on specialty license plates, as license plates are government speech rather than public forums.

Texas law allows automobile owners to choose ordinary or specialty license plates. The specialty plates can be created three ways. First, the legislature may create a design. Second, a state approved private vendor may create a design at the request of an individual or organization. Examples include: “Keller Indians” and “Get it Sold with RE/MAX.” Third, a nonprofit organization may offer a design for approval by the Texas Motor Vehicles Board. Among other grounds, the board may refuse approval on grounds that the design is offensive to any member of the public. At issue was a design with the words “SONS OF CONFEDERATE VETERANS” on the license plate. “At the side was the organization’s logo, a square Confederate battle flag framed by the words ‘Sons of Confederate Veterans 1896.’” A faint Confederate battle flag was the background for the lower portion of the plate. As with all plates, the name of the state and its map also appeared on the plate.

Justice Breyer delivered the opinion for the Court. The Free Speech Clause allows the government to determine the content of its own speech. Through elections, the public can check Government speech that it does not like and normally First Amendment protections do not apply. This is necessary for government to work. Otherwise, for example, if it wishes to institute a recycling program, it would have to include a contrary view articulated by a local trash business. The Free Speech Clause may prohibit government from forcing a private individual to convey government speech. Government speech is also subject to other constitutional restrictions.

The Court relied on *Pleasant Grove City v. Summum*, (supplement p.), which allowed the government to refuse displaying in a city park a monument offered by a religious organization. While the city had allowed other monuments in the park including “a wishing well, a September 11 monument, a historic granary, the city’s first fire station, and a Ten Commandments monument” – all donated by private individuals, the Court considered displays of monuments government speech. As the city retained control over which private monuments to display in the park, the city had not created a public forum to display monuments donated by private entities.

First, analogous to city parks, governments, including Texas, have long used license plates to convey its messages. Second, as with monuments in city parks, the public frequently treats license plate messages as being endorsed by state government. If people did not think this, they would not seek to put their messages on license plates, but simply use bumper stickers. Third, as with the park in *Summum*, “Texas maintains direct control over the messages conveyed on its specialty plates.”

There are some distinctions. Unlike messages on license plates, parks can only

accommodate a limited number of monuments. The park in *Sumnum* was 2.5 acres. More importantly, license plates present a more compelling case to allow government to limit messages: parks are traditional public forums whereas license plates are not.

Justice Breyer rejected the characterization by the Sons of Confederate Veterans (SCV) of license plates as public forums. The parties agreed that they were not traditional public forums. They are not public forums by designation. Nor are they limited public forums as the government has not intentionally opened them up for public discourse. The Court makes this determination by examining the government's "policy and practice" and "the nature of the property and its compatibility with expressive activity." First, Texas maintains control over license plate design; second, it takes ownership over that design; third, the license plates are used for government speech for identification and the State's name.

Nor are license plates nonpublic forums, where government merely manages the property: again analogizing to *Sumnum*, Texas's specialty license plate designs "are meant to convey and have the effect of conveying a government message." Hence, license plates are government speech. The number of messages Texas allows on license plates does not alter this conclusion. Nor does the fact that specialty license plate holders pay a fee.

Wooley v. Maynard, (casebook p. 788), recognizes that license plate messages "also implicate the free speech rights of private persons." But under *Wooley*, "just as Texas cannot require SCV to convey 'the State's ideological message,' SCV cannot force Texas to include a Confederate battle flag on its specialty license plates."

Justice Alito dissented, joined by the Chief Justice, Justice Scalia, and Justice Kennedy. "The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing." Justice Alito states that a person watching cars passing by in Texas and viewing the license plates would not assume that any of those messages were attributable to the State. For example, does a license plate stating "Rather Be Golfing" prompt an observer to think that is an official message of the State? Today, Texas makes money with specialty license plates and allows motorists to select among 350 messages. The State has converted license plates into "little billboards"; and has proceeded to reject a message that it finds offensive. This is "viewpoint discrimination." Could the State do the same thing on actual highway billboards that it owns?

Originally, the Board voted 4-4 on the SCV plate with one member absent. At a subsequent meeting, the Board unanimously rejected the license plate at issue because many people testified that they would find it offensive. The Board also thought that such offensiveness could cause public disturbances and safety issues. At that same meeting, the Board approved a "Buffalo Soldiers" license plate by a vote of 5-3; the name was used to refer to a black Civil War Regiment and later applied to other black soldiers. However, as the name "Buffalo Soldiers" originally applied to those who fought in the Indian wars, this plate was opposed by some Native Americans who said they felt the same way about it that African-Americans felt about the SCV plate.

The majority relies almost exclusively on *Pleasant Grove City v. Sumnum*, which

Justice Alito distinguishes on three bases. First, governments have long employed monuments to express messages. For most of the history of license plates, private messages were not permitted, thus impairing their treatment as government speech. Second, there is no history of public parks being thrown open to whatever monuments people wanted to put there. In contrast to *Summum*, the license plate program “is *not* selective by design” as its main purpose is generating revenues. People wanting their messages placed on license plates rather than bumper stickers does not transform these messages into government speech: “There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech.” Third, spatial limitations capped the number of monuments. “Texas has space available on millions of little mobile billboards.” It “sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.”

Justice Alito found the license plates a limited public forum. Prohibiting the SCV plate on the grounds of offensiveness was viewpoint discrimination as was permitting the Buffalo Soldiers. Moreover, Texas’s rationale of averting a disturbance did not satisfy strict scrutiny.

[4] Religious Speech in Public Places

Page 1042: Insert the following after Good News Club v. Milford Central School

**CHRISTIAN LEGAL SOCIETY CHAPTER OF THE
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE
OF THE LAW, AKA HASTINGS CHRISTIAN
FELLOWSHIP v. LEO P. MARTINEZ
561 U.S. 661, 130 S. Ct. 2971, 177 L.Ed.2d 838 (2010)**

JUSTICE GINSBERG delivered the opinion of the Court.

In a series of decisions, this Court has emphasized that the *First Amendment* generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups’ viewpoints. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group -- and the attendant use of school funds and facilities -- on the organization’s agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its *First Amendment* rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization’s core beliefs about religion and sexual orientation. . . .

. . . Compliance with Hastings’ all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS -- in common with all other student organizations -- to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings’ policy. The *First Amendment* shields CLS against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

I

. . . Hastings encourages students to form extracurricular associations that “contribute to the Hastings community and experience.” . . .

Through its “Registered Student Organization” (RSO) program . . . RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students. . . . In addition, RSOs may apply for permission to use the Law School’s facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

. . . Only a “non-commercial organization whose membership is limited to Hastings students may become [an RSO].” A prospective RSO must submit its bylaws to Hastings for approval. . . .

The Law School’s Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states: . . .

“[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.”

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.”⁷⁵ Other law schools have adopted similar all-comers policies. *See, e.g.*, Georgetown University Law Center; Hofstra Law School. . . .

. . . CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a “Statement of Faith” and to conduct their lives in accord with prescribed principles.⁷⁶ Among those tenets is the belief that sexual activity should not occur outside

⁷⁵ [Court’s footnote 2] . . . RSOs may require them, *inter alia*, to pay dues, maintain good attendance, refrain from gross misconduct, or pass a skill-based test, such as the writing competitions administered by law journals. . . .

⁷⁶ [Court’s footnote 3] The Statement of Faith provides:
“Trusting in Jesus Christ as my Savior, I believe in:
One God, eternally existent in three persons, Father, Son and Holy Spirit.
God the Father Almighty, Maker of heaven and earth.
The Deity of our Lord, Jesus Christ, God’s only Son conceived of the Holy Spirit, born of the

of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in “unrepentant homosexual conduct.” CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

. . . CLS formally requested an exemption from the Nondiscrimination Policy, but Hastings declined to grant one. . . . If CLS instead chose to operate outside the RSO program, Hastings stated, the school “would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities.” CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS’s endeavors, but neither would it lend RSO-level support for them.

. . . CLS did . . . operate independently during the 2004-2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. . . .

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings’ refusal to grant the organization RSO status violated CLS’s *First* and *Fourteenth Amendment* rights to free speech, expressive association, and free exercise of religion. . .

. . . the U.S. District Court for the Northern District of California ruled in favor of Hastings. The Law School’s all comers condition on access to a limited public forum, the court held, was both reasonable and viewpoint neutral, and therefore did not violate CLS’s right to free speech.

. . . On appeal, the Ninth Circuit affirmed . . .

We . . . now affirm the Ninth Circuit’s judgment.

II

. . . CLS urges us to review the Nondiscrimination Policy as written -- prohibiting discrimination on several enumerated bases, including religion and sexual orientation. . . . CLS contends, “target[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior.” . . .

CLS’s assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. . . .

“Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. . . .”⁷⁷

virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
The presence and power of the Holy Spirit in the work of regeneration.
The Bible as the inspired Word of God.”

⁷⁷ [Court’s footnote 5] . . . Other law schools have adopted similar requirements.

Under the District Court’s local rules, stipulated facts are deemed “undisputed.”⁷⁸

Litigants, we have long recognized, “[a]re entitled to have [their] case tried upon the assumption that. . . facts, stipulated into the record, were established.”⁷⁹ . . .

. . . Time and again, the dissent races away from the facts to which CLS stipulated.⁸⁰ But factual stipulations are “formal concessions. . . .”⁸¹ . . .

III A

. . . CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. . . . [T]he Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.⁸²

Second, . . . this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, . . . such restrictions are permitted only if they serve “compelling state interests” that are “unrelated to the suppression of ideas” -- interests that cannot be advanced “through . . . significantly less restrictive [means].” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). “Freedom of association,” we have recognized, “plainly presupposes a freedom not to associate.” *Id.*, at 623. . . .

. . . [O]ur limited-public-forum precedents supply the appropriate framework for assessing both CLS’s speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums. . . .

⁷⁸ [Court’s footnote 6] The dissent spills considerable ink attempting to create uncertainty about when the all-comers policy was adopted. What counts, however, is the parties’ unqualified agreement that the all-comers policy *currently* governs. CLS’s suit, after all, seeks only declaratory and injunctive -- that is, prospective -- relief.

⁷⁹ [Court’s footnote 7] Record evidence, moreover corroborates the joint stipulation concerning Hastings’ all-comers policy. . . .

⁸⁰ [Court’s footnote 8] . . . [T]he dissent emphasizes a sentence in Hastings’ answer to CLS’s first amended complaint which, the dissent contends, casts doubt on Hastings’ fidelity to its all-comers policy. . . . In any event, the parties’ joint stipulation supersedes the answer, to the extent of any conflict between the two filings.

⁸¹ [Court’s footnote 9] . . . As CLS’s petition for certiorari stressed, “[t]he material facts of this case are undisputed.” . . .

⁸² [Court’s footnote 12] Our decisions make clear, and the parties agree, that Hastings, through its RSO program, established a limited public forum.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums -- the State may “reserv[e] [them] for certain groups.” *Rosenberger*, 515 U.S., at 829. See also *Cornelius [v. NAACP Legal Defense & Ed. Fund, Inc.]*, 473 U.S. [788,] 806 [(1985)] (“[A] speaker may be excluded from” a limited public forum “if he is not a member of the class of speakers for whose especial benefit the forum was created.”). . . .

Third, . . . CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out.⁸³

. . . [O]ur decisions have distinguished between policies that require action and those that withhold benefits. . . . Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. . . .

B

. . . [W]e do not write on a blank slate. . . . First, in *Healy [v. James]*, 408 U.S. 169 (1972), a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). . . . [A] public educational institution exceeds constitutional bounds, we held, when it “restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.” [*Healy*, 408 U.S. at] 187-188.⁸⁴

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. . . . [B]ecause the university singled out religious organizations for disadvantageous treatment, we subjected the university’s regulation to strict scrutiny. . . .

Most recently and comprehensively, in *Rosenberger*, . . . [t]he officially recognized student group . . . was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. . . . [W]e held, the university had engaged in “viewpoint discrimination. . . .”

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. “Once it has opened a limited [public] forum,” . . . “[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.” [*Rosenberger*, 515 U.S. at 829].

⁸³ [Court’s footnote 14] . . . *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) . . . involved the application of a statewide public-accommodations law to the most traditional of public forums: the street. That context differs markedly from the limited public forum at issue here. . . .

⁸⁴ [Court’s footnote 15] The dissent relies heavily on *Healy*. . . . Hastings denied CLS recognition not because the school wanted to silence the “viewpoint that CLS sought to express through its membership requirements,” but because CLS, insisting on preferential treatment, declined to comply with the open-access policy applicable to all RSOs. . . .

C

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances." *Cornelius*, 473 U.S., at 809.

1

Our inquiry is shaped by the educational context in which it arises. . . . This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206 (1982).

. . . Hastings' decisions about the character of its student-group program are due decent respect.

2

. . . [W]e review the justifications Hastings offers in defense of its all-comers requirement.⁸⁵ First, . . . "the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students." . . . [T]he all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.⁸⁶

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. . . .

Third, the Law School reasonably adheres to the view that an all-comers policy . . . "encourages tolerance, cooperation, and learning among students." And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates -- in fact, subsumes -- state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove." State law, of course, may not *command* that public universities take action

⁸⁵ [Court's footnote 17] . . . The dissent fights the distinction between state *prohibition* and state *support*, but its real quarrel is with our limited public forum doctrine, which recognizes that distinction. . . .

⁸⁶ [Court's footnote 18] CLS notes that its "activities -- its Bible studies, speakers, and dinners -- are open to all students," even if attendees are barred from membership and leadership. Welcoming all comers as guests or auditors, however, is hardly equivalent to accepting all comers as full-fledged participants.

impermissible under the *First Amendment*. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school’s educational endeavors stands on firm footing⁸⁷

3

The Law School’s policy is all the more creditworthy in view of the “substantial alternative channels that remain open for [CLS-student] communication to take place.” *Perry Ed. Assn. [v. Perry Local Educators’ Assn.]*, 460 U.S. 37, 53 (1983). . . .

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Although CLS could not take advantage of RSO-specific methods of communication the advent of electronic media and social-networking sites reduces the importance of those channels.

. . . CLS . . . hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. . . .

4

. . . [T]he *advisability* of Hastings’ policy does not control its *permissibility*. . . . [A] State’s restriction on access to a limited public forum “need not be the most reasonable or the only reasonable limitation.” *Cornelius*, 473 U.S., at 808.

CLS also assails the reasonableness of the all-comers policy . . . by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. . . . CLS points to no history or prospect of RSO-hijackings at Hastings. . . .

. . . If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

. . . CLS’s analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out. . . . Hastings, caught in the crossfire between a group’s desire to exclude and students’ demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.

D

1

. . . It is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. . . .

2

Conceding that Hastings’ all-comers policy is “nominally neutral,” CLS attacks

⁸⁷ [Court’s footnote 20] Although the Law School has offered multiple justifications for its all-comers policy, we do not suggest that each of them is necessary for the policy to survive constitutional review.

the regulation by pointing to its effect: The policy . . . CLS contends . . . “systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream.” This argument stumbles from its first step because “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” . . .⁸⁸ . . .⁸⁹

IV

In its reply brief, CLS contends that “[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext.” Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved. . . .

It is so ordered.

JUSTICE STEVENS, concurring.

. . . [T]he dissent has volunteered an argument that the school’s general Nondiscrimination Policy would be “plainly” unconstitutional if applied to this case. . . .

In the dissent’s view, by refusing to grant CLS an exemption from the Nondiscrimination Policy, Hastings violated CLS’s rights, for by proscribing unlawful discrimination on the basis of religion, the policy discriminates unlawfully on the basis of religion. There are numerous reasons why this counterintuitive theory is unsound. Although the *First Amendment* may protect CLS’s discriminatory practices off campus, it does not require a public university to validate or support them.

. . . The policy is “directed at the organization’s activities rather than its philosophy.” Those who hold religious beliefs are not “singled out.” . . . [A]ll acts of religious discrimination are equally covered. The discriminator’s beliefs are simply irrelevant. . . .

To be sure, the policy may end up having greater consequence for religious groups -- whether and to what extent it will is far from clear *ex ante* -- inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths. . . . And it is a basic tenet of *First Amendment* law that disparate impact does not, in itself, constitute viewpoint discrimination. . . .

. . . [T]he CLS chapter that brought this lawsuit does not want to be just a

⁸⁸ [Court’s footnote 26] Although registered student groups must conform their conduct to the Law School’s regulation by dropping access barriers, they may express any viewpoint they wish -- including a discriminatory one.

⁸⁹ [Court’s footnote 27] CLS briefly argues that Hastings’ all-comers condition violates the *Free Exercise Clause*. Our decision in *Smith*, 494 U.S. 872, forecloses that argument. In *Smith*, the Court held that the *Free Exercise Clause* does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. . . .

Christian group; it aspires to be a recognized student organization. . . .

. . . [R]eligious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. . . . As a general matter, courts should respect universities' judgments and let them manage their own affairs. . . .

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct." . . . Other groups may exclude or mistreat Jews, blacks, and women. . . . A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.

JUSTICE KENNEDY, concurring.

. . . Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. . . . A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

. . . The school's policy therefore represents a permissible effort to preserve the value of its forum.

In addition to a circumstance . . . in which it could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, petitioner also would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views. . . .

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

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

. . . Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS). CLS claims that Hastings refused to register the group because the law school administration disapproves of the group's viewpoint and thus violated the group's free speech rights.

. . . [T]he Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit *any* student who wishes to join. . . .

. . . The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint

neutral because it was announced as a pretext to justify viewpoint discrimination. . . .

I

A

. . . This frees the Court from the difficult task of defending the constitutionality of either the policy that Hastings actually -- and repeatedly -- invoked when it denied registration, *i.e.*, the school's written Nondiscrimination Policy, or the policy that Hastings belatedly unveiled when it filed its brief in this Court. Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began. . . .

When CLS applied for registration, Judy Hansen Chapman, the Director of Hastings' Office of Student Services, sent an e-mail to an officer of the chapter informing him that "CLS's bylaws did not appear to be compliant" with the Hastings Nondiscrimination Policy. . . .

A few days later, three officers of the chapter met with Ms. Chapman, and she reiterated that the CLS bylaws did not comply with "the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization." . . . [N]ot a word was said about an accept-all-comers policy.

. . . Hastings claims that this accept-all-comers policy has existed since 1990 but points to no evidence that the policy was ever put in writing or brought to the attention of members of the law school community prior to the dean's deposition. . . . And while Dean Kane and Ms. Chapman stated, well after this litigation had begun, that Hastings had such a policy, neither they nor any other Hastings official has ever stated in a deposition, affidavit, or declaration when this policy took effect. . . .

. . . [A]t least until Dean Kane unveiled the accept-all-comers policy in July 2005, Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints. For example, the bylaws of the Hastings Democratic Caucus provided that "any full-time student at Hastings may become a member of HDC *so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization* as stated in Article 3, Section 1." The constitution of the Association of Trial Lawyers of America at Hastings provided that every member must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." A student could become a member of the Vietnamese American Law Society so long as the student did not "exhibit a consistent disregard and lack of respect for the objective of the organization," which centers on a "celebrat[ion] [of] Vietnamese culture." Silenced Right limited voting membership to students who "are committed" to the group's "mission" of "spread[ing] the pro-life message." La Raza limited voting membership to "students of Raza background." . . .

Citing the binding effect of stipulations, the majority sternly rejects what it terms "CLS's unseemly attempt to escape from the stipulation and shift its target to [the Nondiscrimination Policy]."

I agree that the parties must be held to their Joint Stipulation, but the terms of the

stipulation should be respected. What was admitted in the Joint Stipulation is that Hastings had an accept-all-comers policy. CLS did not stipulate that its application had been denied more than a year earlier pursuant to such a policy. On the contrary, the Joint Stipulation notes that the reason repeatedly given by Hastings at that time was that the CLS bylaws did not comply with *the Nondiscrimination Policy*. Indeed, the parties did not even stipulate that the accept-all-comers policy existed in the fall of 2004. . . .

The majority's insistence on the binding effect of stipulations contrasts sharply with its failure to recognize the binding effect of a party's admissions in an answer. . . . Hastings admitted in its answer, which was filed prior to the former dean's deposition, that at least as of that time, the law school did not follow an accept-all-comers policy and instead allowed "political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs."

B

The Court also distorts the record with respect to the effect on CLS of Hastings' decision to deny registration. . . . As Hastings' attorney put it, in the District Court, Hastings told CLS: " 'Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations.' We offered that." . . .

At the beginning of the 2005 school year, the Hastings CLS group had seven members. . . . [T]he majority's emphasis on CLS's ability to endure that discrimination -- by using private facilities and means of communication -- is quite amazing. . . .

C

. . . According to the majority, CLS is "seeking what is effectively a state subsidy." . . . Most of what CLS sought and was denied -- such as permission to set up a table on the law school patio -- would have been virtually cost free. If every such activity is regarded as a matter of funding, the *First Amendment* rights of students at public universities will be at the mercy of the administration. . . .

II

To appreciate how far the Court has strayed . . . [t]he group in *Healy* was a local chapter of the Students for a Democratic Society (SDS). . . .

. . . The Court held that the denial of recognition substantially burdened the students' right to freedom of association. . . .

III

The Court pays little attention to *Healy* and instead focuses solely on the question whether Hastings' registration policy represents a permissible regulation in a limited public forum. While I think that *Healy* is largely controlling, I am content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion. . . .

IV

. . . [W]hen Hastings refused to register CLS, it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation. . . . [B]oth of these grounds constituted viewpoint discrimination.

Religion. . . . [T]he Court has recognized that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” [*Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000)]. . . .

. . . But the policy singled out one category of expressive associations . . . groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. . . . An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. . . .

. . . “Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association.”

Sexual orientation. . . . CLS has a particular viewpoint on this subject, namely, that sexual conduct outside marriage between a man and a woman is wrongful. Hastings would not allow CLS to express this viewpoint by limiting membership. . . . By contrast .

. . . [a] Free Love Club could require members to affirm that they reject the traditional view of sexual morality to which CLS adheres. . . .

V

Hastings’ current policy, as announced for the first time in the brief filed in this Court . . . really does not require a student group to accept all comers. Now . . . its policy allows “neutral and generally applicable membership requirements unrelated to ‘status or beliefs.’ ” . . . “. . . *even conduct requirements.*” . . .

. . . [W]hat CLS demands is that members forswear “unrepentant participation in or advocacy of a sexually immoral lifestyle.” That should qualify as a conduct requirement.

VI

I come now to the version of Hastings’ policy that the Court has chosen to address. . . . [T]he accept-all-comers policy is not reasonable in light of the purpose of the RSO forum, and it is impossible to say on the present record that it is viewpoint neutral.

A

. . . [T]he RSO forum . . . included separate pro-choice and pro-life organizations . . . the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students. . . .

. . . The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam. . . .

. . . The Court lists four justifications offered by Hastings in defense of the accept-all-comers policy and, deferring to the school’s judgment, the Court finds all those justifications satisfactory. . . . [T]he justifications offered by Hastings and accepted by the Court are insufficient.

The Court first says that the accept-all-comers policy is reasonable because it helps Hastings to ensure that “ ‘leadership, educational, and social opportunities’ ” are afforded to all students. The RSO forum, however, is designed to achieve these laudable ends in a very different way -- by permitting groups of students, no matter how small, to form the groups they want. . . .

Second, the Court approves the accept-all-comers policy because it is easier to enforce than the Nondiscrimination Policy that it replaced. . . .

This is a strange argument, since the Nondiscrimination Policy prohibits discrimination on substantially the same grounds as the antidiscrimination provisions of many States, including California. . . .

Third, the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals. . . . But we seek to achieve those goals through “[a] confident pluralism that conduces to civil peace and advances democratic consensus-building,” not by abridging *First Amendment* rights.

Fourth. . . . [t]he only Hastings policy considered by the Court -- the accept-all-comers policy -- goes far beyond any California antidiscrimination law. Neither Hastings nor the Court claims that California law demands that state entities must accept all-comers. . . .

In sum, Hastings’ accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints “*among*” -- not within -- “registered student organizations.”

B

The Court is also wrong in holding that the accept-all-comers policy is viewpoint neutral. . . . Even if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext. . . .

Shifting policies. When Hastings denied CLS’s application in the fall of 2004, the only policy mentioned was the Nondiscrimination Policy. In July 2005, the former dean suggested in a deposition that the law school actually followed the very different accept-all-comers policy. . . .

Timing. The timing of Hastings’ revelation of its new policies closely tracks the law school’s litigation posture. . . .

Lack of documentation. When an employer has a written policy and then relies on a rule for which there is no written documentation, that deviation may support an inference of pretext.

Here, Hastings claims that it has had an accept-all-comers policy since 1990, but it has not produced a single written document memorializing that policy. . . .

Nonenforcement. Since it appears that no one was told about the accept-all-comers policy before July 2005, it is not surprising that the policy was not enforced. . . . Hastings made no effort to enforce the all-comers policy until after it was proclaimed by the former dean. If the record here is not sufficient to permit a finding of pretext, then the law of pretext is dead.

The Court -- understandably -- sidesteps this issue. The Court states that the lower courts did not address the “argument that Hastings selectively enforces its all-comer policy,” that “this Court is not the proper forum to air the issue in the first instance,” and that “[o]n remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved.”

Because the Court affirms the entry of summary judgment in favor of respondents, it is not clear how CLS will be able to ask the Ninth Circuit on remand to review its claim of pretext. . . .

C

. . . In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely would not eliminate this threat.

. . . There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. *See* Brief for Evangelical Scholars; Brief for Agudath Israel of America; Brief for Union of Orthodox Jewish Congregations of America.

* * *

I do not think it is an exaggeration to say that today’s decision is a serious setback for freedom of expression in this country. . . .

Chapter XV

SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION

§ 15.01 EXPRESSIVE CONDUCT

Page 1055: Insert the following as Note (3) after Texas v. Johnson

(3) *Public Official Voting.* In *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), the Court upheld against an overbreadth challenge a recusal provision in Nevada’s Ethics in Government Law that prohibits a public official to vote upon or “‘advocate the passage or failure’ ” of a proposal in which he has a conflict of interest. Carrigan, a city council member, was censured for violating this provision when he voted to approve an application for a hotel/casino project in which an alleged “disabling conflict” existed because a close associate of Carrigan, who worked on the project, would benefit from the application’s approval.

Writing for the Court, Justice Scalia referenced a tradition of similarly “applicable conflict-of-interest recusal rule[s]” whose continued existence “creates a strong presumption” of constitutionality. For example, recusal rules applicable to federal judges have been in place since the establishment of the courts. State common-law rules also “have long required recusal of public officials with a conflict.” Moreover, “virtually every state has enacted some type of recusal law, many of which, not unlike Nevada’s, require public officials to abstain from voting on all matters presenting a conflict of interest.”

A legislator’s power to vote was non-expressive conduct “engaged in for an independent governmental purpose,” and, thus, not protected by the First Amendment. As “a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal,” this voting power “is not personal to the legislator but belongs to the people.”

Justice Kennedy concurred but expressed concern that the “statute may well impose substantial burdens on what undoubtedly is speech.” He questioned the “constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter” because of the “logical and inevitable burden on speech and association that preceded the vote.” In this context, “the possibility that Carrigan was censured because he was thought to be beholden to a person who helped him win an election raises constitutional concerns of the first magnitude.”

Justice Alito concurred stating that conflict-of-interest recusal rules were permissible restrictions since the “founding era” but disagreed with the Court finding that legislators’ voting comprised non-expressive conduct. The act of voting has “an expressive component in and of itself.” The Court exhibits a “strange understanding” of free speech in protecting someone who burns the American flag, but not legislators voting on a controversial proposal – when both acts have serious social consequences. Moreover, he rejected the court’s notion that “[a] legislative vote is not speech” when it

expresses a view favored by the legislator’s constituents and not shared by the legislator himself as “the same is sometimes true of legislators’ speeches,” of which the latter is considered protected speech.

§ 15.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA

Page 1072: Insert the following after Buckley v. Valeo

ARIZONA FREE ENTERPRISE CLUB’S FREEDOM CLUB PAC v. BENNETT, 131 S. Ct. 2806 (2011). In *Bennett*, the Court held that “Arizona’s matching funds scheme substantially burdens protected political speech without serving a compelling state interest.”

Once a privately funded candidate exceeded his “set spending limit,” the Arizona law provided public financing; competitors who elected public financing received “roughly one dollar for every dollar” the private candidate spent in excess of that limit. “The publicly financed candidate also receive[d] roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate.” To receive public funds candidates had “to limit their expenditure of personal funds to \$500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public money to the State.”

Upon “accepting these conditions,” Arizona would grant publicly funded candidates “additional ‘equalizing’ or matching funds,” in “both primary and general elections.” In “the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate.” Once that occurs, “every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent.” Moreover, in “an election where a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.”⁹⁰ Also, “[a]dditional expenditures by independent groups result in dollar-for-dollar matching funds.” But, in the event that independent expenditures are used to oppose a privately funded candidate, “[t]he matching funds provision is not activated.” The matching funds would “top out at two times the initial authorized grant of public funding to the publicly financed candidate.” For example, a publicly financed House of Representatives candidate “would continue to receive additional state money in response to fundraising and spending by the privately financed candidate and independent expenditure groups until that publicly financed candidate received a

⁹⁰ Each dollar actually attracts \$.94 of public matching funds.

total of \$64,437 in state funds (three times the initial allocation for a State House race).”

Chief Justice Roberts delivered the opinion (5-4) of the Court. While government restrictions of political speech generally attract strict scrutiny, sometimes the Court has “subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions.” On some occasions, “after finding that the restriction at issue was ‘closely drawn’ to serve a ‘sufficiently important interest,’ ” the Court has upheld “limits on contributions to candidates, caps on coordinated party expenditures, and requirements that political funding sources disclose their identities.”

Chief Justice Roberts noted three main distinctions between the law at issue in *Davis v. Federal Election Comm’n*, (supplement, p. 243), and the Arizona law. Under the law at issue in *Davis*, “if a candidate for the United States House of Representatives spent more than \$350,000 of his personal funds,” limits on contributions to opponents’ campaigns trebled from \$2300 to \$6900. “If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.” If anything, these differences “make the Arizona law *more* constitutionally problematic, not less.”

First, while “the penalty in *Davis* consisted of raising the contribution limits for one of the candidates,” that candidate “still had to go out and raise” the money. “Second, depending on the specifics of the election at issue, the matching funds provision can create a multiplier effect” as each dollar spent could fund multiple publicly funded candidates. Third, all spending by independent groups, “whether such support was welcome or helpful—could trigger matching funds.” The “disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.”

As a result, independent expenditure groups face burdens that “are akin to those imposed on the privately financed candidates themselves.” Like the privately financed candidate, “spending one dollar can result in the flow of dollars to multiple candidates the group disproves of.” However, “[i]n some ways, the burden the Arizona law imposes on independent expenditure groups is worse than the burden it imposes on privately financed candidates, and thus substantially worse than the burden we found constitutionally impermissible in *Davis*.” A candidate “at least has the option of taking public financing” while independent expenditure groups have no such option.

The Court rejected the State’s argument that “the matching funds provision actually results in more speech.” Instead, “[a]ny increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates.” This increase comes at the expense of “privately financed candidates and independent expenditure groups” as the burden imposed by the law “reduces their speech.” The Court has “rejected government efforts to increase the speech of some at the expense of others.”⁹¹ Chief Justice Roberts continued: “It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic,” but the manner of that funding “in direct response to the political speech of privately

⁹¹ “If a candidate uses his own money to engage in speech above the initial public funding threshold, he is forced to ‘help disseminate hostile views’ in a most direct way—his own speech triggers the release of state money to his opponent.”

financed candidates and independent expenditure groups.”

As the law imposes a “substantial burden” on speech, it must be “ ‘justified by a compelling state interest.’ ” Arizona argued that the law was designed to “ ‘level the playing field.’ ” *Buckley* declared that “limits on overall campaign expenditures could not be justified by a purported government ‘interest in equalizing the financial resources of candidates.’ ” Moreover, “even if the ultimate objective of the matching funds provision is to combat corruption—and not ‘level the playing field’—the burdens that the matching funds provision imposes on political speech are not justified.”

The Court made clear that it was not calling “into question the wisdom of public financing.” However, how government “chooses to encourage participation in its public funding system matters.”

Justice Kagan dissented, joined by Justices Ginsberg, Breyer, and Sotomayor. “Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all” constituents. “To prevent both corruption and the appearance of corruption—and so to protect our democratic system of governance—citizens have implemented reforms designed to curb the power of special interests.”

Nearly “one-third of the States have adopted some form of public financing.” Congress regarded public financing for presidential elections as the “ ‘only way [t]o eliminate reliance on large public contributions’ and its attendant danger of corruption, while still ensuring that a wide range of candidates had access to the ballot.” *Buckley* “declared the presidential public financing system constitutional”; that system involves a “lump-sum grant at the beginning of an election cycle.” Justice Kagan said that “the dynamic nature of our electoral system makes *ex ante* predictions about campaign expenditures almost impossible. And that creates a chronic problem for lump-sum public financing programs, because inaccurate estimates produce subsidies that either dissuade candidates from participating or waste taxpayer money.” Thus, “States have made adjustments to the lump-sum scheme,” and the Arizona “program’s designers found the Goldilocks solution, which produces the ‘just right’ grant to ensure that a participant in the system has the funds needed to run a competitive race.”⁹²

After “the publicly financed candidate has received three times the amount of the initial disbursement, he gets not further public funding, and remains barred from receiving private contributions, no matter how much more his privately funded opponent spends.” The question then becomes “whether this modest adjustment to the public financing program that we approved in *Buckley* makes the Arizona law unconstitutional.” The Arizona statute “subsidizes and so produces *more* political speech.” Thus, what the “petitioners demand is essentially a right to quash others’ speech through the prohibition of a (universally available) subsidy program.”

In upholding “the presidential public financing system,” *Buckley* rejected “the principal challenge to that system [which] came from minor-party candidates not eligible

⁹² In response to the majority that the Act inhibits expenditure groups, Justice Kagan noted that “[e]xpenditures by these groups have risen by 253% since Arizona’s law was enacted.”

for benefits.” The Court “rejected that attack in part because we understood the federal program as supporting, rather than interfering with, expression.” The idea that “additional speech constitutes a ‘burden’ is odd and unsettling.” The “only ‘burden’ ” here stems from “the opportunity that subsidy allows for responsive speech.” The Court “has never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden.” While “responsive speech by one candidate may make another candidate’s speech less effective, that after all, is the whole idea of the First Amendment, and a *benefit* of having more responsive speech.”

The District Court Judge found that “petitioners had presented only ‘vague’ and ‘scattered’ evidence of the law’s deterrent impact.” Even the lump-sum system upheld in *Buckley* “may deter speech.” A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. Moreover, this Court has repeatedly upheld “disclosure and disclaimer requirements” despite their deterrent effects on campaign speech. Furthermore, whatever “burden that the Arizona law imposed does not exceed the burden associated with contribution limits, which we have also repeatedly upheld.” Thus, the Court erred “in holding that the government action in this case substantially burdens speech.” In any event, “[p]reventing corruption or the appearance of corruption is a compelling government interest.”⁹³

Page 1108: Insert the following after Fed. Election Comm’n v. Wisconsin Right to Life, Inc.

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753
(2010)

JUSTICE KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203-209 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had held that political speech may be banned based on the speaker’s corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that “*Austin* was a significant departure from ancient *First Amendment* principles,” *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490

⁹³ “As Arizona and other jurisdictions have discovered, contribution limits may not eliminate the risk of corrupt dealing between candidates and donors, especially given the widespread practice of bundling small contributions into large packages.”

(2007) (WRTL) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. . . .

I

A

. . . Citizens United has an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary*. . . . *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. . . . Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. . . . In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel. . . .

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. . . .

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited -- and still does prohibit -- corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. § 441b (2000 ed.); see *McConnell*, [540 U.S.] at 204. BCRA § 203 amended § 441b to prohibit any “electioneering communication” as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). . . .

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b’s ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA’s disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie. . . .

We noted probable jurisdiction. The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. § 441b. See 557 U.S. , 129 S. Ct. 2893 (2009).

II

A

. . . Citizens United contends that § 441b does not cover *Hillary*, as a matter of statutory interpretation, because the film does not qualify as an “electioneering communication.” § 441b(b)(2). . . .

B

Citizens United . . . argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that § 441b(b)(2)’s definition of an “electioneering communication” was facially constitutional insofar as it restricted speech that was “the functional equivalent of express advocacy” for or against a specific candidate. 540 U.S. at 206. *WRTL* then found an unconstitutional application of § 441b where the speech was not “express advocacy or its functional equivalent.” 551 U.S. at 481 (opinion of Roberts, C.J.). As explained by The Chief Justice’s controlling opinion in *WRTL*, the functional-equivalent test is objective: “a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 469-470.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. . . .

Citizens United argues that *Hillary* is just “a documentary film that examines certain historical events.” We disagree. . . .

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

. . . [A]ny effort by the Judiciary to decide which means of communications are to be preferred . . . might soon prove to be irrelevant or outdated by technologies that are in rapid flux. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639 (1994).

Courts, too, are bound by the *First Amendment*. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. . . . *First Amendment* standards, however, “must give the benefit of any doubt to protecting rather than stifling speech.” *WRTL*, 551 U.S. at 469.

D

Citizens United also asks us to carve out an exception to § 441b’s expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis, however, would be unavailing. . . .

. . . We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech. . . . Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*. . . .

. . . [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its *First Amendment* challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise -- the permissibility of restricting corporate political speech -- that is itself in doubt. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of *Austin*, which in turn implicates the facial validity of § 441b.

When the statute now at issue came before the Court in *McConnell*, both the majority and the dissenting opinions considered the question of its facial validity. The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion, which upheld BCRA's extension of § 441b. *McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections. Four Members of the *McConnell* Court would have overruled *Austin*. . . .

The *McConnell* majority considered whether the statute was facially invalid. . . . [I]n *WRTL*, the controlling opinion of the Court not only entertained an as-applied challenge but also sustained it. Three Justices noted that they would continue to maintain the position that the record in *McConnell* demonstrated the invalidity of the Act on its face. The controlling opinion in *WRTL*, which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell*, while vindicating the *First Amendment* arguments made by the *WRTL* parties.

As noted above . . . it is necessary then for the Court to consider the facial validity of § 441b. Any other course of decision would prolong the substantial, nation-wide chilling effect caused by § 441b's prohibitions on corporate expenditures. . . .

. . . [T]he FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. . . . This is an unprecedented governmental intervention into the realm of speech.

. . . [A] statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. . . .

III

. . . The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations -- including nonprofit advocacy corporations -- either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. . . .

. . . [T]he option to form PACs does not alleviate the *First Amendment* problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement. . . .

And that is just the beginning. PACs must file detailed monthly reports with the FEC. . . . PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. . . .

. . . If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley v. Valeo*, 424 U.S. 1] at 14-15 [1976]. . . . The *First Amendment* “ ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989).

. . . Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL*, 551 U.S. at 464. . . .

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. . . . By contrast . . . voters must be free to obtain information from diverse sources in order to determine how to cast their votes. . . .

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. . . .

A

1

The Court has recognized that *First Amendment* protection extends to corporations. [*First Nat. Bank v.*] *Bellotti* [435 U.S. 765] at 778, n. 14.

. . . [P]olitical speech does not lose *First Amendment* protection “simply because

its source is a corporation.” *Bellotti*, [435 U.S.] at 784. . . .

2

. . . .

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption . . .”

. . . .

Buckley did not consider § 610’s separate ban on corporate and union independent expenditures. . . . The expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions. . . .

Notwithstanding this precedent, Congress recodified § 610’s corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. . . .

Less than two years after *Buckley*, *Bellotti* . . . struck down a state-law prohibition on corporate independent expenditures related to referenda issues. . . .

. . . [T]he reasoning and holding of *Bellotti* . . . rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State’s ban on corporate independent expenditures to support candidates. . . .

3

Thus the law stood until *Austin*. *Austin* “up[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history.” 494 U.S. at 695 (Kennedy, J., dissenting). There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. . . .

To bypass *Buckley* and *Bellotti*, the *Austin* Court . . . found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” 494 U.S. at 660.

B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them. . . .

1

As for *Austin*’s antidistortion rationale, the Government does little to defend it. . . .

. . . If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing

books. . . .

. . . Austin sought to defend the antidistortion rationale as a means to prevent corporations from obtaining “ ‘an unfair advantage in the political marketplace’ ” by using “ ‘resources amassed in the economic marketplace.’ ” 494 U.S. at 659. But Buckley rejected the premise that the Government has an interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” 424 U.S. at 48. . . .

Either as support for its antidistortion rationale or as a further argument, the Austin majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages -- such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” 494 U.S. at 658-659. . . . “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.” *Id.* at 680 (Scalia, J., dissenting).

It is irrelevant for purposes of the First Amendment that corporate funds may “have little or no correlation to the public’s support for the corporation’s political ideas.” *Id.* at 660. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. . . .

. . . Media corporations are now exempt from § 441b’s ban on corporate expenditures. Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public’s support” for those views. Austin, 494 U.S. at 660. . . .

The law’s exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. . . . [T]he exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. . . .

Even if § 441b’s expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens -- those that have taken on the corporate form -- are penalized for engaging in the same political speech. . . .

2

. . . [T]he Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. . . .

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. . . . We now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. . . .

Seizing on this aside in Bellotti’s footnote, the Court in NRWC did say there is a “sufficient” governmental interest in “ensur[ing] that substantial aggregations of wealth amassed” by corporations would not “be used to incur political debts from legislators who are aided by the contributions.” [Federal Election Comm’n v. National Right to Work Comm.] 459 U.S. [197] at 207-208. NRWC, however, . . . decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. . . .

. . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

“Favoritism and influence are not . . . avoidable in representative politics. . . .” McConnell, 540 U.S. at 297, (opinion of Kennedy, J.). . .

The McConnell record was “over 100,000 pages” long, McConnell I, 251 F. Supp. 2d at 209, yet it “does not have any direct examples of votes being exchanged for . . . expenditures,” *id.* at 560. . . . When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. . . . The remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. . . .

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*’s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. . . .

. . . [M]oreover, the statute is . . . underinclusive. . . . [I]f Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder’s interests would be implicated by speech in any media at any time. . . . [T]he statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. . . .

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. “Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 129 S. Ct. 2079 (1986). .

..

. . . “This Court has not hesitated to overrule decisions offensive to the *First Amendment*.” *WRTL*, 551 U.S. at 500. . . .

. . . When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished. . . .

Rapid changes in technology -- and the creative dynamic inherent in the concept of free expression -- counsel against upholding a law that restricts political speech in certain media or by certain speakers. . . . Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The *First Amendment* does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

No serious reliance interests are at stake. . . . Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents. . . .

. . . *Austin* . . . is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity. . . .

D

. . . Section 441b’s restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203’s extension of § 441b’s restrictions on corporate independent expenditures. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*. . . .

IV A

Citizens United next challenges BCRA’s disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “ ‘_____ is responsible for the content of this advertising.’ ” 2 U.S.C. § 441d(d)(2). The required statement must be . . . displayed on the screen . . . for at least four seconds. *Ibid*. It must state that the communication “is not authorized by any candidate or candidate’s committee”; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” *Buckley*, 424 U.S. at 64. . . . [T]hese requirements to “exacting scrutiny,” which require[] a “substantial relation” between the

disclosure requirement and a “sufficiently important” governmental interest. [*Id.*] at 64, 66.

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending. [*Id.*] at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements “ ‘while hiding behind dubious and misleading names.’ ” [*McConnell*, 540 U.S.] at 197. . . .

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a “ ‘reasonable probability’ ” that disclosure of its contributors’ names “ ‘will subject them to threats, harassment, or reprisals from either Government officials or private parties.’ ” *Id.* at 198. . . .

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that “[p]roposes a commercial transaction” was not subject to 2 U.S.C. § 441b. . . . The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311.

Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. . . . The disclaimers required by § 311 . . . “insure that the voters are fully informed” about the person or group who is speaking, *Buckley*, [424 U.S.] at 76. . . .

Citizens United argues that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that § 311 decreases both the quantity and effectiveness of the group’s speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell*. . . .

. . . In *Buckley*, the Court upheld a disclosure requirement for independent expenditures

. . . [T]he public has an interest in knowing who is speaking about a candidate shortly before an election. . . .

. . . In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed. . . . Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

. . . [M]odern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . .

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. . . .

V

. . . Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the “purchase . . . or anything of value” in order to engage in political speech. . . . [I]t seems stranger than fiction for our Government to make this political speech a crime. . . .

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b’s restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA’s disclaimer and disclosure requirements. . . .

CHIEF JUSTICE ROBERTS, with whom Justice Alito joins, concurring.

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the *First Amendment* that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. . . .

I

. . . [I]n *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*) . . . the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy; there was thus no need to go on to address the broader claim that *McConnell* . . . should be overruled. . . .

. . . Despite agreeing that . . . narrower arguments fail, . . . the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law. . . .

. . . There is a difference between judicial restraint and judicial abdication. When constitutional questions are “indispensably necessary” to resolving the case at hand, “the court must meet and decide them.” . . .

. . . Even if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United -- because corporations as well as individuals enjoy the pertinent *First Amendment* rights -- would mean that any other corporation raising the same challenge would also win. . . . Regardless whether we label Citizens United’s claim a “facial” or “as-applied” challenge, the consequences of the Court’s decision are the same.⁹⁴

⁹⁴ [Court’s footnote 1] The dissent suggests that I am “much too quick” to reach this conclusion because I “ignore” Citizens United’s narrower arguments. . . . [O]n the contrary, I (and my colleagues in the majority) appropriately consider and reject them on their merits. . . .

II

. . . The dissent erroneously declares that the Court “reaffirmed” *Austin*’s holding in subsequent cases -- namely, *Federal Election Comm’n v. Beaumont*; *McConnell*; and *WRTL*. Not so. Not a single party in any of those cases asked us to overrule *Austin*

A

. . . [D]epartures from precedent are inappropriate in the absence of a “special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). . . .

Stare decisis is . . . a “principle of policy.” *Helvering [v. Hallock]*, 309 U.S. 106] at 119. . . .

. . . [W]hen fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court’s jurisprudence, returning to the “ ‘intrinsicly sounder’ doctrine established in prior cases” may “better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995). . . .

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent’s validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake. *See, e.g., Pearson v. Callahan*, 129 S. Ct. 808 (2009).

B

. . . *Austin* undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech. . . . *Austin*’s reasoning was -- and remains -- inconsistent with *Buckley*’s explicit repudiation of any government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.” 424 U.S. at 48-49.

Austin was also inconsistent with *Bellotti*. . . .

Second, . . . *Austin* . . . has proved to be the consistent subject of dispute among Members of this Court ever since. The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent’s ability to contribute to the stable and orderly development of the law. . . .

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court’s decisions even outside the particular context of corporate express advocacy. .

. . *Austin*’s logic would authorize government prohibition of political speech by a category of speakers in the name of equality. . . .

If taken seriously, *Austin*’s logic would apply most directly to newspapers

and other media corporations. . . . These corporate entities are, for the time being, not subject to § 441b's otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. . . .

. . . Because *Austin* is so difficult to confine to its facts -- and because its logic threatens to undermine our *First Amendment* jurisprudence and the nature of public discourse more broadly -- the costs of giving it *stare decisis* effect are unusually high. . . .

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. . . .

None of this is to say that the Government is barred from making new arguments to support the outcome in *Austin*. . . . But the Government's new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. . . .

JUSTICE SCALIA, with whom JUSTICE ALITO joins, and with whom JUSTICE THOMAS joins in part, concurring.

I join the opinion of the Court.⁹⁵

. . . [T]he dissent purports to show that today's decision is not supported by the original understanding of the *First Amendment*. . . .

Even if we thought it proper to apply the dissent's approach of excluding from *First Amendment* coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion. Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. . . .

. . . [C]olleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter, *see* 1 W. Blackstone, *Commentaries on the Laws of England* 455-473 (1765). . . . The dissent offers no evidence -- none whatever -- that the *First Amendment's* unqualified text was originally understood to exclude such associational speech from its protection. . . .

. . . And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind. . . .

. . . [T]he individual person's right to speak includes the right to speak *in association with other individual persons*. . . .

. . . Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

⁹⁵ [Concurrence footnote 1] Justice Thomas does not join Part IV of the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE GINSBERG, JUSTICE BREYER, and JUSTICE SOTOMAYER join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. . . .

. . . Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. . . .

. . . Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. . . . The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*. . . . [T]he majority blazes through our precedents, overruling or disavowing a body of case law. . . .

. . . Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. . . .

Scope of the Case

. . . [T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. . . .

. . . Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

As-Applied and Facial Challenges

This Court has repeatedly emphasized in recent years that “[f]acial challenges are disfavored.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008); see also *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006) (“[T]he ‘normal rule’ is that ‘partial, rather than facial, invalidation is the required course,’ such that a ‘statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact’”). . . .

. . . The unnecessary resort to a facial inquiry “run[s] contrary to the fundamental principle of judicial restraint. . . .”

. . . Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress’ efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than Citizens United. . . .⁹⁶

The majority suggests that a facial ruling is necessary because anything less would chill too much protected speech. . . . That assertion . . . is particularly hard to square with the legal landscape following *WRTL*, which held that a corporate communication could be regulated under § 203 only if it was “susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate.” [*WTFLL*,] 551 U.S. at 470. . . .

. . . Not only the as-applied/facial distinction, but the basic relationship between litigants and courts, would be upended if the latter had free rein to construe the former’s claims⁹⁷

Narrower Grounds

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents. . . .

Consider just three of the narrower grounds of decision that the majority has bypassed. First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an “electioneering communication” under § 203 of BCRA, 2 *U.S.C.* § 441*b*. . . .-

Second, the Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. . . .

Finally, let us not forget Citizens United’s as-applied constitutional challenge. . . . [T]he Court could have easily limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically -- and always spared expenditures restrictions -- in the political realm. Yet the Court nonetheless turns its back on the as-applied review process that has been a staple of

⁹⁶ [Dissent’s footnote 6] . . . If our colleagues nonetheless concluded that § 203’s fatal flaw is that it affects too much protected speech, they should have invalidated it for overbreadth and given guidance as to which applications are permissible, so that Congress could go about repairing the error.

⁹⁷ [Dissent’s footnote 12] . . . At times, the majority . . . appears to suggest that nonprofit corporations have a better claim to *First Amendment* protection than for-profit corporations, “advocacy” organizations have a better claim than other nonprofits, domestic corporations have a better claim than foreign corporations, small corporations have a better claim than large corporations, and printed matter has a better claim than broadcast communications. . . .

campaign finance litigation since *Buckley v. Valeo*. . . .

. . . There was also the straightforward path: applying *Austin* and *McConnell*, just as the District Court did in holding that the funding of Citizens United’s film can be regulated under them. . . .

II

The final principle of judicial process that the majority violates is . . . : *stare decisis*. . . .

The Court’s central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. . . .

. . . Nor does the majority bother to specify in what sense *Austin* has been “undermined.” . . .

The majority also contends that the Government’s hesitation to rely on *Austin*’s antidistortion rationale “diminishe[s]” “the principle of adhering to that precedent.” . . . The task of evaluating the continued viability of precedents falls to this Court, not to the parties.

Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. . . .

We have recognized that “[s]tare decisis has special force when legislators or citizens ‘have acted in reliance on a previous decision. . . .’”

. . . Political parties are barred under BCRA from soliciting or spending “soft money,” funds that are not subject to the statute’s disclosure requirements or its source and amount limitations. 2 U.S.C. § 441i; *McConnell*, 540 U.S. at 122-126. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court’s ruling thus dramatically enhances the role of corporations and unions -- and the narrow interests they represent -- vis-A-vis the role of political parties. . . .

. . . *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by today’s opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin*. Certainly nothing relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

. . . [L]eading groups representing the business community,⁹⁸ organized labor,⁹⁹ and the nonprofit sector, together with more than half of the States, urge that we

⁹⁸ [Dissent’s footnote 23] See Brief for Committee for Economic Development as *Amicus Curiae*; Brief for American Independent Business Alliance as *Amicus Curiae*. But see Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae*.

⁹⁹ [Dissent’s footnote 24] See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3, 9.

preserve *Austin*. . . .

. . . [T]he majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.

Today’s ruling thus strikes at the vitals of *stare decisis*. . . .

The So-Called “Ban”

III

. . . Pervading the Court’s analysis is the ominous image of a “categorical ba[n]” on corporate speech. . . .

[T]he statutes upheld in *Austin* and *McConnell* do “not impose an *absolute* ban on all forms of corporate political spending.” *Austin*, 494 U.S. at 660. For starters, both statutes provide exemptions for PACs. . . .

. . . [D]uring the most recent election cycle, corporate and union PACs raised nearly a billion dollars. . . . Like all other natural persons, every shareholder of every corporation remains entirely free . . . to do however much electioneering she pleases outside of the corporate form. . . . If ideologically aligned individuals wish to make unlimited expenditures through the - corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests.

. . . BCRA § 203 . . . has no application to genuine issue advertising . . . or to Internet, telephone, and print advocacy. Like numerous statutes, it exempts media companies’ news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, to fund additional PAC activity through trade associations to distribute voting guides and voting records to underwrite voter registration and voter turnout activities to host fundraising events for candidates within certain limits and to publicly endorse candidates through a press release and press conference.

At the time *Citizens United* brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a non-*MCFL*, nonmedia corporation; (5) paid for with general treasury funds; and (6) “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” . . .

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all *Citizens United* needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC. . . .

Identity-Based Distinctions

The second pillar of the Court’s opinion is its assertion that “the Government cannot restrict political speech based on the speaker’s . . . identity.” . . .

. . . [I]n a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity. . . . The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. . . .

The election context is distinctive in many ways, and the Court, of course, is right that the *First Amendment* closely guards political speech. But in this context, too, the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled. We have, for example, allowed state-run broadcasters to exclude independent candidates from televised debates. *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666 (1998). We have upheld statutes that prohibit the distribution or display of campaign materials near a polling place. *Burson v. Freeman*, 504 U.S. 191 (1992). Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. And we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities. . . .

Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also “furthest from the core of political expression, since corporations’ *First Amendment* speech and association interests are derived largely from those of their members and of the public in receiving information,” *Beaumont*, 539 U.S. at 161, n. 8. . . .

Our First Amendment Tradition

A third fulcrum of the Court’s opinion is the idea that *Austin* and *McConnell* are radical outliers. . . . The Court has it exactly backwards. . . .

1. *Original Understandings*

. . . To the extent that the Framers’ views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority’s position.

. . . [T]he Framers and their contemporaries conceived of speech more narrowly than we now think of it, . . . also . . . they held very different views about . . . the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. . . . Corporations were created, supervised, and conceptualized as quasi-public entities, “designed to serve a social function for the state.” Handlin & Handlin, *Origin of the American Business Corporation*, 5 J. Econ. Hist. 1, 22 (1945). It was “assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.” R. Seavoy, *Origins of the American Business Corporation, 1784-1855*, p. 5 (1982).

. . . Thomas Jefferson famously fretted that corporations would subvert the

Republic. General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's. . . .

Justice Scalia criticizes the foregoing discussion. . . . Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights . . . , and that they conceptualized speech in individualistic terms.

Justice Scalia also emphasizes the unqualified nature of the First Amendment text. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? . . .

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment. . . .

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today. . . .

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. . . .

. . . [T]he Tillman Act . . . was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed. . . .

. . . The Taft-Hartley Act of 1947 . . . extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. . . .

. . . [In] Buckley, no one even bothered to argue that the bar as such was unconstitutional. . . .

When we asked in *McConnell* “whether a compelling governmental interest justify[d]” § 203, we found the question “easily answered”: “We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’ ” . . . [McConnell,] 540 U.S. at 205. BCRA, we found, is faithful to the compelling governmental interests in “ ‘preserving the integrity of the electoral process, preventing corruption, . . . sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,’ ” and maintaining “ ‘the individual citizen’s confidence in government.’ ” [*Id.*] at 206-207, n. 88. What made the answer even easier than it might have been otherwise was the option to form PACs. . . .

3. *Buckley and Bellotti*

. . . FECA’s separate corporate and union campaign expenditure restriction, § 610 (now codified at 2 U.S.C. § 441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.

. . . Bellotti ruled, in an explicit limitation on the scope of its holding, that “our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” [Bellotti,] 435 U.S. at 788, n. 26. . . .

. . . A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation’s retaliation. . . . [O]ver the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. . . .

The *Bellotti* Court confronted a dramatically different factual situation. . . . Specifically, the statute barred a business corporation “from making contributions or expenditures ‘for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation,’ ” [Id.] at 768, and it went so far as to provide that referenda related to income taxation would not “ ‘be deemed materially to affect the property, business or assets of the corporation,’ ” [Id.] . . . [T]he legislature had enacted this statute in order to limit corporate speech on a proposed state constitutional amendment to authorize a graduated income tax. . . .

. . . To make matters worse, the law at issue did not make any allowance for corporations to spend money through PACs. . . .

. . . [S]peech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. . . . [N]either Austin nor McConnell held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. . . .

. . . [A]ll six Members of the Austin majority had been on the Court at the time of Bellotti, and none so much as hinted in Austin that they saw any tension between the decisions. . . .

IV

. . . *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. . . .

The Anticorruption Interest

. . . On numerous occasions we have recognized Congress’ legitimate interest in preventing the money that is spent on elections from exerting an “ ‘undue influence on an officeholder’s judgment’ ” and from creating “ ‘the appearance of such influence,’ ” beyond the sphere of *quid pro quo* relationships. [McConnell,] 540 U.S. at 150. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum, and the majority’s

apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs. . . .

. . . “[A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations.” [*McConnell*, 251 F. Supp. 2d] at 623-624. . .

. . . “[T]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.” *Burroughs v. United States*, 290 U.S. 534, 545 (1934). . . . “[T]he Framers were obsessed with corruption,” [Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 348 (2009)], which they understood to encompass the dependency of public officeholders on private interests, see *id.*, at 373-374. They discussed corruption “more often in the Constitutional Convention than factions, violence, or instability.” [*Id.*] at 352. . . .

Quid Pro Quo Corruption

. . . Even under the majority's “crabbed view of corruption,” *McConnell*, 540 U.S. at 152, the Government should not lose this case. . . .

. . . *Buckley* expressly contemplated that an anticorruption rationale might justify restrictions on independent expenditures at a later date, “because it may be that, in some circumstances, ‘large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.’ ” *WRTL*, 551 U.S. at 478 (quoting *Buckley*, 424 U.S. at 45). . . .

. . . The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting “issue ads” to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over. *McConnell*, 540 U.S. at 129. . . .

. . . In sum, Judge Kollar-Kotelly found, “[t]he record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.” [*McConnell*, 251 F. Supp 2d] at 622-623. . . .

. . . *McConnell* . . . did not rest . . . on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as recognized in *Austin*'s antidistortion and shareholder protection rationales as well as the interest in preventing circumvention of contribution limits. . . .

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures “do not give rise to [*quid pro quo*] corruption or the

appearance of corruption” is thus unfair as well as unreasonable. . . . [T]he only reason we do not have any of the relevant materials before us is that the Government had no reason to develop a record at trial for a facial challenge the plaintiff had abandoned. . . .

In *Caperton*, then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. . . .

Deference and Incumbent Self-Protection

. . . Section 203, our colleagues have suggested, may be little more than “an incumbency protection plan,” *McConnell*, 540 U.S. at 306 (Kennedy, J., concurring in judgment in part and dissenting in part). . . .

. . . “Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.” *Buckley*, 424 U.S., at 31. . . .

. . . “[P]olitical scientists and academic experts . . . with no self-interest in incumbent protectio[n] were central figures in pressing the case for BCRA.” . . .

Austin and Corporate Expenditures

. . . The majority fails to appreciate that Austin’s antidistortion rationale is itself an anticorruption rationale, see [*Austin*,] 494 U.S., at 660. . . . {i}n protecting against improper influences on officeholders. . . .

1. *Antidistortion*

. . . Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.” [*Id.*] at 658-659. . . .

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. . . .

. . . Recognizing the weakness of a speaker-based critique of Austin, the Court places primary emphasis not on the corporation’s right to electioneer, but rather on the listener’s interest in hearing what every possible speaker may have to say. . . .

. . . If the overriding concern depends on the interests of the audience, surely the public’s perception of the value of corporate speech should be given important weight. . . .
. The distinctive threat to democratic integrity posed by corporate domination of politics

was recognized at “the inception of the republic” and “has been a persistent theme in American political life” ever since. Regan, *Corporate Speech and Civic Virtue*, in *Debating Democracy’s Discontent* 289, 302 (A. Allen & M. Regan eds. 1998). . . .

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations “unfair influence” in the electoral process, [Austin,] 494 U.S. at 660, and distort public debate in ways that undermine rather than advance the interests of listeners. . . . In a state election such as the one at issue in Austin, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. . . .

On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to “hold officials accountable to the people,” and disserve the goal of a public debate that is “uninhibited, robust. . . .” . . .

When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, “provides a simple way to channel rents to only those who have paid their dues. . . .” Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1113 (2002). . . .

. . . [C]orporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to participate in the democratic process. . . .

. . . Our colleagues have raised some interesting and difficult questions about Congress’ authority to regulate electioneering by the press, and about how to define what constitutes the press. But that is not the case before us. Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. . . .

The Court’s . . . approach . . . will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. . . .

2. *Shareholder Protection*

. . . The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. . . .

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected “through the procedures of corporate democracy. . . .”¹⁰⁰ Most American households that own stock do so through intermediaries such as mutual funds and

¹⁰⁰ [Dissent’s footnote 76] I note that, among the many other regulatory possibilities it has left open, ranging from new versions of § 203 supported by additional evidence of *quid pro quo* corruption or its appearance to any number of tax incentive or public financing schemes, today’s decision does not require that a legislature rely solely on these mechanisms to protect shareholders. Legislatures remain free in their incorporation and tax laws to condition the types of activity in which corporations may engage, including electioneering activity, on specific disclosure requirements or on prior express approval by shareholders or members.

pension plans. . . .

V

. . . The majority . . . “elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.” *Bellotti*, 435 U.S. at 817, n. 13 (White, J., dissenting). . . .

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court’s opinion.

. . . I dissent from Part IV of the Court’s opinion. . . . The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional.

Congress may not abridge the “right to anonymous speech” based on the “‘simple interest in providing voters with additional relevant information.’ ” [*McConnell*, 540 U.S.] at 276. . . .

Amici’s examples relate principally to Proposition 8. . . . Proposition 8 amended California’s constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.” *Cal. Const., Art. I, § 7.5*. Any donor who gave more than \$100 to any committee supporting or opposing Proposition 8 was required to disclose his full name, street address, occupation, employer’s name (or business name, if self-employed), and the total amount of his contributions.¹⁰¹ . . .

Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. . . .

. . . [*A*]*mici* present evidence of yet another reason to do so -- the threat of retaliation from *elected officials*. . . . [*A*] candidate challenging an incumbent state attorney general reported that some members of the State’s business community feared donating to his campaign because they did not want to cross the incumbent. . . .

. . . [*A*]-applied challenges to § 203 “would require substantial litigation over an extended time” and result in an “interpretive process [that] itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.” . . .

I cannot endorse a view of the *First Amendment* that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in “core political speech, the

¹⁰¹ [Concurrence/Dissent’s footnote 1] BCRA imposes similar disclosure requirements. See, e.g., 2 *U.S.C. § 434(f)(2)(F)* (“Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$ 10,000 during any calendar year” must disclose “the names and addresses of all contributors who contributed an aggregate amount of \$ 1,000 or more to the person making the disbursement”).

‘primary object of *First Amendment* protection.’ ” *McConnell*, 540 U.S. at 264. . . .

Page 1108: Insert the following after Fed. Election Comm’n. v. Wisconsin Right to Life, Inc.

DAVIS v. FEDERAL ELECTION COMM’N., 554 U.S. 724 (2008). In *Davis v. Federal Election Commission*, the Court invalidated §§ 319(a) and (b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), parts of “the so-called ‘Millionaire’s Amendment.’ ” The BCRA sometimes imposes “different campaign contribution limits on candidates competing for the same congressional seat.” The application of § 319(a) depends on a statistic called the “ ‘opposition personal funds amount’ (OPFA).” When a candidate spends over \$350,000 of her personal funds on her own campaign (a “ ‘self-financing’ ” candidate), the statute changes the fundraising rules for her opponent. Specifically, “the candidate’s opponent (the ‘non-self-financing’ candidate) may receive individual contributions at treble the normal limit (*e.g.*, \$6,900 rather than the current \$2,300),” and also “may accept coordinated party expenditures without limit” until contributions “exceed the OPFA,” in which case “the prior limits are revived.”¹⁰²

Self-financing candidates are required under the BCRA § 319(b) to make three types of disclosures. “First, within 15 days after entering a race, a candidate must file a ‘[d]eclaration of intent’ revealing the amount of personal funds the candidate intends to spend in excess of \$350,000.¹⁰³ . . . Second, within 24 hours of crossing or becoming obligated to cross the \$350,000 mark, the candidate must file an ‘[i]nitial notification.’ Third, the candidate must file an ‘[a]dditional notification’ within 24 hours of making or becoming obligated to make each additional expenditure of \$10,000 or more using personal funds.” In contrast, the BCRA’s disclosure scheme is much less demanding for a non-self-financing candidate than for a self-financing candidate.¹⁰⁴ Plaintiff Jack Davis contributed to his campaigns approximately \$1.2 million in 2004 and \$2.3 million in 2006, while his opponent did not personally donate to his own campaign.

“If § 319(a) simply raised the contribution limits for all candidates,” the section would have been facially constitutional under *Buckley v. Valeo* (casebook, p. 1056). However, even “limits on discrete and aggregate individual contributions and on coordinated party expenditures” must be “ ‘closely drawn’ to serve a ‘sufficiently

¹⁰² Under these circumstances, the non-self-financing candidate may receive contributions “even from individuals who have reached the normal aggregate contributions cap.”

¹⁰³ “A candidate who does not intend to cross this threshold may simply declare an intent to spend no personal funds.”

¹⁰⁴ However, “when the additional contributions that a non-self-financing candidate is authorized to receive pursuant to the asymmetrical limitations scheme equals” her opponent’s expenditures of personal funds, she “must notify the FEC and the appropriate national and state committees within 24 hours.”

important interest,’ such as preventing corruption and the appearance of corruption. *McConnell v. Federal Election Comm’n.*” (casebook, p. 1083) . Moreover, “limits that are too low cannot stand,” but there is “no constitutional basis for attacking contribution limits on the ground that they are too high.”¹⁰⁵ However, § 319(a) “does not raise the contribution limits across the board. Rather it raises the limits only for the non-self-financing candidate” whose “expenditure of personal funds causes the OPFA threshold to be exceeded. We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.”

Buckley rejected a cap on a candidate’s personal expenditures to finance her campaign. “While BCRA does not impose a cap on a candidate’s expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises” the First Amendment right “to spend personal funds for campaign speech.” Under § 319(a), a candidate must “choose between the *First Amendment* right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.” Wealthy candidates may continue to support their own campaigns, “but they must shoulder a special and potentially significant burden if they make that choice.” The statute gives candidates “two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits.”

As “§ 319(a) imposes a substantial burden on the exercise of the *First Amendment* right to use personal funds for campaign speech,” it must be “ ‘justified by a compelling state interest.’ ” In this case, the burden is “not justified by any governmental interest in eliminating corruption or the perception of corruption.”¹⁰⁶ The Court also rejected Congress’s proffered interest in reducing “ ‘the natural advantage that wealthy individuals possess in campaigns for federal office.’ ” *Buckley* “held that ‘[t]he interest in equalizing the financial resources of candidates’ did not provide a ‘justification for restricting’ candidates’ overall campaign expenditures.” Such an attempt to “ ‘level electoral opportunities’ has ominous implications because it would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates” campaigning for election. “Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name.” Justice Alito continued: “If the normally applicable limits on individual contributions and coordinated party contributions are seriously distorting the electoral process, if they are feeding a ‘public perception that wealthy people can buy seats in Congress,’ and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits.”

For the disclosure requirements in § 319(b) to stand, “there must be ‘a

¹⁰⁵ In determining whether a contribution limit is too restrictive, the Court has “extended a measure of deference” to the legislature.

¹⁰⁶ “Even if § 319(a) were characterized as a limit on contributions rather than expenditures, it is doubtful whether it would survive. A contribution limit involving “ ‘significant interference’ with associational rights” must be “ ‘closely drawn’ ” to serve “ ‘a sufficiently important interest.’ ” *McConnell v. Federal Elections Comm’n.*”

“relevant correlation” or “substantial relation” between the governmental interest and the information required to be disclosed,’ and the governmental interest ‘must survive exacting scrutiny.’ That is, the strength of the governmental interest must reflect the seriousness of the actual burden on *First Amendment* rights.” The disclosure requirements in § 319(b) impose an unjustifiable burden.¹⁰⁷

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. Justice Stevens would uphold the “Millionaire’s Amendment,” as it “does no more than diminish the unequal strength of the self-funding candidate.”

In his *Buckley* dissent, Justice White explained that expenditure limitations “should be analyzed, not as direct restrictions on speech, but rather as akin to time, place, and manner regulations.” Justice Stevens likewise concluded that “a number of purposes” could “justify the imposition of reasonable limitations on expenditures.” Such limitations could eliminate the “burden of fundraising” while “improving the quality of the exposition of ideas.” In general, “[q]uantity limitations are commonplace in any number of other contexts in which high-value speech occurs.” For example, the Supreme Court limits both the time of oral arguments and the page lengths of briefs submitted to the Court. By “flooding the airwaves with slogans and sound-bites,” candidates “may well do more to obscure the issues than to enlighten listeners. At least in the context of elections, the notion that rules limiting the quantity of speech are just as offensive to the *First Amendment* as rules limiting the content of speech is plainly incorrect.”

The statute is constitutional even under *Buckley*’s holding that “expenditure limits as such are uniquely incompatible with the *First Amendment*.” In addition, the government has presented two important interests: “reducing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder.” The Millionaire’s Amendment causes no “*First Amendment* injury whatsoever,” and “quiets no speech at all.” In fact, the statute “does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire.”¹⁰⁸ A “voter’s ability to make an informed choice is impaired” when “only one candidate can make himself heard.”

Justice Stevens continued: “The Court is simply wrong when it suggests that the ‘governmental interest in eliminating corruption or the perception of corruption’ is the sole governmental interest sufficient to support campaign finance regulations.” In fact, the Court has “long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.” While “the focus [of the Court’s] cases has been on aggregations of corporate rather than individual wealth,” the “concerns about the corrosive and distorting effects of wealth on our political process” are equally applicable to individual wealth. “Minimizing the effect of concentrated wealth on our political process, and the concomitant interest in addressing the dangers

¹⁰⁷ The Court did not address Davis’ equal protection claims as “§§ 319(a) and (b) violate the *First Amendment*.”

¹⁰⁸ “The self-funder retains the choice” to “forgo self-financing and rely on contributions alone, at the same level as his opponent.”

that attend the perception that political power can be purchased, are, therefore, sufficiently weighty objectives to justify significant congressional action.” Moreover, the statute does not create an unfair advantage for a self-funding candidate’s opponent, since that candidate “may avail himself of the enhanced contribution limits only until parity is achieved, at which point he becomes again ineligible for contributions above the normal maximum.”

The dissent also dismissed appellant’s equal protection argument. “It blinks reality to contend that the millionaire candidate is situated identically to a nonmillionaire opponent.”

Justice Ginsburg, with whom Justice Breyer joined dissenting, agreed that “the provisions challenged in this case are entirely consistent with *Buckley v. Valeo*.” However, she did not join Justice Stevens’ discussion of “*Buckley*’s distinction between expenditure and contribution limits and, correspondingly, *Buckley*’s holding that expenditure limits impose ‘direct quantity restrictions on political communication.’ ” She “would leave reconsideration of *Buckley* for a later day and case.”

MCCUTCHEON V. FEC, 134 S. Ct. 1434 (2014). In *McCutcheon*, the Court struck down the aggregate limitations on how much individuals and certain entities could give as political contributions over a particular period of time. Writing for a plurality of four, Chief Justice Roberts began by saying: “There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign.”

Government can regulate campaign financing to prevent corruption and the appearance of corruption. However, precedent contrasts “*quid pro quo*” exchanges for money, which government can regulate, with “[i]ngratiation and access,” which regulations may not target as that is part of the democratic process.

Over the two-year 2013-2014 election cycle, the Bipartisan Campaign Reform Act (BCRA) §441a(a)(3) limited the amount that individuals could contribute to aggregate contributions to a total of \$123,200, with a maximum of \$48,600 to federal candidates and \$74,600 to other political committees including PACs.¹⁰⁹

These aggregate limits were in addition to individual contribution limits, which had already been upheld in previous cases. For the 2013-14 election cycle, BCRA permitted “an individual to contribute up to \$2,600 per election to a candidate (\$5,200

¹⁰⁹ The Act authorized six national committees: the Republican National Committee, the Democratic National Committee, the National Republican Senatorial Committee, the Democratic Senatorial Campaign Committee, the National Republican Congressional Committee, and the Democratic Congressional Campaign Committee. See 2 U.S.C. §431(14). “Of that \$74,600, only \$48,600 may be contributed to state or local party committees and PACs as opposed to national party committees.”

total for the primary and general elections); \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee, or ‘PAC.’ A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to \$5,000 per election to a candidate.” These aggregate limits included earmarks made through conduits to a particular candidate.

The three-judge District Court dismissed the case viewing the aggregate and individual contribution limitations as part of one coherent system that averted circumvention. A plurality of the Supreme Court held that the aggregate limitations failed whether they were treated under strict scrutiny as expenditure limitations or under the lower “‘closely drawn’” standard for contribution limitations. *Buckley v. Valeo*, casebook p. 1056, had upheld aggregate contributions limits.

Specifically, *Buckley* had stated: “‘The overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.’”

The plurality stated that it was not bound by these three sentences written “‘without the benefit of full briefing or argument on the issue.’” Moreover, the *McCutcheon* case involved a new statutory schema containing important differences. Specifically, after *Buckley*, Congress had limited contributions to political committees. Congress also prohibited donors from creating or controlling multiple PACs, which could have been used as a tool for circumvention. Although earmarking regulations existed when *Buckley* was decided, Congress broadened them to make more difficult earmarking to a particular candidate through conduits.

“‘The First Amendment ‘is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.’” Chief Justice Roberts disagreed with *Buckley’s* characterization of the aggregate contribution limitation as “‘modest’”; it constrained how many candidates, committees or policy concerns an individual could support.

The only interest upon which the plurality would uphold the law was actual corruption or the appearance of corruption. The plurality defined corruption narrowly to *quid pro quo* corruption. In its individual contribution limitations, Congress had already made a determination that \$5200 was the threshold for corruption. If Congress thought that there was no danger of corruption beyond that amount, then Congress had to defend its aggregation limits on circumvention grounds rather than on corruption grounds.

Circumvention was rendered improbable by various earmarking restrictions. For example, once the donor reached his \$5200 threshold for a particular candidate, the donor could not give an additional contribution to a PAC that only supported that candidate, or one that the donor knew would direct “a substantial portion” of his contributions to that candidate. “The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.” The donor could only contribute \$5000 to the PAC. The PAC is also limited to \$2600 in how much it could give in each election to a particular candidate. All this diminished the possibility of corruption or its appearance.

Turning to the District Court’s example of a \$500,000 gift to a joint committee, an individual donor could give to a joint committee comprised of national and state committees, and then all of the committees comprising the joint committee could turn around and give this money to one committee. However, the donor could not telegraph his desire to earmark the gift to a particular candidate.¹¹⁰ Moreover, that state committees would funnel funds given them to committees in other states was highly improbable. The anti-coordination regulations were effective: in 2012, PACs spent \$7 billion on political campaigns. At the same time, the four Democratic and Republican senatorial and congressional committees¹¹¹ “spent less than \$1 million each on direct candidate contributions and less than \$10 million each on coordinated expenditures.” If the aggregate restriction did not serve the purpose of circumvention, it “impermissibly restrict[ed] participation in the political process.”¹¹²

The plurality did suggest certain alternative measures that might be used to avoid channeling large sums to a small group of candidates. In addition to more robust enforcement, these included limiting targeted transfers between party committees and candidate committees. “There are currently no such limits on transfers among party committees and from candidates to party committees.”

A possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Another possibility would be to require any donations made to joint committees to be spent by the joint committee, and further restricting earmarking. For example, a PAC might be required to contribute to a minimum number of candidates to ensure that funds contributed to that PAC are not

¹¹⁰ Moreover, the \$500,000 example is designed around contributions to a presidential candidate, not just any candidate.

¹¹¹ These are: the National Republican Senatorial Committee (NRSC), the National Republican Congressional Committee (NRCC), the Democratic Senatorial Campaign Committee (DSCC), and the Democratic Congressional Campaign Committee (DCCC).

¹¹² The contribution limitations for each election cycle further constrict circumvention possibilities for donations to a particular candidate. For example, even if a donor gave \$2600 to each of 100 congressmen who are in safe races in hopes that each would reroute \$2000 to one particular candidate in a contested race, only one donor could do this. This is because for that particular election cycle, the 100 congressmen would have reached their contribution limits to the single congressman in the contested race.

earmarked to a specific candidate. Alternatively, donors who had already given the maximum contribution to particular candidates could be prohibited from additional contributions to PACs that have indicated they will support the same candidates. The plurality cautioned that it was not constitutionally pre-approving any of these ideas.

Disclosure is also a more effective alternative in an Internet world than it was when *Buckley* was decided. At that time, the disclosures would sit in the FEC office. Organizations like Open-Secrets.org and FollowTheMoney.org have rendered disclosure far more effective. Disclosure can be avoided by contributions to 501(c) organizations, which made \$300 million of independent expenditures during the 2012 election cycle.

The plurality also rejected the argument that contributions of a large check to an individual legislator presented an opportunity for corruption, even when the check was divided among other candidates, the political party and PACs who supported that party. This concept of corruption went far beyond the Court's definition of *quid pro quo* corruption. The plurality had "no occasion to consider a law that would specifically ban candidates from soliciting donations—within the base limits—that would go to many other candidates, and would add up to a large sum." While it also burdened speech, disclosure of contributions was also a less restrictive alternative than limiting aggregate contributions.

In summary, campaign finance jurisprudence should focus "on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others."

Concurring in the judgment, Justice Thomas reiterated his view that individual contribution limitations were also invalid. The plurality's rationale for striking down aggregate contribution limitations could not be squared with *Buckley's* basic rationale for allowing any contribution limitations at all. *Buckley* says that contribution limits allow "the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." The plurality decision effectively continued to chip away at *Buckley's* upholding the imposition of contribution limitations.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.

Justice Breyer stated that the Court overruled that part of *Buckley* permitting limitations on aggregate campaign contributions. *McCutcheon* created a loophole permitting "a single individual to contribute millions" to a party or candidate. With *Citizens United v. Federal Election Comm'n*, see p. of this supplement, the "decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."

The plurality disconnected large aggregate contributions from corruption or its appearance by defining corruption as *quid pro quo* corruption or bribery. This narrow definition, which excluded influence and access, was inconsistent with prior case law

including *McConnell*. In prior cases, the Court understood corruption “not only as quid pro quo agreements, but also as undue influence on an officeholder’s judgment.’ *Federal Election Comm’n v. Beaumont*, casebook p. 1080. In *Election Comm’n v. Colorado Republican Federal Campaign Comm.*, (*Colorado II*), casebook p. 1072, the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including ‘undue influence’ by wealthy donors. In *Nixon v. Shrink Missouri*, casebook p. 1077, the Court upheld limitations imposed by the Missouri Legislature upon contributions to state political candidates, not only because of the need to prevent bribery, but also because of ‘the broader threat from politicians too compliant with the wishes of large contributors.’”

McConnell v. FEC, casebook p. 1083, quoting *Colorado II*, specifically rejected this narrow *quid pro quo* definition of corruption. “Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder’s judgment, and the appearance of such influence.”” The *McConnell* Court articulated corruption concerns that went far beyond the plurality’s narrow approach to corruption. “Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”

The *McConnell* Court relied on an extensive record of over 100,000 pages and over 200 witnesses compiled by the District Court, which carefully depicted “the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence.” In that extensive record, there was not one instance of a bribe. Citing Justice Brandeis and others, the dissent emphasized the essential relation of free speech to democracy. Corruption “derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard.”

Citizens United does contain some language supporting the plurality’s definition of corruption. But not a single opinion in *Citizens United* interpreted this language as overruling *McConnell*. Yet the plurality rejected the definition of corruption upon which *McConnell*’s holding rests. Each candidate can give \$4000 for the primary and the election for a total of \$1,872,000, and each party committee can give \$10,000 for a total of \$530,000.

The dissent outlined several examples of the vast donations that the removal of the aggregate contribution limitations could produce. The first example showed how the aggregate contribution limit capped the amount that a donor could give to a Joint Party Committee, during a two-year election cycle, at \$74,600. Removing the aggregate limits allowed the same donor to contribute \$1.2 million during the same election cycle.

In example two, when one adds that same donor contributing to congressional candidates, the \$1.2 million increases to \$3.6 million every two years. The \$3.6 million could be distributed \$64,800 to national party committees, \$20,000 to state committees,

and \$5,200 to individual candidates. The donor can give \$5200 to 435 congressional candidates and 33 senatorial candidates.

In example three, the joint committee could give \$2.37 million to a single candidate. A donor can give \$64,800 to each of the three national committees of each party and \$20,000 to each of the 50 state political party committees. In addition, for a general election, coordinated expenditures could be directed to the candidate valued from \$46,600 to \$2.68 million.¹¹³ Thus, the entire \$3.6 million in contributions by a single donor could be channeled to a single candidate. These funds could be directed to candidates in hotly contested races. The aggregate contribution limit had been \$123,200.

The dissent's third example demonstrated how PACs would be able to channel \$2 million from each of ten wealthy donors to ten candidates in close races. In 2012, the average House race cost \$1.6 million and the average Senate race cost \$11.5 million.

Justice Breyer further elaborated his third example. "Groups of party supporters—individuals, corporations, or trade unions— create 200 PACs. Each PAC claims it will use the funds it raises to support several candidates from the party, though it will favor those who are most endangered. (Each PAC qualifies for 'multicandidate' status because it has received contributions from more than 50 persons and has made contributions to five federal candidates at some point previously. Over a 2-year election cycle, Rich Donor One gives \$10,000 to each PAC (\$5,000 per year)—yielding \$2 million total. Rich Donor 2 does the same. So, too, do the other eight Rich Donors. This brings their total donations to \$20 million, disbursed among the 200 PACs. Each PAC will have collected \$100,000, and each can use its money to write ten checks of \$10,000—to each of the ten most Embattled Candidates in the party (over two years). Every Embattled Candidate, receiving a \$10,000 check from 200 PACs, will have collected \$2 million."

The dissent contested the plurality's claim that these examples could simply not happen. First, while contribution limits to political committees have been added since *Buckley*, there is still no limit on the number of political committees that can be created which supported party or group of party candidates.

Second, while the nonproliferation rule attributes all contributions to political committees by the same corporation, labor union or person to the contribution limit of that organization, there were still 2700 non-connected political committees operating during the 2012 election. Removal of aggregate contribution limits will only cause that number to grow. "Just because a group of multicandidate PACs all support the same party and all decide to donate funds to a group of endangered candidates in that party does not mean they will qualify as 'affiliated' under the relevant definition."

Third, the earmarking restrictions in political committees when *Buckley* was decided are virtually the same as the provisions in place today. Fourth, while the

¹¹³ The amount depends on the size of the candidate's State and whether the election is for the House or the Senate.

contribution limitations apply to multiple single candidate political committees, they do not apply to one political committee supporting a particular candidate and another supporting multiple candidates including that one. The briefs before the Court suggests that this is a realistic option.

Fifth, the FEC can attribute to the contributors' grand total both contributions to an individual candidate and contributions to a "political committee that has supported or anticipates supporting the same candidate if the individual knows that "a substantial portion [of his contribution] will be contributed to, or expended on behalf of," that candidate." Since 2000, the FEC has been able to meet this heavy burden in only one case.

Demonstrating the lack of efficacy of this FEC regulation, political parties and candidates had over 500 joint fundraising committees in the last election and candidates established over 450 "Leadership PACs." In addition, party supporters had established over 3000 multicandidate PACs. These groups were not prosecuted under the \$123,200 aggregate contribution limit. They will certainly not be prosecuted under limits of several million dollars.

The dissent rejected the alternatives offered by the plurality as ineffective substitutes for aggregate contribution restrictions. In any event, the plurality did not endorse the constitutionality of any of these alternatives and admitted they could be subject to challenge. "We disagree, for example, on the possibilities for circumvention of the base limits in the absence of aggregate limits. We disagree about how effectively the plurality's 'alternatives' could prevent evasion."

Finally, the dissent questioned why the plurality did not remand the case, which came up on a motion to dismiss, back to the three-judge District Court. The plurality itself noted the substantial factual disputes between the dissent and the plurality.

There were also a tremendous number of factual questions left open including the existence of a compelling state interest, the fit between that interest and statute, and the extent to which the plurality should defer to the judgment of Congress. Justice Breyer elaborated: "Determining whether anticorruption objectives justify a particular set of contribution limits requires answering empirically based questions, and applying significant discretion and judgment. To what extent will unrestricted giving lead to corruption or its appearance? What forms will any such corruption take? To what extent will a lack of regulation undermine public confidence in the democratic system? To what extent can regulation restore it?" A remand would have been consistent with the Court's past practice.

NOTES

1) *Corruption*. For an interesting and rich account of corruption based on government outputs and behavior, see Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 127-129 (2010). "Clientelist pressures arose at public institutions with incentives to increase the size, complexity, and non-transparency of governmental decision-making, with this corresponding impetus simply to increase the relative size of

the public sector, often beyond the limits of what the national economy can tolerate.”

2) *Contrasting perspectives.* For two interesting but sharply contrasting perspectives on *McCutcheon*, compare Bert Neuborne, “Welcome to Oligarchs United”, <http://www.scotusblog.com/2014/04/symposium-welcome-to-oligarchs-united/> (April 3, 2014) with Richard A. Epstein, “Oligarchs United? Not So Fast”, <http://www.hoover.org/publications/defining-ideas/article/174986> (April 7, 2014).

Page 1123: Insert the following before § 15.04 COMMERCIAL SPEECH

AGENCY FOR INT’L DEV. v. ALLIANCE FOR OPEN SOC’Y INT’L, INC., 133 S. Ct. 2321 (2013). In *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, the Court held unconstitutional a funding condition, referred to as the Policy Requirement, of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. § 7601 *et seq.* The Leadership Act was designed to halt the spread of HIV/AIDS around the world. In order to effectuate this plan “Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight.” The Policy Requirement mandates that “no funds may be used by an organization ‘that does not have a policy explicitly opposing prostitution and sex trafficking.’ ” The Court ultimately determined that the Policy Requirement violates the First Amendment.

Congress enacted the Leadership Act in the wake of congressional findings that “more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade.” Entities that accept Leadership Act funding, however, must comply with the Policy Requirement. The Policy Requirement stems from Congress’s findings “that the ‘sex industry, the trafficking of individuals into such industry, and sexual violence’ were factors in the spread of the HIV/AIDS epidemic, and determined that ‘it should be the policy of the United States to eradicate’ prostitution and ‘other sexual victimization.’ ”

Respondents consisted of domestic organizations engaged in fighting HIV/AIDS abroad. These organizations receive significant private funding, in addition to the billions they receive annually in financial assistance from the United States through programs such as the Leadership Act. Respondents are in opposition to the Policy Requirement because they “fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS.” Furthermore, they are “concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.”

Writing for a 6-2 majority,¹¹⁴ Chief Justice Roberts held that the Policy Requirement violates the First Amendment because it is an unconstitutional restriction of freedom of speech. In point of fact, the Chief Justice noted that “[w]ere it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment.” Relying on *Rust v. Sullivan*, (casebook, p. 1108), Chief Justice Roberts specified that the broad discretion granted to Congress under the Spending Clause “includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends.” However, in *Rumsfeld v. Forum for Academic & Institutional Rights*, (casebook, p. 1121), the Court placed a limit on this discretion by holding that “the Government ‘ “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” ’ ”

Again utilizing its opinion in *Sullivan*, the Court opined, “Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem.” Applying this distinction to the spending condition (Title X) at issue in *Sullivan*, the Court “stressed that ‘Title X expressly distinguishes between a Title X *grantee* and a Title X *project*.’ ” Specifically, the Title X regulations “governed only the scope of the grantee’s Title X projects, leaving it ‘unfettered in its other activities.’ ” Thus, “[t]he Title X *grantee* can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” For these reasons, the Court found that the Title X regulations passed First Amendment scrutiny and were therefore permissible under the Constitution.

Chief Justice Roberts then explained that the key distinction in these cases is “between conditions that define the federal program and those that reach outside it.” However, this distinction “is not always self-evident.” In the present case, funding provided by the Leadership Act is restricted by two conditions. The first condition, 22

U.S.C. § 7631(e), was unchallenged in this litigation. It “prohibits Leadership Act funds from being used ‘to promote or advocate the legalization or practice of prostitution or sex trafficking.’ ” The Government conceded that the first condition alone “ensures that federal funds will not be used for the prohibited purposes.” The Court then characterized Justice Scalia’s dissent as viewing the Policy Requirement as “simply a selection criterion.” In contrast, the Chief Justice asserted, “whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete.” This led the Court to find that “[b]y requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.”

The Government sought to save the Policy Requirement by constructing a set of affiliate guidelines. The guidelines allow Leadership Act funding recipients “to work

¹¹⁴ Justice Kagan did not take part in the consideration or decision of the case.

with affiliated organizations that do not abide by the condition, as long as the recipients retain ‘objective integrity and independence’ from the unfettered affiliates.” The Chief Justice found the guidelines insufficient stating: “[i]f the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.” The Government then argued that “ ‘if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the government’s program and confuse its message opposing prostitution and sex trafficking.’ ” Chief Justice Roberts also rejected this argument as he found that “the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution.” Having dispatched the Government’s attempts to save the condition, the Chief Justice concluded that the Policy Requirement violates the First Amendment because it “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.”

Justice Scalia dissented joined by Justice Thomas. Justice Scalia argued that the Policy Requirement is permissible under the Constitution because it “is nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS.” Furthermore, Justice Scalia stated that the “First Amendment does not mandate a viewpoint-neutral government.” He expanded upon this idea by asserting that the “Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas.” In essence, Justice Scalia argued that a spending condition would be constitutional so long “as the unfunded organization remains free to engage in its activities.” For example, the Policy Requirement would not, “permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution.” Further, he emphasized that “here a central part of the Government’s HIV/AIDS strategy is the suppression of prostitution.” Thus, Justice Scalia determined that it is “entirely reasonable to admit to participation in the program only those who believe in that goal.”

Justice Scalia, however, found the majority’s distinction between “conditions that operate *inside* a spending program and those that control speech *outside* of it” to be one “that the Court itself admits is ‘hardly clear.’ ” He then stressed that the Policy Requirement induced “no compulsion at all.” Finally, Justice Scalia concluded that the Policy Requirement is “the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject.”

§ 15.04 COMMERCIAL SPEECH

[1] Protection for Commercial Speech: General Principles

Page 1144: Insert the following after Lorillard Tobacco Co. v. Reilly

SORRELL v. IMS HEALTH, INC., 131 S. Ct. 2653 (2011). In *Sorrell*, the Court invalidated a Vermont statute that “restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.” Absent the prescriber’s consent, this “ ‘prescriber-identifying information’ ” could “not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers.” Marketing included “ ‘advertising, promotion, or any activity’ that is ‘used to influence sales or the market share of a prescription drug.’ ”

Writing for the majority, Justice Kennedy found that an express purpose of the statute was to combat the marketing practice of “ ‘detailing.’ ” Detailing entails the sale of prescriber-identifying information to “ ‘data miners’ ” who then produce reports used by pharmaceutical manufacturers to optimize their marketing of their brand-name drugs. “ ‘Counter-detailing’ ” refers to “efforts to promote the use of generic pharmaceuticals.” A clear “ ‘counter-detailing’ ” intent was evident in the statute’s sponsorship of an “ ‘evidence-based prescription drug education program’ ” to “advise prescribers ‘about commonly used brand-name drugs for which the patent has expired’ or will soon expire.”

Legislative findings also criticized the efficacy of detailing saying that prescriber-identifying information allowed “ ‘detailers to target their visits’ ” and “shape their messages” according to the specific characteristics of particular doctors. The legislature noted that the goals of these programs frequently “ ‘conflict with the goals of the state.’ ” Moreover, an imbalance existed in the “ ‘marketplace for ideas on medicine safety and effectiveness’ ” because brand-name pharmaceutical manufacturers regularly “ ‘invest in expensive pharmaceutical marketing campaigns to doctors.’ ” Such an imbalance “fosters disruptive and repeated marketing visits tantamount to harassment.”

During oral argument, the State altered its interpretation of the statute, which the Court found “particularly troubling in a First Amendment case, where plaintiffs have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law.” In earlier proceedings, Vermont had stated that the statute “prohibits pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing.” However, during oral argument, Vermont maintained that the statute prohibited “pharmacies, health insurers, and similar entities” from selling “prescriber-identifying information for any purpose, subject to the statutory exceptions.” These exceptions, for example, allowed pharmacies to “sell the information to private or academic researchers,” but prohibited selling it to pharmaceutical marketers. The Court invalidated the statute under either interpretation.

The statute at issue “disfavors marketing, that is, speech with a particular content.

More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.” Both the record and formal legislative findings demonstrate that the statute “imposes an aimed, content-based burden on detailers.” The statute “has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner.” The legislative findings “confirm that the law’s express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs” because, “detailers, in particular those who promote brand-name drugs, convey messages that ‘are often in conflict with the goals of the state.’ ” Consequently, the statute “ ‘goes even beyond mere content discrimination, to actual viewpoint discrimination.’ ”

Vermont argues against heightened scrutiny invoking *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), which “held that a plaintiff could not raise a facial challenge to a content-based restriction on access to government-held information.”¹¹⁵ The State argues that since the “information was generated in compliance with a legal mandate,” it should be “considered a kind of governmental information.” Distinguishing *United Reporting*, the Court first said that Vermont’s statute restricted “access to information in private hands.” Second, “plaintiff in *United Reporting* had neither ‘attempt[ed] to qualify’ for access to the government’s information nor presented an as-applied claim in this Court.” Moreover, unlike the law in *United Reporting*, “Vermont’s law imposes a content- and speaker-based burden on respondents’ own speech.”

The Court then rejected the State’s justifications for the law under both a heightened judicial scrutiny and a less restrictive commercial speech test. Under the more lenient commercial speech standards, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” The purpose behind “these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.”

The State tried to justify this statute based on “medical privacy” and “improved public health and reduced healthcare costs.” Although it may be assumed that “physicians have an interest in keeping their prescription decisions confidential,” Vermont’s law fails “to serve that interest.” The statute “permits insurers, researchers, journalists, the State itself, and others” to use prescriber-identifying information for any purpose besides marketing. Moreover, the State did not argue “that detailing is false or misleading.”

In conclusion, the Court noted that it would be impermissible for the State to “engage in content-based discrimination to advance its own side of a debate” even though “[t]he capacity of technology to find and publish personal information” inevitably creates “serious and unresolved” privacy and dignity issues. The State may have had a better argument if the “statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances.” Instead,

¹¹⁵ *United Reporting* “remanded for consideration of an as-applied challenge. *United Reporting* is thus a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim.”

“[t]he State has burdened a form of protected expression that it found too persuasive.”

Justice Breyer dissented, joined by Justices Ginsburg and Kagan. Justice Breyer would uphold Vermont’s statute because its “effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise.” Vermont’s statute “adversely affects expression in one, and only one, way” by “depriv[ing] pharmaceutical and data-mining companies of data, collected pursuant to the government’s regulatory mandate, that could help pharmaceutical companies create better sales messages.”

Justice Breyer disagreed with the majority’s application of heightened scrutiny. Free speech precedent “offers considerably less protection to the maintenance of a free marketplace for goods and services.” Justice Breyer would “defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause.” Failure to do so risks, as Justice Rehnquist once said, is a “retur[n] to the bygone era of *Lochner v. New York*, (casebook, p. 386).’ ”

Justice Breyer also was concerned that the majority would extend the same heightened standard to other government regulators, such as, the Food and Drug Administration (FDA). The requirements of the Vermont statute are “part of a traditional, comprehensive regulatory regime.” In addition, “[t]he pharmaceutical drug industry has been heavily regulated at least since 1906” and the FDA has regulated the “content of drug labels and the manner in which drugs can be advertised and sold.”

Prescriber-identifying information only exists because of Vermont’s regulation. “The ease with which one can point to actual or hypothetical examples with potentially adverse speech-related effects at least roughly comparable to those at issue here indicates the danger of applying a ‘heightened’ or ‘intermediate’ standard of First Amendment review where typical regulatory actions affect commercial speech.” Consequently, “it is not surprising that, until today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate.”

Many regulatory lines are based on content. Never before has the Court “justified greater scrutiny” on commercial regulations for “ ‘content-based’ ” or “ ‘speaker-based’ ” restrictions. “The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions.” Likewise, “the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture.”

Vermont’s statute would withstand scrutiny under both “*Central Hudson*’s ‘intermediate’ commercial speech standard as well as any more limited ‘economic regulation’ ” standard. “The record contains no evidence that prescriber-identifying data is widely disseminated.” The statute only prevents “companies from shaping a commercial message they believe maximally effective.”

Applying the *Central Hudson* test, Justice Breyer found that the interests of “ ‘protecting the public health’ ” and “ ‘the privacy of prescribers’ ” as well as ensuring “ ‘unbiased information’ ” and low cost, are both “ ‘substantial’ ” and “ ‘neutral’ ” in respect to speech.” Regulating public health lies within the state’s traditional police powers. Detailing involves “diverting attention from scientific research about a drug’s safety and effectiveness, as well as its cost.” Consequently, “Vermont’s attempts to ensure a “ ‘fair balance’ ” of information is no different from the FDA’s similar

requirement.”

Justice Breyer rejects the majority’s contention that the State would have a better argument had the “ ‘statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances’ ” because “this alternative is not ‘a *more limited* restriction’ ” under *Central Hudson*.

The restriction on pharmaceutical manufacturers using “prescriber-identifying information works no more than modest First Amendment harm; the prohibition is justified by the need to ensure unbiased sales presentations, prevent unnecessarily high drug costs, and protect the privacy of prescribing physicians.”

The “regulatory context” here is very important. “At best the Court opens a Pandora’s Box of First Amendment” claims. “At worse, it reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking” for “ordinary economic regulation.”

§ 15.05 OBSCENITY

[1] The Constitutional Standard

Page 1164: Insert the following after Ashcroft v. The Free Speech Coalition

UNITED STATES v. WILLIAMS, 553 U.S. 285 (2008). In *Williams*, the Court upheld a congressional statute which “criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography.” Michael Williams was arrested following his participation in an online chat room that was being monitored by the Secret Service. The Secret Service obtained a search warrant for his home where agents seized “two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sado-masochistic.” Williams pled guilty to charges of possessing child pornography and pandering child pornography, but he “reserved the right to challenge the constitutionality of the pandering conviction.”

In dealing with Williams’ overbreadth challenge, the Court first construed the statute at issue. While government may ban child pornography, *New York v. Ferber* (casebook, p. 1160) and *Ashcroft v. Free Speech Coalition* (casebook, p. 1162), held facially overbroad a statute that restricted materials produced without children as such restrictions lacked “the child-protection rationale.” Unlike the statute in *Free Speech Coalition*, which prohibited the possession or distribution of child pornography, the statute at issue does not target the underlying material, but “bans the collateral speech that introduces such material into the child-pornography distribution network.” Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute. Moreover, the material that may not be pandered “tracks the material held constitutionally proscribable in *Ferber* and *Miller v. California*, 413 U.S. 15 (1973): obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct.”

Justice Scalia noted five features of the statute that were important to the

Court's overbreadth analysis. First, he noted that the scienter requirement applies to the pandering "provision in its entirety." Next, Scalia pointed to "the statute's string of operative verbs

— 'advertises, promotes, presents, distributes, or solicits' [that] is reasonably read to have a transactional connotation." Moreover, " '[p]romotes,' in a list that includes 'solicits,' 'distributes,' and 'advertises,' is most sensibly read to mean the act of recommending purported child pornography to another person for his acquisition." In the context of these other verbs, the same construction should be given to the verb "presents."¹¹⁶ While these verbs all "relate to transactions," they may not all "relate to commercial transactions."

"Third, the phrase 'in a manner that reflects the belief' " indicates "that the defendant must actually have held the subjective 'belief' that the material or purported material was child pornography." This phrase also has an objective aspect. "The statement or action must objectively manifest a belief that the material is child pornography." Fourth, Justice Scalia pointed out "the other key phrase, 'in a manner ... that is intended to cause another to believe,' contains only a subjective element."

Fifth, unlike *Free Speech Coalition*, the "requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term 'simulated sexual intercourse.' "

Justice Scalia next examined whether the statute, as construed above, "criminalizes a substantial amount of protected expressive activity. Offers to engage in illegal transactions are categorically excluded from *First Amendment* protection." This "is based not on the less privileged *First Amendment* status of commercial speech," but rather "on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no *First Amendment* protection. Many long established criminal proscriptions — such as laws against conspiracy, incitement, and solicitation — criminalize speech (commercial or not) that is intended to induce or commence illegal activities." Justice Scalia acknowledged that "there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. *See Brandenburg v. Ohio*, (casebook, p. 782). The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it."¹¹⁷

The respondent argued that the statute might cover documentary footage of atrocities being committed in foreign countries, such as soldiers raping young children.¹¹⁸ Scalia acknowledged that this may be the case "if the material rises to the

¹¹⁶ Moreover, "the verb 'present' — along with 'distribute' and 'advertise,' as well as 'give,' 'lend,' 'deliver,' and 'transfer' — was used in the definition of 'promote' in *Ferber*."

¹¹⁷ In this statute, " 'promotes' does not refer to abstract advocacy, such as the statement 'I believe that child pornography should be legal' or even 'I encourage you to obtain child pornography.' It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer."

¹¹⁸ Justice Scalia also rejected the argument that the statute could apply to Hollywood movies. "The

high level of explicitness that we have held is required. That sort of documentary footage could of course be the subject of an as-applied challenge.”¹¹⁹

In response to the dissent’s argument that this decision silently overrules *New York v. Ferber* and *Free Speech Coalition*, Justice Scalia stated that virtual child pornography is protected by the *First Amendment*. In contrast, “an offer to provide or request to receive virtual child pornography is not prohibited by the statute. A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children.”

The Court also rejected the vagueness challenge.¹²⁰ “The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact.”

Concurring, Justice Stevens added “two interrelated considerations” not relied on by Justice Scalia. First, he stated “ ‘every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.’ ” Second, if “the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters.” Both the historical context of the statute and the statements of its drafters convinced Justice Stevens that “in addition to the other limitations the Court properly concludes constrain the reach of the statute, the heightened scienter requirements ... contain an element of lasciviousness.”

Justice Souter dissented joined by Justice Ginsburg. According to Justice Souter, a transaction in images that do not show real children “could not be prosecuted consistently with the *First Amendment*.” Moreover, “maintaining the *First Amendment* protection” of such “fake child pornography, requires a limit to the law’s criminalization of pandering proposals.”¹²¹ In permitting “the new pandering prohibition to suppress otherwise protected speech, the Court undermines *Ferber* and *Free Speech Coalition* in both reasoning and result.” *Free Speech Coalition* protects “non-obscene virtual pornographic images ... because they fail to trigger the concern for child safety that disentitles child pornography to *First Amendment* protection.” Consequently, assuming that “*Ferber* and *Free Speech Coalition* are good law, the facts sufficient for conviction under the Act do not suffice to show that the image (perhaps merely simulated), and thus a transfer of that image, are outside the bounds of constitutional protection.” Justice Souter would “hold that a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of

average person understands that sex scenes in mainstream movies use nonchild actors, depict sexual activity in a way that would not rise to the explicit level necessary under the statute, or, in most cases, both.”

¹¹⁹ “Assuming that the constitutional balance would have to be struck in favor of the documentary,” upholding such an as-applied challenge “would not establish that the statute is *substantially* overbroad.”

¹²⁰ “Although ordinarily ‘[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,’ we have relaxed that requirement in the *First Amendment* context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.”

¹²¹ Specifically, “ ‘fake’ refers to simulations, components of lawful photos spliced together, or those made with adults looking young enough to be mistaken for minors.”

intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.”

The line “between attempt liability and a frustrating mistake” is unclear. “Not all attempts frustrated by mistake should be punishable, and not all mistaken assumptions that expressive material is unprotected should bar liability for attempts to commit a crime. The legitimacy of attempt liability should turn on its consequences for protected expression and the law that protects it.”¹²²

Page 1165: Insert the following after *Ashcroft v. The Free Speech Coalition*

BROWN v. ENTERTAINMENT MERCHANTS ASSN., 131 S. Ct.

2729

(2011). In *Brown*, the Court invalidated a California law prohibiting “the sale or rental of ‘violent video games’ to minors,” and required “their packaging to be labeled ‘18.’ ” The Act covered “games ‘in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted’ in a manner that ‘[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,’ that is ‘patently offensive to prevailing standards in the community as to what is suitable for minors,’ and that ‘causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.’ ” Violators could receive civil fines of up to \$1,000.

Justice Scalia wrote for the Court. Resembling “the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” Such characteristics “confer First Amendment protection.” As such, “‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government.’ ” Even with today’s “ever-advancing technology, ‘the basic principles of freedom of speech . . . do not vary’ when a new and different medium for communication appears.” The “most basic of those principles” is that “ ‘government has no power to restrict expression because of its content’ ” with the exception of a “ ‘few limited areas’ ” such as obscenity, incitement, and fighting words.

United States v. Stevens, 559 U.S. 460 (2010), (supplement, p. 258), held the statute at issue in that case an “impermissible content-based restriction on speech” as there was “no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.” The Court emphasized the necessity of “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.” As in *Stevens*, California “tried to make violent-speech regulation look like obscenity regulation.” Rejecting this position, Justice Scalia

¹²² In support of the statute, “the Government argued that a jury’s appreciation of the mere possibility of simulated or virtual child pornography will prevent convictions for the real thing, by inevitably raising reasonable doubt about whether actual children are shown.” However, “in the 1,209 federal child pornography cases concluded in 2006, 95.1% of defendants were convicted.”

stated that obscenity “does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’ ”

Moreover, “[b]ecause speech about violence is not obscene,” it was “of no consequence that California’s statute mimics the New York Statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*,” (casebook, p. 1157). In *Ginsberg*, since obscenity is not “ ‘protected expression,’ ” the Court upheld the statute “ ‘so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.” ’ ” However, unlike the law at issue in *Ginsberg*, the California Act “wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.” Minors have “a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar” material from being disseminated to them.¹²³ Perhaps, the law “would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence,” but no such tradition exists.

California claimed “video games present special problems because they are ‘interactive,’ in that the player participates in the violent action on screen and determines its outcome.” However, Justice Scalia noted that this “is nothing new” as readers of “choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to.” As Judge Posner observed, “all literature is interactive” and successful literature “ ‘draws the reader into the story.’ ” Therefore, “the argument that video games enable participation in the violent action [is] more a matter of degree than of kind.” While the “degree” of video game violence may be disgusting, “disgust is not a valid basis for restricting expression.”

As the Act restricted “the content of protected speech,” it was invalid unless California could demonstrate that the Act was “justified by a compelling government interest” and “narrowly drawn to serve that interest.” Specifically, California had to “identify an ‘actual problem’ ” and show that the “curtailment of free speech” was “actually necessary to the solution.” However, California could not “show a direct causal link between violent video games and harm to minors.” The state’s research was “ ‘based on correlation, not evidence of causation.’ ” Moreover, the state’s expert admitted that the effects of “violent video games are ‘about the same’ ” as that produced by “exposure to violence on television.” The expert declared that “the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated ‘E.’ ”¹²⁴ Therefore, the Court held that California’s “regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it.”

¹²³ Justice Thomas argues in his dissent that “parents have traditionally had the power to control what their children hear and say. This is true enough, but it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents’ prior consent.*”

¹²⁴ “Justice Breyer would hold that California has satisfied strict scrutiny upon his own research into the issue of harmfulness of violent video games. The vast preponderance of this research is outside the record—and in any event we do not see how it could lead to Justice Breyer’s conclusion, since he admits he cannot say whether the studies on his side are right or wrong.”

The Act was also “underinclusive in another respect.” The California Legislature was “perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK.” Moreover, the Court doubted “that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.” That position would “largely vitiate the rule that ‘only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].’ ”

Finally, the video-game industry already “has in place a voluntary rating system,” which encourages retailers “to rent or sell ‘M’ rated games to minors only with parental consent.” With this system already extant, “[f]illing the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.” Moreover, the Act is “vastly overinclusive” since not all of the children’s’ parents “*care* whether they purchase violent video games.” Instead, the Act is simply enforcing “what the State thinks parents *ought* to want.”

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment. Because of today’s “new and rapidly evolving technology, this Court should proceed with caution.” There is an important distinction between spending “hour upon hour controlling the actions of a character who guns down scores of innocent victims” and “reading a description of violence in a work of literature.” As the Act was “impermissibly vague,” Justice Alito did not “reach the broader First Amendment issues addressed by the Court.”

Miller v. California sets out the current adult obscenity test which requires an obscenity regulation be limited “to specifically defined ‘hard core’ depictions.” In *Miller*, the Court gave as an example “a statute that applies to only ‘[p]latently offensive representations or descriptions of ultimate sexual acts,’ ‘masturbation, excretory functions, and lewd exhibition of the genitals.’ ”

Importantly, “depictions of ‘hard core’ sexual conduct were not a common feature of mainstream entertainment” when *Miller* was decided. In contrast, “[f]or better or worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment.” For the California law’s threshold requirement to resemble the limitation in *Miller*, it would need to target “a narrower class of graphic depictions.” For example, “the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups).” Rather, “the legislature relied on undefined societal or community standards,” and included the “terms ‘deviant’ and ‘morbid’ ” which are not defined in the statute. At the time of *Miller*, “obscenity had long been prohibited,” and “this experience had helped to shape certain generally accepted norms concerning expression related to sex.” However, “[t]here is no similar history regarding expression related to violence.” Finally, the California law drew “no distinction between young children and adolescents.” For all these reasons, Justice Alito found the law unconstitutionally vague.

As to the broader free speech issues, *Stevens* was not controlling. First, unlike the law in *Stevens*, “[t]he California law does not regulate the sale or rental of violent games by adults,” or regulate adults renting or purchasing such games for children. Second, *Stevens* did not apply strict scrutiny but merely “rejected the Government’s contention

that depictions of animal cruelty were categorically outside the range of *any* First Amendment protection.” After today’s decision, “a State may prohibit the sale to minors of what *Ginsberg* described as ‘girlie magazines,’ but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.” Also, “*Stevens* expressly left open the possibility that a more narrowly drawn statute” might be constitutional.

The California law “reinforces parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*.” As in *Ginsberg*, “minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children” with these materials. The “video-game industry’s voluntary rating system” was adopted “in response to the threat of federal regulation, a threat that the Court’s opinion may now be seen as largely eliminating.” Moreover, compliance with the voluntary rating system left “much to be desired.”¹²⁵

The majority also failed to grasp the realism of these games; some *amici* predict that games “ ‘will allow children to “actually feel the splatting blood from the blown-off head” of a victim.’ ” Even in present day games, “[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces.” The victims “cry out in agony and beg for mercy.”¹²⁶

Justice Thomas dissented. The “practices and beliefs of the founding generation establish that” minors can neither speak nor access speech “without going through the minors’ parents or guardians.” The founding generation “widely accepted that children needed close monitoring and carefully planned development.” Sir William Blackstone thought that “parents were responsible for maintaining, protecting, and education their children, and therefore had ‘power’ over their children.”

While “the original public understanding” of the Constitution does not always match “modern sensibilities,” the idea “that parents have authority over their children and that the law can support that authority persists today.” Moreover, “this Court has never held, until today, that ‘the freedom of speech’ includes a right to speak to minors without going through the minors’ parents.” As the law allows a minor to obtain “a violent video game with his parent’s or guardian’s help,” it principally regulates “speech that bypasses a minor’s parent.”

Justice Breyer also dissented. According to *United States v. Stevens*, “a facial challenge to this statute based on the First Amendment can succeed only if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ ” Also, “it is more difficult to mount a facial First Amendment attack on a statute that seeks to regulate activity that involves action as well as speech.” Justice Breyer focused upon the core of the statute where “the State can legitimately apply its statute, namely to sales to minors under the age of 17 (the age cutoff used by the

¹²⁵ “A 2004 Federal Trade Commission Report showed that 69 percent of unaccompanied children ages 13 to 16 were able to buy M- rated games and that 56 percent of 13-year-olds were able to buy an M-rated game.”

¹²⁶ Some games allow players to reenact the “murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American Women. There is a game in which players engage in ‘ethnic cleansing’ and can choose to gun down African-Americans, Latinos, or Jews.”

industry’s own ratings system), of highly realistic violent video games, which a reasonable game maker would know meet the Act’s criteria.”¹²⁷

Upholding the statute would not “create a ‘new categor[y] of unprotected speech,’ ” as the majority suggests. “No one here argues that depictions of violence, even extreme violence, *automatically fall* outside the First Amendment.” The statute in *Stevens* was invalid because it “was overly broad,” but, in this case, “[w]hy are the words ‘kill,’ ‘maim,’ and ‘dismember,’ any more difficult to understand than the word ‘nudity,’ ” as used in the New York statute upheld in *Ginsberg v. New York*? Assuming those descriptions are adequate, “[t]he remainder of California’s definition copies, almost word for word, the language this Court used in *Miller v. California*,” just as the statute at issue in *Ginsberg* did.

As in *Ginsberg*, California advances a “compelling” interest of “both (1) the ‘basic’ parental claim ‘to authority in their own household to direct the rearing of their children,’ and (2) the State’s ‘independent interest in the well-being of its youth.’ ” Nowadays, “5.3 million grade-school-age children of working parents are routinely home alone.” Since video games are used to help soldiers train for missions, it makes sense that “[s]ocial scientists have found ‘causal evidence’ ” that “increased exposure to violent video games causes an increase in aggression” in children. Moreover, “ ‘meta-analyses,’ *i.e.*, studies of all the studies, have concluded that exposure to violent video games ‘was positively associated with aggressive behavior, aggressive cognition, and aggressive affect,’ and that ‘playing violent video games is a *causal* risk factor for long-term harmful outcomes.’ ”

This evidence is sufficient “for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children.” Moreover, there is no “ ‘less restrictive’ alternative to California’s law that would be ‘at least as effective.’ ” The “voluntary system has serious enforcement gaps.” Alternatively, “filtering at the console level”, is inadequate as “any such technological controls” can easily be circumvented. The evidence supports the argument that extreme violence “can prove at least as, if not more, harmful to children as photographs of nudity.”

Page 1165: Insert the following before [2] Procedural Issues in Obscenity Cases

In *United States v. Stevens*, 559 U.S. 460 (2010), the Court invalidated a law prohibiting depictions of animal cruelty as “substantially overbroad.”

The statute criminalizes “only portrayals of such conduct,” not the “underlying acts harmful to animals.” Congressional statute 18 U.S.C. § 48 imposes a penalty of up to five years in prison on “anyone who knowingly ‘creates, sells, or possesses a depiction of animal cruelty’ if done ‘for commercial gain’ in interstate or foreign commerce. A depiction of ‘animal cruelty’ is defined as one ‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,’ if that conduct violates federal or state

¹²⁷ Justice Breyer assumed that the number of sales to 17-year-olds “is comparatively small.”

law.” The statute was aimed at prohibiting “ ‘crush videos,’ ” which depict the “intentional torture and killing of helpless animals.” The underlying actions are usually illegal under animal cruelty laws, but the videos usually conceal participants’ identities.

Writing for the majority, Chief Justice Roberts stated that the First Amendment generally prohibits content-based restrictions of speech. Exceptions to this prohibition include “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” The Government urged that “ ‘depictions of animal cruelty’ ” be added as a new category of unprotected speech. Quoting *Chaplinsky v. New Hampshire*, (casebook, p. 947), these depictions have “ ‘such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ ” The Court rejected this “simple cost-benefit analysis.” For example, *New York v. Ferber*, (casebook, p. 1160), did not rest solely on a “ ‘balance of competing interests,’ ” but instead found that the “advertising and sale of child pornography was ‘an integral part’ of its unlawful production.”

After declining to “carve out” depictions of animal cruelty from First Amendment protection, the Court analyzed defendant’s facial challenge. A typical facial challenge requires that there be “ ‘no set of circumstances’ ” under which an act would be constitutional. Another type of facial challenge, which arises only in free speech cases, invalidates a statute “as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ ” First, a court must “ ‘construe the challenged statute.’ ” This statute was alarmingly overbroad. For example, one area of overbreadth concerned the different laws defining illegality of animal cruelty depictions among the various states. Thus, a depiction of conduct not considered illegal in one state would become criminal if it is later found in a state where the conduct is illegal.

The “exceptions clause” did not save the statute. It exempts “ ‘any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.’ ” Chief Justice Roberts continued: “*Most* of what we say to one another” does not fit within any of these categories, but is nevertheless protected speech. The statute’s “presumptively impermissible applications . . . far outnumber any permissible ones.” The market for constitutionally permissible depictions, like hunting magazines and videos, which are prohibited by § 48, dwarfs the market for impermissible depictions. The Court did not “decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional,” but held only that § 48 is “substantially overbroad.”

Justice Alito dissented. The Court of Appeals incorrectly dismissed defendant’s as applied challenge to the statute. Overbreadth should be “ ‘a last resort.’ ” Even if one reaches the overbreadth challenge, the statute is not overbroad judged in relation to its “ ‘plainly legitimate sweep.’ ” Justice Alito continued: “crush videos and dogfighting videos” comprise a “substantial core of constitutionally permissible applications.”

Chapter XVI

RELIGIOUS FREEDOM

§ 16.03 GOVERNMENT SUPPORT FOR RELIGIOUS PRACTICES

(1) Prayer in Public Schools

Page 1231: Insert the following after Note (2), Santa Fe Independent School District v. Doe

TOWN OF GREECE v. GALLOWAY, 134 S. Ct. 1811 (2014). In *Galloway*, the Court approved the recital of a sectarian prayer before a local city Council meeting. Relying on *Marsh v. Chambers*, casebook p. 1228, Justice Kennedy decided that this did not violate the Establishment Clause. The recently elected town supervisor decided to invite an unpaid “chaplain for the month” to deliver an invocation prior to the monthly town board meetings. Town “leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.” Following complaints that the prayers focus too much on Christian themes, the town invited a Jewish layperson, the chairman of the local Baha’i Temple, and a Wiccan priestess. Plaintiff sought an injunction in federal district court not to end the prayers but to “limit the town to ‘inclusive and ecumenical’ prayers that referred only to a ‘generic God’ and would not associate the government with any one faith or belief.” In granting summary judgment, the District Court noted that the town did not exclude any faiths from giving the prayer. “Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town’s congregations, rather than an official policy or practice of discriminating against minority faiths.”

Marsh v. Chambers “concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.” The first Congress appointed and paid chaplains; “both the House and Senate have maintained the office virtually uninterrupted since that time.” State legislatures have also used this practice for many years. According to *Marsh*, considering “the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.” In the 1850s, both houses of Congress reevaluated and endorsed this practice. *Marsh* holds “that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.” Plaintiff’s argument first was “that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the ‘death, resurrection, and ascension of the

Savior Jesus Christ,’ and the ‘saving sacrifice of Jesus Christ on the cross.’”¹²⁸ They maintained that prayers in the public square may contain only the ““most general, nonsectarian reference to God.”” Second, the town meeting setting pressures even non-believers present to remain and feign participation.

Requiring “nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court’s cases.” One of the Senate’s first chaplains “gave prayers in a series that included the Lord’s Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom’s Prayer, and a prayer seeking ‘the grace of our Lord Jesus Christ,’ ” *Marsh* explicitly states “that the ‘content of the prayer is not of concern to judges,’ provided ‘there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.’” Requiring that prayers be nonsectarian “would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”

Nor may government “mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.” Justice Kennedy also doubted “that consensus might be reached as to what qualifies as generic or nonsectarian.” The impossibility of differentiating sectarian and nonsectarian language is illustrated by the letter that plaintiff’s lawyer sent to the town prior to the litigation. It would allow “references to ‘Father, God, Lord God, and the Almighty’” in public prayer, but not to “‘Jesus Christ, the Holy Spirit, and the Holy Trinity.’” The First Amendment does not seek rules based on their acceptability to the majority; instead, its rights apply to all.

“Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.” Its content is still restricted by where it takes place, that is, at the beginning of the legislative sessions. It is meant to solemnize those occasions as legislatures embark on the difficult and divisive task of governing. “If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.” Without “a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.”

¹²⁸ The prayers also mentioned “‘the workings of the Holy Spirit, the events of Pentecost, and the belief that God ‘has raised up the Lord Jesus’ and ‘will raise us, in our turn, and put us by His side.’””

From the earliest days of the country, we have assumed “that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.” While prayers did invoke “Christ” or “the Holy Spirit,” they also invoke universal themes by, for example, urging town leaders to cooperate.

That the majority of guest chaplains were Christians was understandable in light of the fact that the majority of congregations in the town were Christian. The town did extend a general invitation to ministers and lay persons of all denominations to lead the prayer. It also made an effort to identify and seek out all congregations within its borders. Determining the types and frequency of various religious views being presented would inevitably result in excessive entanglement. The Establishment Clause did not obligate the town leaders to find ministers beyond their borders to achieve religious diversity.

The remainder of Justice Kennedy’s opinion was only joined by the Chief Justice and Justice Alito. The plurality also rejected the argument that council members and those present at the meeting seeking council support felt pressured to participate in the prayer. In sharp contrast to Congress, the council meetings are more intimate with constituents frequently attending. While the First Amendment does not tolerate people being coerced into prayer, no facts suggest coercion in this case. The fact sensitive inquiry focuses on both the setting of the prayer and its audience. The long tradition of prayer at public meetings suggests that the purposes “are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens,” not to proselytize particular religious beliefs. Moreover, the audience for the prayer is the council itself rather than its constituents. Its purpose is “largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers.” For board members, it presents “an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.”

“The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.” The record only suggests a few examples of guest ministers, and not board members, engaging in such behavior. Some citizens did testify that they took offense at the prayers. “Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.”

Nor has there been any “attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.”

The plurality distinguished the case from *Lee v. Weisman*, casebook p. 1228. In the context of the high school graduation at issue in that case, “where school authorities

maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student.” In contrast, those attending the board meeting in this case could come and go as they please without any adverse inference of disrespect toward the prayer. Nor are they “readily susceptible to religious indoctrination or peer pressure.” *Marsh.*”

The prayer acknowledges religious leaders rather than excludes nonbelievers: “since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose.”

Justice Alito concurred, joined by Justice Scalia. Responding to Justice Kagan's dissent accusing “the Court of being blind to the facts of this case,” Justice Alito said that for the first four years, a clerical employee in “the town’s office of constituent services” would randomly call religious leaders to offer the prayer. Eventually, the town relied on a list of ministers who accepted the invitation, and possibly continued to invite others as well. Virtually all of the churches in town were Christian; synagogues were not on the list because they lay outside the town's borders. When complaints came to light that the town was not being sufficiently inclusive, it immediately invited interested residents from other denominations, including nonbelievers, to do the invocation; indeed, the town has never refused such a request to offer an invocation. Recently, many non-Christian denominations have been represented.

The essential argument of the principal dissent was that there were two ways to avoid these problems. First, there could have been a nonsectarian prayer of the kind commonly offered to a religiously diverse audience. Congress urges that its prayers be fashioned to accommodate the different faiths of its members. From a policy perspective, “this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice.” As the majority notes, sectarian prayer has been part of our tradition from the first Congress. Non-Christian congressional chaplains have also followed this practice.¹²⁹

Moreover, as the nation has grown more diverse, such generic prayers are more and more difficult to fashion. What must the town do to police compliance with a nonsectarian prayer requirement? “Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be

¹²⁹ “For example, when a rabbi first delivered a prayer at a session of the House of Representatives in 1860, he appeared ‘in full rabbinic dress, “piously bedecked in a white tallit and a large velvet skullcap,” and his prayer ‘invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew.’ See Brief for Nathan Lewin as Amicus Curiae 9. Many other rabbis have given distinctively Jewish prayers, and distinctively Islamic, Buddhist, and Hindu prayers have also been delivered.”

corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?"

To avoid this problem, the dissent offers a second alternative of inviting chaplains from different religious faiths each month. If this is a viable alternative, then the dissent's real problem is with the process followed by the town's clerical employees "in compiling the list of potential guest chaplains." Requiring such "demographic exactitude" of small and medium municipalities would effectively create a "religion free zone." Many municipalities stressed the legal bills that mistakes deviating from such exactitude might entail. Puzzled by the Court's complex establishment jurisprudence, many municipalities already elect this course.

However, the rhetoric of the principal dissent sweeps far more broadly than this small modification. Before this kind of legislative session, the principal dissent would ban "any prayer that is not acceptable to all in attendance." As this kind of prayer was quite typical in local government meetings, the inevitable effect of the dissent's logic would be to ban prayers for local legislative bodies fairly generally while permitting them for state and national bodies. There is no sound basis for this distinction.

Justice Alito also was dubious about the dissent's characterization of the prayer at issue in *Marsh* as being a sheer formality for the largely uninterested Nebraska Legislature. Legislative prayer goes back to the Continental Congress and was immediately adopted by the first House and Senate. Finally, Justice Alito dismissed the various slippery slope arguments made by the dissent stating that this case was only about whether the legislative prayer permitted in *Marsh* for Congress and state legislatures could be extended to local legislative bodies.

Justice Thomas wrote an opinion concurring in part and concurring in the judgment. As he had stated before, Justice Thomas viewed the Establishment Clause "as a federalism provision. " As the Clause has not been incorporated against the states, it had no applicability to the municipality in this case. To start with, "the Clause probably prohibits Congress from establishing a national religion." It "also suggests that Congress 'could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause,'" as the Establishment Clause tracked the language of the Necessary and Proper Clause. Moreover in 1789, six states had established churches and New England states such as Massachusetts, Connecticut, and New Hampshire allowed local governments to choose their minister and denomination. Three southern states allowed taxation for Christian religion; another, for Protestant religions. Even states founded by religious dissenters imposed religious tests for office. So at the time of the framing of the First Amendment the decision of whether to establish religion was left to the states. As the Establishment Clause protected the state's power to establish a religion, incorporating it against the states would invert its original meaning.¹³⁰ While some evidence exists that establishment had become an individual rather than a states

¹³⁰ Justice Thomas reviewed how abruptly and without any reasoning, the Supreme Court and incorporated the Establishment Clause against the states in *Everson v. Board of Ed. of Ewing*, casebook p. 1176.

right by the time of the framing of the Fourteenth Amendment, the burden should be on those who wish to radically change the meaning of the Establishment Clause.

Justice Scalia joined the following portion of Justice Thomas's concurrence. The coercion around which establishment revolved "was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*" Even if establishment were viewed as an individual right by the time of the framing of the Fourteenth Amendment, "there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the 'reasonable observer' feels 'subtle pressure,' or perceives governmental 'endors[ement].'" Neither offensiveness nor peer pressure comprise the actual legal coercion necessary to violate the Clause.

Dissenting, Justice Breyer agreed with the Court of Appeals, which "merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so." In this fact sensitive inquiry, several factors are relevant. First, the Town is primarily, but not exclusively, Christian. "Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the Town's Christian prayer practice and nearly a decade after that practice had commenced." Second, the Chamber of Commerce list of churches from which the Town compiled its invitations did not mention the Buddhist temple or the Jewish synagogues located just outside of Town. Third, as the prayers all reflected a single denomination until 2008, the Town's lack of effort to publicize its policy that anyone could give the invocation demonstrates a lack of effort to be inclusive. "Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations." Fifth, while government should neither write nor critique prayers, the Constitution does not "forbid efforts to explain to those who give the prayers the nature of the occasion and the audience."

"The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the 'political division along religious lines' that 'was one of the principal evils against which the First Amendment was intended to protect.'" Applying "my legal judgment to the relevant facts, I conclude, like Justice Kagan, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith."

Justice Kagan dissented, joined by Justices Ginsburg, Breyer and Sotomayor. "For centuries now, people have come to this country from every corner of the world" to share religious freedom. "A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government." Her "norm of religious equality" does not translate here into a bright separationist line. To the contrary, she agrees with *Marsh* and thinks "that pluralism and inclusion in a town hall can satisfy the constitutional requirement of

neutrality.” Nevertheless, she distinguished *Marsh* “because Greece’s town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to” non-Christians.

“The clearest command of the Establishment Clause,” this Court has held, “is that one religious denomination cannot be officially preferred over another.’ *Larson v. Valente*, casebook p. 1190. Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion.” But the Town is pursuing “religious favoritism anathema to the First Amendment.”¹³¹ Whether “(a) person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?”

The majority is correct that *Marsh* affords legislative prayer “a distinctive constitutional warrant by virtue of tradition.” Consequently, the majority is right “that the issue here is ‘whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.’” “The prayers given in Greece, addressed directly to the Town’s citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.”

The prayers sessions in *Marsh* differs sharply from the one in the instant case. In Nebraska, it takes place early in the morning when few senators may be present and a few members of the general public may be watching from the upstairs gallery. The prayer itself contains no allusions to Christ; those were eliminated when one Jewish senator complained.¹³² It is directed only at the legislative members. In contrast, the prayer at the

¹³¹ In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. See Brief for Paul Finkelman et al. as Amici Curiae 15-19 (noting, for example, that in revising his first inaugural address, Washington deleted the phrase “the blessed Religion revealed in the word of God” because it was understood to denote only Christianity). Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia’s Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order “to comprehend, within the mantle of [the law’s] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.” 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, “if not strictly guarded,” express only “the creed of the majority and a single sect.” Madison’s “Detached Memoranda,” 3 Wm. & Mary Quarterly 534, 561 (1946).

¹³² A typical prayer submitted in Nebraska’s chaplains amicus brief supporting the town reads:

“O God, who has given all persons talents and varying capacities, Thou dost only require of us

meeting for Greece Township begins the session in which the entire council is present as well as perhaps 10 members of the public, some of whom were there to explicitly petition the Township. It has allusions to Christ and those present are not told that they need not participate.¹³³

There are many differences. “First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose.” The general public are active participants in the town council meetings petitioning the council frequently for something they want. Second, “the prayers in these two settings have different audiences.” In *Marsh*, the senators emphasized that the prayer was only directed at them. In sharp contrast, the guest chaplain for Greece faces the public with his back to the council. “He almost always begins with some version of ‘Let us all pray together.’ Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him.” He uses words like “we” and “our,” suggestive of public participation. “In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

“And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as ‘in the Judeo-Christian tradition,’ with all allusions to Christianity having been removed. And as the majority acknowledges, *Marsh* hinged on there being no attempt to proselytize a particular religion. In this case, all the prayers were Christian until the time that litigation loomed. “About two-thirds of the prayers given over this decade or so invoked ‘Jesus,’ ‘Christ,’ ‘Your Son,’ or ‘the Holy Spirit’; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture.” Moreover, “few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session.” As the majority acknowledges, when the plaintiffs began to raise objections, one chaplain said that they comprised a minority “‘ignorant of the history of our country.’”

Marsh is inapposite. “None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion’s beliefs, at a participatory public proceeding, having both legislative and adjudicative components.” Government is obliged to “ensure that its participatory

that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State.”

¹³³ A Town prayer read:

“The beauties of spring . . . are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so . . . [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets.”*Ibid.* After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says ‘Amen.’”

processes will not classify those citizens by faith, or make relevant their religious differences.” Imagine a Muslim woman about to petition for a traffic light near her home. Should she participate in the prayer out of politeness when she is first to appear before the board or should she overtly refuse to acknowledge the divinity of Christ out of respect for her own religious beliefs?

“If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.” Such invocations are given “all the time; there is no great mystery to the project.” Alternatively, the board “might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does.” The majority’s suggestion that it already does this is counterfactual.

Justice Kagan expressed two key differences with the majority. “First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece’s town hall, along with its capacity to exclude and divide.”

The majority glides over factual differences, such as, the difference between a legislative session and a town hall meeting; the audience’s being the public rather than legislature; and the sectarian content the prayers. It also minimizes the fact that chaplains for a long time were all Christian and were not cautioned to make the prayer inclusive.

The majority also understates the “significance of these religious differences, and so fears too little the ‘religiously based divisiveness that the Establishment Clause seeks to avoid.’”¹³⁴ When American citizens “approach their government, they do so only as Americans, not as members of one faith or another.”

[2] Religious Displays

Page 1262: Insert the following before [3] Moment of Silence

SALAZAR v. BUONO, 559 U.S. 700 (2010). (April 28, 2010). In *Salazar*, the Court overturned an injunction that barred a congressional statute that transferred federal land displaying a Latin cross war memorial to a private party. Congress had enacted the statute following an initial injunction under the *Establishment Clause* against the government permitting the display of the privately-erected cross on federal land.

The Latin cross was erected by private citizens in 1934 on a “rock outcropping in a remote section of the Mojave Desert,” on federal land, for the “purpose and intent to honor American soldiers who fell in World War I.”¹³⁵ Frank Buono challenged the

¹³⁴ In 1790, George Washington traveled to one of the first Jewish communities in Newport, Rhode Island, expressing disdain for classes of Americans based on their religious beliefs.

¹³⁵ “The original cross deteriorated” and has since been reconstructed at the same place on federal land.

display under the *Establishment Clause*, claiming to be “offended by the presence of a religious symbol on federal land.” Buono “is a retired Park Service employee who makes regular visits to the Preserve.”

On Buono’s initial claim, regarding the cross display on federal land, the District Court in 2002 granted an injunction which “permanently forbade the Government ‘from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.’ ”

Before Buono filed suit, Congress had passed an appropriations bill including “a provision forbidding the use of governmental funds to remove the cross.” Subsequently, while Buono’s suit “was pending before the District Court, Congress designated the cross and its adjoining land ‘as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.’ ” After the District Court enjoined the display of the cross, “Congress again prohibited the spending of governmental funds to remove the cross.”

In 2004, while the government’s appeal of the injunction was pending,¹³⁶ Congress passed the Defense Appropriations Act of 2004, “directing the Secretary of the Interior to transfer to the VFW (Veterans of Foreign Wars) the Government’s interest in the land that had been designated a national memorial. In exchange, the Government was to receive land elsewhere in the preserve” from two private citizens. Upon plaintiff’s subsequent litigation (Buono III), the District Court “permanently enjoined the Government from implementing” the land-transfer statute. The Court of Appeals affirmed.

Justice Kennedy wrote for a plurality, joined by Chief Justice Roberts and in part by Justice Alito. Justice Kennedy set aside the injunction against the land-transfer statute,¹³⁷ as the statute represented a change in circumstances.¹³⁸ “By dismissing Congress’ motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. Placement of the cross

¹³⁶ The Court of Appeals affirmed the judgment of the District Court, “both as to standing and on the merits of Buono’s *Establishment Clause* challenge.”

¹³⁷ The plurality refused to dismiss plaintiff’s claims for lack of standing. “Whatever the validity of the objection to Buono’s standing, that argument is not available to the Government at this stage of the litigation. When Buono moved the District Court in *Buono I* for an injunction requiring the removal of the cross, the Government raised the same standing objections it proffers now. Rejecting the Government’s position, the District Court entered a judgment in Buono’s favor, which the Court of Appeals affirmed in *Buono II*. The Government did not seek review in this Court. The judgment became final and unreviewable upon the expiration of the 90-day deadline for filing” a certiorari petition.

¹³⁸ Instead the District Court deemed Congress’s “intent illegitimate,” concluding “that nothing of moment had changed.”

on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.

"Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness." Furthermore, there appears to be "no other national memorial honoring American soldiers -- more than 300,000 of them -- who were killed or wounded in World War I."

Justice Kennedy explained: "In belittling the Government's efforts as an attempt to 'evade' the injunction, the District Court had things backwards. Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations." He continued: "Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution. The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged under the *Establishment Clause*, has complex meaning beyond the expression of religious views."

When "legislative action" has undercut the basis for an injunction, a court must examine "whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate."

Justice Kennedy also argued: "Although, for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable. The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework."

Even assuming the initial injunction was proper, it "was issued to address the impression conveyed by the cross on federal, not private, land." Generally, "courts considering *Establishment Clause* challenges do not inquire into 'reasonable observer' perceptions with respect to objects on private land. Even if, however, this standard were the appropriate one," it "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." Improperly applying that test, the District Court "did not attempt to reassess the findings in *Buono I* in light of the policy of accommodation that Congress had embraced. Rather, the District Court concentrated solely on the religious aspects of the cross, divorced from its background and context." In this case, "one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

"Respect for a coordinate branch of Government forbids striking down an Act of

Congress except upon a clear showing of unconstitutionality.” Even assuming, “contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier finding of religious endorsement, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the land-transfer statute. For instance, if there is to be a conveyance, the question might arise regarding the necessity of further action, such as signs to indicate the VFW’s ownership of the land.” The plurality’s mentioning potential “specific remedies, however, is not an indication of agreement about the continued necessity for injunctive relief.”

Considering “the finding of unconstitutionality in *Buono I*, and the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance. On remand, if *Buono* continues to challenge implementation of the statute, the District Court should conduct a proper inquiry as described above.”

Chief Justice Roberts concurred with the plurality in full. “At oral argument, respondent’s counsel stated that it ‘likely would be consistent with the injunction’ for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do -- sell the land with the cross on it.”

Justice Alito concurred in part and concurred in the judgment. He differed with Justice Kennedy’s opinion only insofar as he would not remand the case to the District Court. Instead, the facts are sufficiently clear to allow the statute to be implemented. “If Congress had done nothing, the Government would have been required to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.”

A “‘land exchange’ ” is a common mechanism. A “well-informed observer would appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns.”¹³⁹ He “reject[ed] Justice Stevens’ suggestion that the enactment of the land-transfer law was motivated” by a religious purpose. “Congress’ consistent goal, in legislating with regard to the Sunrise Rock monument, has been to commemorate our Nation’s war dead.”

Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Scalia disagreed with the plurality’s reaching the merits but instead would find that *Buono* lacked standing. Had *Buono* “sought only to compel compliance with the existing order, Article III would not stand in his way.” However, the District Court’s order “is not

¹³⁹ A “hypothetical reasonable observer” in this case “would be familiar with the origin and history of the monument and would also know both that the land on which the monument is located is privately owned and that the new owner is under no obligation to preserve the monument’s present design.” It is also noteworthy that “Congress, in which our country’s religious diversity is well represented, passed this law by overwhelming majorities: 95-0 in the Senate and 407-15 in the House.”

enforcement of the original injunction but expansion of it.”¹⁴⁰ Buono could not establish a concrete injury necessary for standing, because although “the VFW asserted in an *amicus* brief that it ‘intends to maintain and preserve the Veterans Memorial,’ ” its “stated intentions do not prove that the cross will stay put.” Moreover, Buono’s “amended complaint {and myriad other statements made during this litigation} averred that ‘he is deeply offended by the display of a Latin Cross on government-owned property’ but ‘has no objection to Christian symbols on private property.’ ”

Justice Stevens dissented, joined by Justices Ginsburg and Sotomayor. Justice Stevens concluded that “the District Court was right to enforce its prior judgment by enjoining Congress’ proposed remedy -- a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.”

As the government did not petition for *certiorari*, it is the law of this case “that ‘the Sunrise Rock cross will project a message of government endorsement [of religion] to a reasonable observer,’ and that the District Court’s remedy for that endorsement was proper.” The District Court simply found that the land-exchange statute violated its “‘permanent injunction’ and did not ‘actually cur[e] the continuing *Establishment Clause* violation.’ The District Court therefore enforced its 2002 judgment by enjoining the transfer, without considering whether ‘the land transfer itself is an independent violation of the *Establishment Clause*.’ ”

With regard to changed circumstances, “it is axiomatic that when a party seeks to enforce or modify an injunction, the only circumstances that matter are *changed* circumstances.” No circumstances had changed to cure the *Establishment Clause* violation, for the transfer statute “was designed specifically to foster the display of the cross. Regardless of why the Government wanted to ‘accommodat[e]’ the interests associated with its display, it was not only foreseeable but also intended that the cross would remain standing. Indeed, so far as the record indicates, the Government had no other purpose for turning over this land to private hands.”

The land transfer “does not end government endorsement of the cross for two independently sufficient reasons. First, after the transfer it would continue to appear to any reasonable observer that the Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land. This is particularly true because the Government has designated the cross as a national memorial.” The second reason is that “the transfer continues the existing government endorsement of the cross because the purpose of the transfer is to preserve its display.”

Following the land transfer, a reasonable observer would still think that government is endorsing a sectarian message. “Congress transferred it to a specific purchaser in order to preserve its display in the same location, and the Government maintained a reversionary interest in the land.” Moreover, “Congress passed legislation

¹⁴⁰ The “law-of-the-case doctrine” does not bar inquiry into standing here, for the Ninth Circuit Court of Appeals “addressed only Buono’s standing to seek the original injunction barring the display of the cross on public land. It had no occasion to address his standing to seek an expansion of the injunction to bar a transfer enabling the cross’s display on private property.”

prohibiting the use of any federal funds to remove the cross from its location on federal property.” Lastly, “Congress passed legislation officially designating the ‘five-foot-tall white cross’ in the Mojave Desert ‘as a national memorial’ ” commemorating World War I. Designating “a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.” Justice Stevens continued: “Context is critical to the *Establishment Clause* inquiry and not every use of a religious symbol in a war memorial would indicate government endorsement of a religious message.” In this case, the “cross is not merely one part of a more elaborate monument that, taken as a whole, may be understood to convey a primarily nonreligious message. Rather, the cross is the only symbol conveying any message at all.”

Government cannot simply “endorse the cross.” By “arguing that Congress can legitimately favor the cross because of its purported double meaning, the plurality implicitly tries to reopen what is closed.” A cross does sometimes represent “the sacrifice of an individual, as when it marks the grave of a fallen soldier or recognizes a state trooper who perished in the line of duty. Even then, the cross carries a religious meaning. But the use of the cross in such circumstances is linked to, and shows respects for, the individual honoree’s faith and beliefs.” The land exchange “would not cure the *Establishment Clause* violation because the very purpose of the transfer was to preserve the display of the cross.” This “purpose continues the impermissible endorsement of -- indeed, favoritism toward -- the cross, regardless of *why* Congress chose to intervene as it did.”¹⁴¹ An adjudicated *Establishment Clause* violation demands “a complete remedy.” Determining the proper remedy is “a legal judgment.”¹⁴²

Justice Breyer also dissented, arguing that “we need not address any significant issue of *Establishment Clause* law.” Under the law of injunctions, a district court has “considerable leeway to interpret the meaning and application of its own injunctive order.” Moreover, “a court should construe the scope of an injunction in light of its purpose and history, in other words, ‘what the decree was really designed to accomplish.’ ” At bottom, “the District Court’s decision that the land transfer violated the injunction as written and intended was not an abuse of discretion.”

§ 16.05 Free Exercise of Religion

Pg. 1295: Insert the following after Employment Division, Department of Human Resources of Oregon v. Smith

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL v. EEOC, 132 S. Ct. 694 (2012). In *Hosanna-Tabor*, the Court held that, under both the Establishment Clause and Free Exercise Clause, the ministerial exception to employment discrimination actions bars a “ ‘called’ ” teacher’s suit for wrongful

¹⁴¹ “Neither the Korean War Memorial, the Vietnam War Memorial, nor the World War II Memorial commemorates our veterans’ sacrifice in sectarian or predominantly religious ways.”

¹⁴² Moreover, “the inference that Congress has exercised its institutional competence -- or even its considered judgment -- is significantly weaker in a case such as this, when the legislative action was ‘buried in a defense appropriations bill.’ ”

termination. Hosanna-Tabor Evangelical Lutheran Church and School employs both “ ‘called’ ” and “ ‘lay’ ” teachers, and both groups have “generally performed the same duties.” However, lay teachers are only hired if called teachers are unavailable to fill open positions. Called teacher Cheryl Perich was diagnosed with narcolepsy, exhibiting symptoms such as “deep sleeps from which she could not be roused,” and consequently “began the 2004-05 school year on disability leave.” When Perich attempted to return to work in January, the school principal “responded that the school had already contracted with a lay teacher to fill Perich’s position for the remainder of the school year.” The principal also stated “that Perich was not yet ready to return to the classroom.” When the principal asked Perich to leave the school premises, “she would not do so until she obtained written documentation that she had reported to work.” That evening, the principal informed Perich by phone that she would be fired, and Perich responded by informing the principal that she had spoken with an attorney and “intended to assert her legal rights.” The day after the congregation voted to rescind Perich’s call, she was formally fired in a letter that cited her “ ‘insubordination and disruptive behavior’ ” and the injury she had done to her “ ‘working relationship’ ” by “ ‘threatening to take legal action.’ ”

Subsequently, “the EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file” a lawsuit under the Americans with Disabilities Act (ADA). Hosanna-Tabor responded that Perich was a minister and had been fired for a “religious reason,” specifically for failing to follow the Missouri Synod’s teaching that “Christians should resolve their disputes internally.” The Sixth Circuit disagreed with the Church, refusing to classify Perich as a minister because “her duties as a called teacher were identical to her duties as a lay teacher.”

In a unanimous decision, the Supreme Court reversed the Sixth Circuit. Chief Justice Roberts stated that “there can be ‘internal tension . . . between the *Establishment Clause* and the *Free Exercise Clause*.’ Not so here. Both *Religion Clauses* bar the government from interfering with the decision of a religious group to fire one of its ministers.” Supreme Court precedent prohibits the government from contradicting “a church’s determination of who can act as its ministers.” Rather, “[t]he *First Amendment* ‘permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government’ ” and to adjudicate ensuing disputes. “When ecclesiastical tribunals decide such disputes,” civil courts must “accept their decisions as binding upon them.” Indeed, a civil court cannot even review religious decisions for compliance with the church’s own procedures. Such review intrudes into “ ‘quintessentially religious controversies whose resolution the *First Amendment* commits exclusively to the highest ecclesiastical tribunals’ ” of that church.

The Court for the first time recognized the “ministerial exception” and held that it had been violated. “By imposing an unwanted minister, the state infringes the *Free Exercise Clause*, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the *Establishment Clause*, which prohibits government involvement in such ecclesiastical decisions.”

Chief Justice Roberts distinguished *Hosanna-Tabor* from *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), as the ADA’s prohibition on retaliation was a “valid and neutral law of general applicability.”

However, the regulation here did not involve “outward physical acts,” as in *Smith* (specifically, religious ingestion of peyote), but instead government interference with the “mission of the church itself.”

The Chief Justice was “reluctant” to “adopt a rigid formula for deciding when an employee qualifies as a minister.” Under “all the circumstances of her employment,” Perich was a minister. “To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a ‘diploma of vocation’ according to her the title ‘Minister of Religion, Commissioned.’ ” Her title as a minister “reflected a significant degree of religious training,” including “eight college-level courses” and an “oral examination.” Ultimately, “it took Perich six years to fulfill these requirements.” Her formal commission as a minister required “election by the congregation, which recognized God’s call to her.” Even after “her termination Perich again indicated that she regarded herself as a minister.” Finally, at work, Hosanna-Tabor had “expressly charged her with ‘lead[ing] others toward Christian maturity’ and ‘teach[ing] faithfully the Word of God, the Sacred Scriptures.’ ” Considering the “formal title” bestowed by the Church, the “substance reflected in that title, her own use of that title, and the important religious functions she performed,” the Court ruled that Perich was covered by the ministerial exception.

“Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant.” Moreover, the fact that lay teachers performed the same functions as called teachers was not “dispositive.” Instead, this similarity of duties should only have been considered “relevant,” especially as Hosanna-Tabor only hired lay teachers when “commissioned ministers were unavailable.”

The Court refused to inquire whether the reason for firing Perich was pretextual: “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”

The Court rejected the plaintiffs’ assertions that the ministerial exception “could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial.” The holding only applied the ministerial exception to employment discrimination suits involving termination. The Court expressed “no view” regarding whether a ministerial exception barred other types of suits against religious employers, such as contract or tort cases.

In a concurring opinion, Justice Thomas wrote that “the evidence demonstrat[ing] that Hosanna-Tabor sincerely considered Perich a minister” was sufficient to engage the ministerial exception.

Justices Alito and Kagan also concurred. Highlighting the diversity of religions represented within the United States, Justice Alito urged courts to “focus on the function performed by persons who work for religious bodies” more than the title of minister or formal ordination status. In Justice Alito’s view, the ministerial exception “should apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”

Religious bodies are “the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.” Perich functioned as a minister: she taught religion four days a week, took students to chapel, led prayer and devotional services in class, and planned and led school chapel services, “choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.” A “pretext inquiry” would infringe on “religious autonomy.” What is important “is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution.”

Page 1301: Insert the Following after CUTTER v. WILKINSON

Prison beards. In *Holt v. Hobbs*, 135 S. Ct. 853 (2015), Justice Scalia invalidated a prison ban on inmates wearing a beard for religious reasons for violating the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). After the Court’s decision in *Oregon v. Smith*, (casebook p. 1289), Congress enacted the Religious Freedom Restoration Act (RFRA) which requires that a substantial burden on religious liberty be the least restrictive means of effectuating a compelling state interest. After *City of Boerne v. Flores*, (casebook p. 1296), Congress enacted RLUIPA. Section 2 governs land use regulation, and Section 3 governs prisoners. Its protections mirror those of RFRA. Signaling its broad protection, RLUIPA states that a “religious exercise” encompasses “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” Congress charged that this idea “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” RLUIPA “may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”

Holt is a prisoner. He objects to the prison’s prohibition of facial hair except a neatly trimmed mustache unless there are medical, dermatological reasons to maintain a 1/4 inch beard. The prisoner has shown that his objection to the grooming policy is based on a sincerely held religious belief. Holt has also carried his burden of showing that the policies substantially burdens that belief. It forces him to choose between ignoring his religious beliefs and facing severe disciplinary action in the prison. That the Arkansas Department of Corrections provides him with a prayer book and rug is irrelevant, as these do not address the prohibition on being able to grow a 1/2 inch beard. Justice Scalia also rejected the claim that the burden on religious liberty was small because “his religion would ‘credit’ him for attempting to follow his religious beliefs.” Moreover, the District Court erred in relying on Holt’s testimony that not every Muslim believed he had to grow a beard. First, growing beards was hardly “idiosyncratic” in the Muslim faith. Second, neither RLUIPA nor the Free Exercise Clause is limited to protecting beliefs shared by all members of a particular faith.

Once Holt showed that the policy substantially burdens a sincerely held religious belief, the burden shifted to the Department to demonstrate that the prohibition was the least restrictive means of advancing a compelling state interest to trump the burden on free exercise. The Court rejected the proffered government interest in prohibiting beards to prevent hiding contraband. The Department offers no reason why 1/4 inch beards can be searched and 1/2 inch beards cannot. The Department offers an interest in quick and reliable identification of prisoners and preventing disguises. To avert this problem, the Department could institute a policy of dual photographing each prisoner – shaven and unshaven – as other states have done. The prison

contends that two photographs help with escapees but not with quick identification for guards of prisoners who have quickly shaven. “The Department contends that the identification concern is particularly acute at petitioner’s prison, where inmates live in barracks and work in fields.” The Court was unpersuaded that this prison was so different from others that the dual photograph solution would not work. Moreover, the Department failed to establish that the risk of disguise with a 1/2 inch beard is so great “even though prisoners are allowed to grow mustaches, head hair, or 1/4-inch beards for medical reasons.”

In addition, the grooming policy is underinclusive in permitting 1/4 inch beards for medical reasons and hair length longer than 1/2-inch. “Hair on the head is a more plausible place to hide contraband than a 1/2-inch beard — and the same is true of an inmate’s clothing and shoes.” The corrections department argues that few inmates request beards for medical reasons while many may request one for religious reasons. However, “the Department has not argued that denying petitioner an exemption is necessary to further a compelling interest in cost control or program administration.” This is a classic bureaucratic argument of having to make exceptions for many people if an exception is made for one.

The Department also fails to show why it needs to prohibit 1/2 inch beards when the federal government and the vast majority of states permit them. That so many other prisons permit them suggests that less restrictive means exist to satisfy the Department security concerns. Justice Scalia was not suggesting that a few jurisdictions permitting a religious practice requires all others to follow suit. But the widespread prevalence of this exemption requires the prison to give “persuasive reasons” for denying it.

While RLUIPA protects religious exercise, it also maintains prison security. First, in assessing exemptions for religious practices, courts should take into account the prison setting. “Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, “prison officials may appropriately question” the authenticity of the prisoner’s asserted religiosity. Third, even an exemption for a sincere belief can be withdrawn “if the claimant abuses the exemption in a manner that undermines the prison’s compelling interests.”

Justice Ginsburg concurred, joined by Justice Sotomayor. “I do not understand the Court’s opinion to preclude deferring to prison officials’ reasoning when that deference is due — that is, when prison officials offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them.” In this case, “the Department’s failure to demonstrate why the less restrictive policies petitioner identified in the course of the litigation were insufficient to achieve its compelling interests—not the Court’s independent judgment concerning the merit of these alternative approaches—is ultimately fatal to the Department’s position.” Justice Ginsburg said that “‘least restrictive means’ is, by definition, a relative term.” While the term requires comparison, prison officials do not have to “refute” every conceivable alternative. Nor does it require they demonstrate that officials considered every alternative at a particular point in time.

Page 1301: Insert the Following after the Note on Controlled Substances

**BURWELL v. HOBBY LOBBY STORES, INC. AND CONESTOGA WOOD
SPECIALTIES CORPORATION v. BURWELL**

134 S. Ct. 2751 (2014)

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners. We hold that the regulations that impose this obligation violate RFRA. . . .

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion. . . . The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners . . . do not comply, they will pay . . . as much as \$1.3 million per day. . . in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. . . . [I]t must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. . . .

. . . We . . . conclude that this system constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty. . . .

. . . [O]ur holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages . . . on others” or that require “the general public [to] pick up the tab.” And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.” . . .

[T]hese women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

A

Congress enacted RFRA . . . three years after this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause . . . , those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. . . .

In *Smith*, however, the Court rejected “the balancing test set forth in *Sherbert*.” . . .

. . . The Court . . . held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”

Congress responded to *Smith* by enacting RFRA. “[L]aws [that are] ‘neutral’ toward religion,” Congress found, “may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. §2000bb(a)(2). . . . If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” §2000bb-1(b).

. . . [I]n attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. In *City of Boerne*, however, we held that Congress had overstepped its Section 5 authority because “[t]he stringent test RFRA demands” “far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.” [*City of Boerne v. Flores*, 521 U.S. 507, 533-534 (1997)].

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc et seq. . . . RLUIPA amended RFRA’s definition of the “exercise of religion.” See §2000bb-2(4) (importing RLUIPA definition). . . . In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000cc-5(7)(A). And Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA). . . .

Unless an exception applies, ACA requires an employer’s group health plan or group-health-insurance coverage to furnish “preventive care and screenings” for women without “any cost sharing requirements.” . . .

. . . [T]he HRSA promulgated the Women’s Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide “coverage, without cost sharing” for “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling.” 77 Fed. Reg. 8725. Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for “religious employers.” That category encompasses “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively religious activities of any religious order.” . . .

In addition, HHS has effectively exempted . . . a nonprofit organization that “holds itself out as a religious organization” and “opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections.” . . . When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer’s plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.

In addition to these exemptions for religious organizations, . . . [e]mployers providing “grandfathered health plans”—those that existed prior to March 23, 2010, . . . need not comply with many of the Act’s requirements, including the contraceptive mandate. . . .

. . . Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that “[t]he fetus in its earliest stages . . . shares humanity with those who conceived it.”

. . . Conestoga Wood Specialties. . . now has 950 employees. . . The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. . . .

. . . The company’s “Vision and Values Statements” affirms that Conestoga endeavors to “ensur[e] a reasonable profit in [a] manner that reflects [the Hahns’] Christian heritage.”

As explained in Conestoga’s board-adopted “Statement on the Sanctity of Human Life,” the Hahns believe that “human life begins at conception.” It is therefore “against [their] moral conviction to be involved in the termination of human life” after conception, which they believe is a “sin against God to which they are held accountable.” The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA’s contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception commonly called “morning after” pills and two types of intrauterine devices.

. . . The District Court denied a preliminary injunction, see 917 F. Supp. 2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that “for-profit, secular corporations cannot engage in religious exercise” within the meaning of RFRA or the First Amendment. 724 F. 3d, at 381. . . .

B

. . . David Green started an arts-and-crafts store Hobby Lobby . . . has more than 13,000 employees. . . .

One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. . . .

. . . [T]hey remain closely held, and David, Barbara, and their children retain exclusive control of both companies. . . .

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” . . . Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.”

Like the Hahns, the Greens believe that life begins at conception. . . . They specifically object to the same four contraceptive methods . . . and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. . . .

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. The District Court denied a preliminary injunction, see 870 F. Supp. 2d 1278 (WD Okla. 2012). . . .The Tenth Circuit . . . reversed in a divided opinion. . . .

III

A

. . .The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations. . . .

. . . [I]n *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion). . . . , five Orthodox Jewish merchants . . . challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits). . . .

. . . By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. . . .

B

1

. . . RFRA applies to “a person’s” exercise of religion, and RFRA itself does not define the term “person.” We therefore look to the Dictionary Act, which we must consult “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.” 1 U.S.C. §1.

Under the Dictionary Act, “the wor[d] ‘person’ . . . include[s] corporations”

. . . We have entertained RFRA and free-exercise claims brought by nonprofit corporations, . . . and HHS concedes that a nonprofit corporation can be a “person” within the meaning of RFRA.

. . . [N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. . . .

2

The principal argument advanced by HHS and the principal dissent . . . focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. . . .

. . . The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy . . . often furthers individual religious freedom as well.” But this principle applies equally to for-profit corporations. . . . [F]or example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, . . . the Court never even hinted that this objective precluded their claims. . . . Thus, a law that “operates so as to make the practice of . . . religious beliefs more expensive” in the context of business activities imposes a burden on the exercise of religion. *Braunfeld, supra*, at 605. . . .

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t Hobby Lobby, Conestoga, and Mardel . . . ?

. . . While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else. . . . So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well. . . .

3

HHS and the principal dissent . . . argue[] that RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, . . . RFRA as originally enacted . . . defined the “exercise of religion” to mean “the exercise of religion under the First Amendment”—not the exercise of religion as recognized only by then-existing Supreme Court precedents. . . .

Second, . . . the amendment of RFRA through RLUIPA . . . deleted the prior reference to the First Amendment, and neither HHS nor the principal dissent can explain

why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” . . .

Third, . . . [i]n *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked “standing” to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument. . . .

. . . [B]oth HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. . . . If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere “beliefs” of a corporation. HHS goes so far as to raise the specter of “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.”

. . . HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, . . . [t]he companies . . . before us are closely held corporations, . . . and no one has disputed the sincerity of their religious beliefs. . . .

. . . The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. . . . State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. . . .

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. 42 U.S.C. §2000bb-1(a). We have little trouble concluding that it does.

A

As we have noted, the Hahns and Greens object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. . . .

. . . If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. 26 U.S.C. §4980D. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, . . . [t]he companies could face penalties of \$2,000 per employee each year. §4980H. These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel. . . .

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument . . . addresses a . . . question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). . . . Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. . . . [W]e have repeatedly refused to take such a step. See, e.g., *Smith*, 494 U.S., at 887 (“Repeatedly. . . , we have warned that courts must not presume to determine . . . the plausibility of a religious claim”).

Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that “it is not for us to say that the line he drew was an unreasonable one.” *Id.*, at 715.

. . . [O]ur “narrow function . . . is to determine” whether the line drawn reflects “an honest conviction,” *id.*, at 716. . . .

V

Since the . . . mandate imposes a substantial burden on the exercise of religion, we must . . . decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §2000bb-1(b).

A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting “public health” and “gender equality.” RFRA, however, . . . “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”. . .

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold v. Connecticut*, 381 U. S. 479, 485-486 (1965), and HHS tells us that “[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.”

. . . As we have noted, many employees— those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

. . . [T]he interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” 75 Fed. Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset.

. . . We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider . . . whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.” §2000bb-1(b)(2).

B

The least-restrictive-means standard is exceptionally demanding HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties. . . .

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. . . . HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office. . . , ACA's insurance-coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

. . . We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. §2000cc-3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). . . .

. . . As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries." 45 CFR §147.131(c)(2); 26 CFR §54.9815-2713A(c)(2).

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief. . . .

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate. . . . Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits. . ." because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. . . .

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions. . . . HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

. . . HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in [*United States v.*] *Lee* (455 U.S. 252 (1982)) despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. . . . [W]e explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." 455 U.S., at 260. . . .

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less

restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. . . . ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. . . . Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws. . . . [T]he dissent reiterates a point made forcefully by the Court in *Smith*, 494 U.S., at 888-889 (applying the *Sherbert* test to all free-exercise claims “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”). But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. §2000bb(a)(5). The wisdom of Congress's judgment on this matter is not our concern. . . .

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by *Conestoga* and the *Hahns*. . . .

JUSTICE KENNEDY, concurring. . . .

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. . . . Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. . . .

The Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs. . . .

. . . As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. . . .

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III-C-1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.

. . . In the Court’s view RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith

I

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). . . .

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary. . . . The scheme had a large gap, however; it left out preventive services that “many women’s health advocates and medical professionals believe are critically important.” 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women’s Health Amendment. . . .

Women paid significantly more than men for preventive care, the amendment’s proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. See, e.g., *id.*, at 29070 (statement of Sen. Feinstein) (“Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”). . . . And increased access to contraceptive services . . . would yield important public health gains. See, e.g., *id.*, at 29768 (statement of Sen. Durbin) (“This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] This expanded access will reduce unintended pregnancies.”).

As altered by the Women’s Health Amendment’s passage, the ACA requires new insurance plans to include coverage without cost sharing of “such additional preventive care and screenings” . . . [T]he Institute of Medicine (IOM). . . experts determined that preventive coverage should include the “full range” of FDA-approved contraceptive methods.

. . . [T]he IOM’s report . . . noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families.”); (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, . . . and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face “increased odds of preterm birth and low birth weight”).

. . . Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations. . . This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women’s Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called “conscience amendment,” which would have enabled any employer or insurance provider to deny coverage based on its asserted “religious beliefs or moral convictions.” 158 Cong. Rec. [*85] S539 (Feb. 9, 2012). . . . Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*. . . .

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.

The exemption sought by Hobby Lobby and Conestoga . . . would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. . . .

III

A

. . . RFRA. . . was crafted to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened.” §2000bb(b)(1). . .

. . . In line with this restorative purpose, Congress expected courts considering RFRA claims to “look to free exercise cases decided prior to *Smith* for guidance.” Senate Report 8. See also H. R. Rep. No. 103-88, pp. 6-7 (1993) (hereinafter House Report) (same). . .

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. . .

. . . “[B]y imposing a least-restrictive-means test,” the Court suggests, RFRA “went beyond what was required by our pre-*Smith* decisions.” But as RFRA’s statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. See also Senate Report 9 (RFRA’s “compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.”); House Report 7 (same).

The Congress that passed RFRA correctly read this Court’s pre-*Smith* case law as including within the “compelling interest test” a “least restrictive means” requirement. . .

C

. . . Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA’s compelling interest test, as noted, applies to government actions that “substantially burden *a person’s exercise of religion*.” 42 U.S.C. §2000bb-1(a) (emphasis added). This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act. . . . The Dictionary Act’s definition, however, controls only where “context” does not “indicat[e] otherwise.” §1. . . . Whether a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-*Smith* “free-exercise caselaw.” *Gilardi*, 733 F. 3d, at 1212. . . .

. . . . As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819). . . .

The First Amendment’s free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. . . . [U]ntil today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” *Amos*, 483 U. S., at 337. . . .

. . . Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C. §§2000e(b), 2000e-1(a), 2000e-2(a). . . .

. . . [R]eligious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. . . . Recognition of the discrete characters of “ecclesiastical and lay” corporations dates back to Blackstone, see 1 W. Blackstone, *Commentaries on the Laws of England* 458 (1765). . . .

. . . Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood. . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement “substantially burden[s] [their] exercise of religion.” 42 U.S.C. §2000bb-1(a). . . .

The Court rests on the Greens’ and Hahns’ “belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” . . . RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal conclusion . . . that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake. . . .

. . . I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. . . .

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents. . . .

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. . . . To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. . . . And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. . . .

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage; that almost one-third of women would change their contraceptive method if costs were not a factor; and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be. . . .

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. . . .

Federal statutes often include exemptions for small employers. . . . See, e.g., Family and Medical Leave Act of 1993, 29 U.S.C. §2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. §630(b) (originally exempting employers with fewer than 50 employees, the statute now governs employers with 20 or more employees). . . .

The ACA's grandfathering provision allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR §147.140(g). . . . The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. . . .

The Court ultimately acknowledges a critical point: RFRA’s application “*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. . . .

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA’s least restrictive means test. . . . A “least restrictive means” cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer’s faith), the Court suggests. . . .

And where is the stopping point to the “let the government pay” alternative? Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. . . .

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. “We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims.”. . .

IV

. . . *Lee* . . . made two key points one cannot confine to tax cases. “When followers of a particular sect enter into commercial activity as a matter of choice,” the Court observed, “the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.” *Id.*, at 261. . . . Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would “operat[e] to impose the employer’s religious faith on the employees.” *Ibid.* . . .

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court?. . .

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses);

antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? . . .

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. . . .”

. . . [A]pproving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.” *Ibid.* . . . I would confine religious exemptions under that Act to organizations formed “for a religious purpose,” “engage[d] primarily in carrying out that religious purpose,” and not “engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts.” (*Spencer v. World Vision, Inc.*, 633 F. 3d 723,) 748 (CA9 2010) (Kleinfeld, J., concurring). . . .

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with Justice Ginsburg that the plaintiffs’ challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III-C-1 of Justice Ginsburg’s dissenting opinion.

NOTE

In *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), the Court granted an injunction pending appeal under the Religious Freedom Restoration Act (RFRA) against enforcing a requirement in the Patient Protection and Affordable Care Act (Act) that employers file EBSA Form 700, in order to avoid a requirement under the Act that its health care coverage include contraception. The Court issued this injunction three days after deciding *Hobby Lobby*. “Nothing in this interim order affects the ability of the applicant’s employees and students to obtain, without cost, the full range of FDA approved contraceptives.” Government took the position that the College’s health-care coverage must provide the full range of contraceptive coverage. The College maintained that it was exempted on religious grounds from providing coverage for contraceptives once it notified government even without using Form 700, to do so. “Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.” The Court did not express its views on the merits.

Justice Scalia concurred in the result. Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan. “Churches are categorically exempt” from the Act. A religious nonprofit organization “is also exempt, as long as it signs a form certifying that it is a religious nonprofit that objects to the provision of contraceptive services, and provides a copy of that form to its insurance issuer or third-party administrator.”

Wheaton contends that even filing the form violates RFRA; “filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects.” This objection does not state a viable claim under the Religious Freedom Restoration Act (RFRA); “contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law.” Even assuming a burden on RFRA rights, the accommodation should be upheld under RFRA and *Burwell v. Hobby Lobby Stores*, as “the least restrictive means of furthering the Government’s compelling interests in public health and women’s well-being.”

Even if “the self-certification procedure violates RFRA,” the Court’s granting an injunction under the All Writs Act when the district court has not even adjudicated the merits of the claim is “extraordinary.” Precedent permits such an injunction “only if (1) it is necessary or appropriate in aid of our jurisdiction, and (2) the legal rights at issue are indisputably clear.” This standard cannot be met here because two Courts of Appeal have explicitly rejected the type of claim asserted by the College. While in the past the Court has used such a split to bar this type of injunction, here the Court uses a Circuit split to justify its order.

Not only is filling out the form not a substantial burden, but it also is the least restrictive means to advance the compelling state interests “in public health and women’s well-being.” The form is “the *least* intrusive way” of identifying organizations entitled to accommodations under the Act. The government simply accepts the statement without even inquiring about the sincerity of the employer’s views. The Court’s alternative notification plan or approach is simply unworkable on a national scale.