FEDERAL COURTS:

CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS

Third Edition

2016 Supplement

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PREFACE

The Third Edition of our casebook, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process*, was published in June 2013, but work on the manuscript was essentially completed in the fall of 2012. Since then, the Supreme Court has handed down some important new decisions and Congress has amended the federal officer removal statute, 28 U.S.C. § 1442. This Supplement covers those developments. Two of the new decisions — *Sprint Communications, Inc. v. Jacobs* and *White v. Woodall* — clarify (and perhaps change) the law to a degree that we think they should replace principal cases in the Third Edition.

Once again, Article III standing has occupied center stage at the Court, with two noteworthy decisions, both holding that standing was lacking. In *Clapper v. Amnesty International USA*, the Court reversed a decision that allowed a group of journalists and lawyers to challenge the constitutionality of a federal statute that authorizes the Government to acquire foreign intelligence information by authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. In *Hollingsworth v. Perry*, the Court held that proponents of California's Proposition 8 on same-sex marriage lacked standing to appeal a district court decision that held the initiative unconstitutional. Both decisions will be found in Chapter 3.

Although the two cases on standing made headlines, a decision on mootness is substantially more important from the perspective of legal practice. In *Already, LLC v. Nike, Inc.* (also Chapter 3), the Court held that a covenant not to sue rendered moot a trademark action brought by one of Nike's competitors. In so holding, the Court concluded for the first time under the voluntary cessation doctrine that an action was moot because of a contractual promise made by one of the parties to the litigation.

Also important from the perspective of everyday legal practice is *Gunn v. Minton* (Chapter 9). In *Gunn*, a unanimous Court clarified — and arguably narrowed — the 2008 decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.* on the availability of federal-question jurisdiction over state-law claims with "embedded" federal issues. Legislation designed to override *Gunn* has been approved by the House Judiciary Committee; that too is covered in the Supplement.

The Court continued to be active in the realm of federal habeas corpus for state prisoners. Two decisions are of particular interest; both are included as principal cases in Chapter 18. In *White v. Woodall*, the Court elaborated on what qualifies as an "unreasonable application" of Supreme Court precedent for purposes of 28 U.S.C. § 2254(d). With *Woodall*'s clear exposition now on the books, we think there is no longer any need to cover *Williams v. Taylor*. We recommend omitting that case and using *Harrington v. Richter* and *Woodall* to teach about AEDPA deference. Separately, in *McQuiggin v. Perkins*, the Court held that the "actual innocence" gateway to federal habeas review applies not only to judicially established barriers but also to the one-year limitations period contained in AEDPA.

The 2013 Term brought an important decision on *Younger* abstention. In *Sprint Communications, Inc. v. Jacobs*, the Court clarified and limited the scope of *Younger* outside the criminal context. *Sprint* replaces *Gilbertson v. Albright* as a principal case in Chapter 17.

"Clarification" is not the word that comes to mind in reading the decision in *Wellness International Network, Ltd. v. Sharif* (Chapter 22). Once again the Court has shifted course in its delineation of the permissible role for Article I courts. Some teachers may choose to assign *Wellness* in lieu of *CFTC v. Schor*.

The 2015 Term was shadowed by the sudden death of Justice Antonin Scalia. Several cases that were expected to produce major precedents yielded narrow rulings or affirmances by an equally divided Court. However, one decision warrants treatment as a principal case. In *Bank Markazi v. Peterson* (Chapter 21), a six-Justice majority applied and arguably narrowed the landmark precedent in *United States v. Klein*.

Shortly before we began work on the Third Edition, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), the most far-reaching package of revisions to the Judicial Code since the Judicial Improvements Act of 1990. No judiciary legislation of comparable importance has been adopted since then, but early in 2013 Congress added some new provisions to the federal officer removal statute, 28 U.S.C. § 1442. The 2013 amendments, although little noticed, raise some interesting constitutional questions; these are the subject of a Problem in Chapter 2.

We have also added a Problem in Chapter 5 that we think provides a good review of the adequate state ground doctrine.

* * *

The 2015 Supplement marked an important development for this casebook: the addition of a new co-author. Professor F. Andrew Hessick, now of the University of North Carolina School of Law, joined as a collaborator on these Supplements and future editions of the casebook. In 2013, Professor Ryan Scott of the Indiana University Maurer School of Law joined as a co-author. Professor Hellman, Provost Robel, and Justice Stras are pleased to welcome our new collaborators to the enterprise.

* * *

In preparing this Supplement, we have continued the approach followed by the Casebook. First, we have concentrated on the main lines of doctrinal development and their implications for future disputes. In doing so, we have emphasized elements of litigation strategy and the practical application of Federal Courts doctrines and rules as well as the underlying policy and institutional-competence issues.

Second, we have edited the cases with a relatively light hand. We have also attempted to keep the decisions readable; thus, some brackets and internal quotation marks have been omitted from quoted material within cases.

* * *

The authors express their appreciation to the staff of the University of Pittsburgh School of Law Document Technology Center for their dedicated efforts that made it possible to produce this Supplement under a very tight deadline.

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PROBLEM: DANGER INVITES RESCUE — AND ALSO REMOVAL?

Richard Cunningham worked for 20 years as a Special Agent for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Three years ago he was transferred to a supervisory position at the ATF regional office in the state of Oceana.

Cunningham lives in a condo in a suburb of Bayport, the largest city in Oceana. One evening early this year Cunningham was leaving his condo when he saw his neighbor Alice Markell trying to back her car up. Her boyfriend Gerald Hanley was blocking her car and yelling at her. Witnesses said Hanley and Markell had been drinking at brunch before returning to the apartment complex.

According to police reports, Hanley grabbed a heavy metal tire jack from Markell's car and was edging toward Markell when Markell caught sight of Cunningham. Markell moved away from her car and called out to Cunningham, asking him for a ride to the guard gate. Cunningham agreed, and Markell got into his SUV.

Witnesses tell conflicting stories about what happened next, but according to affidavits submitted by the prosecution, Hanley approached Cunningham, who was sitting in the SUV with the driver's door open. Hanley struck the SUV's door with the tire jack. Cunningham drew his service weapon, a .40 caliber Glock, and told Hanley to step back. The police affidavit continues: "Hanley stood there with his hands at his side when Richard Cunningham discharged his service weapon. He hit Hanley five times in the chest." Hanley died of his injuries.

After investigating, the State Attorney General concluded that the shooting was unjustified, and he charged Cunningham with second degree murder. The case was filed in the Oceana Superior Court, the state trial court of general jurisdiction.

Cunningham immediately removed the case to federal district court. He relied on 28 U.S.C. § 1442 as amended by Pub. L. No. 112-239, signed by President Obama on Jan. 2, 2013. The 2013 amendment was originally introduced as a standalone bill, the Officer Safety Act of 2012, and for convenience that name will be used here. The new law added two new sections to 28 U.S.C. § 1442. In relevant part, they are as follows:

> (c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer —
>
> (1) protected an individual in the presence of the officer from a crime of violence;
>
> (2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

> (3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.
>
> (d) In this section, the following definitions apply: . . .
>
> (2) The term "crime of violence" has the meaning given that term in section 16 of title 18.
>
> (3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.
>
> (4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

The legislative history of the Officer Safety Act is sparse. The principal sponsor of the legislation, Sen. Chuck Grassley of Iowa, explained its purpose as follows: "This bill allows a Federal law enforcement agent, who stops a violent crime while off-duty and is indicted in a State court for those actions, to petition for the State criminal prosecution against him to be removed to Federal court." Sen. Grassley added:

> This bill does not provide immunity for law enforcement agents, and it does not grant them additional authority. It doesn't even guarantee that the case will be moved from State to Federal court: the State will be heard and its position will be weighed by the judge before deciding if removal is appropriate. It does allow a Federal law enforcement officer/agent, who is indicted in a State court for actions related to his protection of a victim of a violent crime that is committed in the officer's presence, to petition for that criminal case to be removed to Federal court, where the officer will be required to defend his actions.

(For the complete text of section 1442, see the Judicial Code Supplement.)

You are a new lawyer in the Office of the State Attorney General. The Attorney General tells you:

> I am preparing a motion to remand the case back to our state court. I will have to concede that Cunningham is a "law enforcement officer" within the meaning of the Officer Safety Act, but apart from that, is it clear that the statute covers this case?
>
> The main argument I would like to make, though, is that if the new law allows removal of the prosecution against Cunningham, it is unconstitutional under the Supreme Court's decisions. Cunningham's attorney has been quoted in the media as saying that under ATF regulations, agents are "always on duty" and are always armed. Assuming that that is correct, is it enough?

How would you answer the Attorney General's questions?

Chapter 3
JUSTICIABILITY AND THE CASE OR CONTROVERSY REQUIREMENT

A. STANDING

[1] The Basic Doctrine

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CLAPPER v. AMNESTY INTERNATIONAL USA

Supreme Court of the United States, 2013.
133 S. Ct. 1138.

JUSTICE ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1881a, 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 (FISC) 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.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future. But respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to § 1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of § 1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.

I

A

. . . In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in "the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization." In January 2007, the FISC issued orders authorizing the Government to target international communications into or out of the United

States where there was probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated terrorist organization. These FISC orders subjected any electronic surveillance that was then occurring under the NSA's program to the approval of the FISC. After a FISC Judge subsequently narrowed the FISC's authorization of such surveillance, however, the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism.

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, § 702 of FISA, 50 U.S.C. § 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." § 1881a(a). 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. Among other things, the Government's certification must attest that (1) procedures are in place "that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the [FISC] that are reasonably designed" to ensure that an acquisition is "limited to targeting persons reasonably believed to be located outside" the United States; (2) minimization procedures adequately restrict the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons, as appropriate; (3) guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment; and (4) the procedures and guidelines referred to above comport with the Fourth Amendment.

The Foreign Intelligence Surveillance Court's role includes determining whether the Government's certification contains the required elements.

Additionally, the Court assesses whether the targeting procedures are "reasonably designed" (1) to "ensure that an acquisition . . . is limited to targeting persons reasonably believed to be located outside the United States" and (2) to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known . . . to be located in the United States." The Court analyzes whether the minimization procedures "meet the definition of minimization procedures under section 1801(h) . . . , as appropriate." The Court also assesses whether the targeting and minimization procedures are consistent with the statute and the Fourth Amendment.

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.

After both parties moved for summary judgment, the District Court held that respondents do not have standing. On appeal, however, a panel of the Second Circuit reversed. The panel agreed with respondents' argument that they have standing due to the objectively reasonable likelihood that their communications will be intercepted at some time in the future. In addition, the panel held that respondents have established that they are suffering "*present* injuries in fact —

economic and professional harms — stemming from a reasonable fear of *future* harmful government conduct." . . .

Because of the importance of the issue and the novel view of standing adopted by the Court of Appeals, we granted certiorari, and we now reverse.

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, it is no surprise that respondents fail to offer any evidence that their communications have been monitored under § 1881a, a failure that substantially undermines their standing theory. Indeed, respondents do not even allege that the Government has sought the FISC's approval for surveillance of their communications. 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. For example, journalist Christopher Hedges states: "I have no choice but to *assume* that any of my international communications *may* be subject to government surveillance, and I have to make decisions . . . in light of that assumption." Similarly, attorney Scott McKay asserts that, "[b]ecause of the [FISA Amendments Act], we now have to *assume* that every one of our international communications *may* be monitored by the government."

"The party invoking federal jurisdiction bears the burden of establishing" standing — and, at the summary judgment stage, such a party "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.' " Respondents, however, have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted. Moreover, because § 1881a at most *authorizes* — but does not *mandate* or *direct* — the surveillance that respondents fear, respondents' allegations are necessarily conjectural. Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target.

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 after the enactment of the FISA Amendments Act, for example, the Government may still conduct electronic surveillance of persons abroad under the older provisions of FISA so long as it satisfies the applicable requirements, including a demonstration of probable cause to believe that the person is a foreign power or agent of a foreign power. The Government may also obtain information from the intelligence services of foreign nations. . . . 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. . . .

We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors. Section 1881a mandates that the Government must obtain the Foreign Intelligence Surveillance Court's approval of targeting procedures, minimization procedures, and a governmental certification regarding proposed surveillance. The Court must, for example, determine whether the Government's procedures are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." And, critically, the Court must also assess whether the Government's targeting and minimization procedures comport with the Fourth Amendment.

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.[5]

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

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[5] Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. But to the extent that the "substantial risk" standard is relevant and is distinct from the "clearly impending" requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here. In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about " 'the unfettered choices made by independent actors not before the court.' "

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. The Second Circuit panel concluded that, because respondents are already suffering such ongoing injuries, the likelihood of interception under § 1881a is relevant only to the question whether respondents' ongoing injuries are "fairly traceable" to § 1881a. Analyzing the "fairly traceable" element of standing under a relaxed reasonableness standard, the Second Circuit then held that "plaintiffs have established that they suffered *present* injuries in fact — economic and professional harms — stemming from a reasonable fear of *future* harmful government conduct."

The Second Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not "fanciful, paranoid, or otherwise unreasonable." This improperly waters down the fundamental requirements of Article III. 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. As Judge Raggi accurately noted, under the Second Circuit panel's reasoning, respondents could, "for the price of a plane ticket, . . . transform their standing burden from one requiring a showing of actual or imminent . . . interception to one requiring a showing that their subjective fear of such interception is not fanciful, irrational, or clearly unreasonable." 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. For instance, respondent Scott McKay's declaration describes — and the dissent heavily relies on — Mr. McKay's "knowledge" that thousands of communications involving one of his clients were monitored in the past. But this surveillance was conducted pursuant to FISA authority that predated § 1881a. Thus, because the Government was allegedly conducting surveillance of Mr. McKay's client before Congress enacted § 1881a, it is difficult to see how the safeguards that Mr. McKay 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, and our decision in *Laird v. Tatum*, 408 U.S. 1 (1972) makes it clear that such a fear is insufficient to create standing. The plaintiffs in *Laird* argued that their exercise of First Amendment rights was being "chilled by the mere existence, without more, of [the Army's] investigative and data-gathering activity." While acknowledging that prior cases had held that constitutional violations may arise from the chilling effect of "regulations that fall

short of a direct prohibition against the exercise of First Amendment rights," the Court declared that none of those cases involved a "chilling effect aris[ing] merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual." Because "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," the plaintiffs in *Laird* — and respondents here — lack standing.

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

. . . .

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. We therefore reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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 50 U.S.C. § 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

. . . 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

. . . .

B

It is . . . important to understand the kinds of communications in which the plaintiffs say they engage and which they believe the Government will intercept. Plaintiff Scott McKay, for example, says in an affidavit (1) that he is a lawyer; (2) that he represented "Mr. Sami Omar Al-Hussayen, who was acquitted in June 2004 on terrorism charges"; (3) that he continues to represent "Mr. Al-Hussayen, who, in addition to facing criminal charges after September 11, was named as a defendant in several civil cases"; (4) that he represents Khalid Sheik Mohammed, a detainee, "before the Military Commissions at Guantanamo Bay, Cuba"; (5) that in representing these clients he "communicate[s] by telephone and email with people outside the United States, including Mr. Al-Hussayen himself," "experts, investigators, attorneys, family members . . . and others who are located abroad"; and (6) that prior to 2008 "the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving [his client] Al-Hussayen."

Another plaintiff, Sylvia Royce, says in her affidavit (1) that she is an attorney; (2) that she "represent[s] Mohammedou Ould Salahi, a prisoner who has been held at Guantanamo Bay as an enemy combatant"; (3) that, "[i]n connection with [her] representation of Mr. Salahi, [she] receive[s] calls from time to time from Mr. Salahi's brother, . . . a university student in Germany"; and (4) that she

has been told that the Government has threatened Salahi "that his family members would be arrested and mistreated if he did not cooperate."

The plaintiffs have noted that McKay no longer represents Mohammed and Royce no longer represents Ould Salahi. But these changes are irrelevant, for we assess standing as of the time a suit is filed, and in any event McKay himself continues to represent Al Hussayen, his partner now represents Mohammed, and Royce continues to represent individuals held in the custody of the U.S. military overseas.

A third plaintiff, Joanne Mariner, says in her affidavit (1) that she is a human rights researcher, (2) that "some of the work [she] do[es] involves trying to track down people who were rendered by the CIA to countries in which they were tortured"; (3) that many of those people "the CIA has said are (or were) associated with terrorist organizations"; and (4) that, to do this research, she "communicate[s] by telephone and e-mail with . . . former detainees, lawyers for detainees, relatives of detainees, political activists, journalists, and fixers" "all over the world, including in Jordan, Egypt, Pakistan, Afghanistan, [and] the Gaza Strip."

Other plaintiffs, including lawyers, journalists, and human rights researchers, say in affidavits (1) that they have jobs that require them to gather information from foreigners located abroad; (2) that they regularly communicate electronically (e.g., by telephone or e-mail) with foreigners located abroad; and (3) that in these communications they exchange "foreign intelligence information" as the Act defines it.

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. A fair reading of the affidavit of Scott McKay, for example, taken together with elementary considerations of a lawyer's obligation to his client, indicates that McKay will engage in conversations that concern what suspected foreign terrorists, such as his client, have done; in conversations that concern his clients' families, colleagues, and contacts; in conversations that concern what those persons (or those connected to them) have said and done, at least in relation to terrorist activities; in conversations that concern the political, social, and commercial environments in which the

suspected terrorists have lived and worked; and so forth. 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. As just pointed out, plaintiff Scott McKay states that the Government (under the authority of the pre-2008 law) "intercepted some 10,000 telephone calls and 20,000 email communications involving [his client] Mr. Al-Hussayen."

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. As the intelligence court itself has stated, its review under § 1881a is "narrowly circumscribed." 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. Nor does it describe any system for avoiding the interception of an electronic communication that happens to include a party who is an American lawyer, journalist, or human rights worker. One can, of course, always imagine some special circumstance that negates a virtual likelihood, no matter how strong. But the same is true about most, if not all, ordinary inferences about future events. Perhaps, despite pouring rain, the streets will remain dry (due to the presence of a special chemical). But ordinarily a party that seeks to defeat a strong natural inference must bear the burden of showing that some such special circumstance exists. And no one has suggested any such special circumstance here.

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.

The Court's use of the term "certainly impending" is not to the contrary. Sometimes the Court has used the phrase "certainly impending" as if the phrase described a *sufficient*, rather than a *necessary*, condition for jurisdiction. On other occasions, it has used the phrase as if it concerned *when*, not *whether*, an alleged injury would occur. Thus, in *Lujan v. Defenders of Wildlife* (1992), the Court considered a threatened future injury that consisted of harm that plaintiffs would suffer when they "soon" visited a government project area that (they claimed) would suffer environmental damage. The Court wrote that a "mere profession of an intent, some day, to return" to the project area did not show the harm was "*imminent*," for "soon" might mean nothing more than "in this lifetime."

On still other occasions, recognizing that " 'imminence' is concededly a somewhat elastic concept," the Court has referred to, or used (sometimes along with "certainly impending") other phrases such as "reasonable probability" that suggest less than absolute, or literal certainty. Taken together the case law uses the word "certainly" as if it emphasizes, rather than literally defines, the immediately following term "impending."

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. Consider a few, fairly typical, cases. Consider *Pennell v. San Jose*, 485 U.S. 1 (1988). A city ordinance forbade landlords to raise the rent charged to a tenant by more than 8 percent where doing so would work an unreasonably severe hardship on that tenant. A group of landlords sought a judgment declaring the ordinance unconstitutional. The Court held that, to have standing, the landlords had to demonstrate a "*realistic danger of sustaining a direct injury* as a result of the statute's operation." It found that the landlords had done so by showing a likelihood of enforcement and a "probability" that the ordinance would make the landlords charge lower rents — even though the landlords had not shown (1) that they intended to raise the relevant rents to the point of causing unreasonably severe hardship; (2) that the tenants would challenge those increases; or (3) that the city's hearing examiners and arbitrators would find against the landlords. Here, even more so than in *Pennell*, there is a "realistic danger" that the relevant harm will occur. . . .

Or, consider *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008). The plaintiff, a candidate for the United States House of Representatives, self-financed

his campaigns. He challenged the constitutionality of an election law that relaxed the limits on an opponent's contributions when a self-financed candidate's spending itself exceeded certain other limits. His opponent, in fact, had decided not to take advantage of the increased contribution limits that the statute would have allowed. But the Court nonetheless found standing because there was a "realistic and impending threat," not a certainty, that the candidate's opponent would do so at the time the plaintiff filed the complaint. The threat facing the plaintiffs here is as "realistic and impending." . . .

Moreover, courts have often found *probabilistic* injuries sufficient to support standing. . . .

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? The defendant, say, has threatened to load wheat onto a ship bound for India despite a promise to send the wheat to the United States. No one can know for certain that this will happen. Perhaps the defendant will change his mind; perhaps the ship will turn and head for the United States. Yet, despite the uncertainty, the Constitution does not prohibit a federal court from hearing such a claim. . . .

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? . . .

4

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. The considerations set forth in Parts II and III, *supra*, make clear that the 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.

NOTE: SURVEILLING THE STANDING REQUIREMENTS

1. In light of the secrecy surrounding the government surveillance program authorized by the FISA Amendments Act of 2008, could an individual ever establish that he or she has suffered a sufficiently concrete and particularized injury to challenge the constitutionality of section 1881a? If so, how? The *Clapper* majority explains that some government actions may never be challenged in court, but suggests that a party may be able to challenge the collection of information under section 1881a if the government attempts to use the information in a judicial or administrative proceeding. Does the majority's suggestion provide sufficient protection to those individuals affected by the surveillance program?

2. The Second Circuit concluded that the plaintiffs had standing because there was an "objectively reasonable likelihood" that their communications with foreign contacts would be intercepted in the future under section 1881a. The Supreme Court majority rejects the Second Circuit's "objectively reasonable likelihood" standard as "inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.' " Although the majority concedes in a footnote that the Court has "found standing based on a 'substantial risk' that the harm will occur," it concludes that the plaintiffs lack standing even under that standard. What, if any, is the difference between the "certainly impending" and "substantial risk" standards? And why is the Second Circuit's "objectively reasonable likelihood" standard inconsistent with both articulations of the injury-in-fact requirement?

3. The *Clapper* majority also rejects the plaintiffs' alternative argument that standing exists because of measures that they have taken to avoid surveillance under section 1881a. The majority explains that the plaintiffs "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 [the plaintiffs] are suffering are not fairly traceable to § 1881a." In rejecting the plaintiffs' alternative standing argument, however, does the majority in effect conflate the injury-in-fact and "fairly traceable" requirements of Article III standing?

4. In *Allen v. Wright* (Casebook p. 78), the plaintiffs asserted that the IRS's grant of tax-exempt status to racially discriminatory schools harmed them by impairing their ability to send their children to racially integrated schools. In that case, the Court found the causal link between the IRS's actions and the plaintiffs' injury insufficient to establish standing. Is the causal link between section 1881a and the plaintiffs' alleged injury in *Clapper* more or less tenuous than the causal link in *Allen*?

Page 144: ***insert before the Note:***

PROBLEM: STANDING FOR ELECTIONS

Idaho voters pass an initiative requiring all counties in the state to allow "early voting" in elections for the United States Senate during the two weekends preceding each November general election date. That initiative, which has the force of law under the Idaho Constitution, effectively overrides a law passed the prior year by the Idaho Legislature, which had banned counties from permitting early voting in any election.

The Idaho Legislature files a lawsuit in federal district court, claiming that the initiative violates Article I, section 4 of the United States Constitution, which says that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The Idaho Attorney General, representing county clerks, files a motion to dismiss the action brought by the Legislature on the ground that it lacks standing to bring the suit.

How should the district court rule on the motion to dismiss?

In thinking about this question, consider first the decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court there recognized the "special position and interest of" states acting in their sovereign capacity. Should the state Legislature be treated as a "sovereign" in this context?

Consider also the recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ___ (2015). The Supreme Court held that the Arizona Legislature had standing to file a lawsuit against the state's independent redistricting commission, which was created by a citizen-led initiative, in a challenge to the commission's authority under the Elections Clause. Specifically, the Arizona Legislature argued that the independent redistricting commission did not have the authority to adopt a redistricting plan because the commission was not the "Legislature." The Court held that the Legislature had standing to sue because it had suffered an institutional injury by being deprived of the power to pass its own redistricting plan.

In *Arizona Legislature*, the Court relied on *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Court held that a group consisting of half of Kansas's state senators had standing to challenge the state's putative ratification of a constitutional amendment. The senators had voted against the amendment, but the Lieutenant Governor, who they alleged was not a member of the body allowed to vote on a constitutional amendment, broke the tie. The Court said that the legislators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes."

The Court in *Arizona Legislature* distinguished *Raines v. Byrd*, 521 U.S. 811 (1997). In that case, the Court held that six members of Congress who voted against the Line Item Veto Act, which allowed the President to cancel certain tax and spending items in appropriations bills, did not have standing to maintain a lawsuit challenging the Act's constitutionality.

Page 146: ***insert after the Problems:***

[2A] Standing on Appeal

HOLLINGSWORTH v. PERRY

Supreme Court of the United States, 2013.
133 S. Ct. 2652.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause "prohibits the State of California from defining marriage as the union of a man and a woman." Respondents, same-sex couples who wish to marry, view the issue in somewhat different terms: For them, it is whether California — having previously recognized the right of same-sex couples to marry — may reverse that decision through a referendum.

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual "case" or "controversy." As used in the Constitution, those words do not include every sort of dispute, but only those "historically viewed as capable of resolution through the judicial process." This is an essential limit on our power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives.

For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury. Because we find that petitioners do not have

standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California 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. Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the Proposition was properly enacted under California law.

According to the California Supreme Court, Proposition 8 created a "narrow and limited exception" to the state constitutional rights otherwise guaranteed to same-sex couples. 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). The California Supreme Court concluded that the California Constitution further guarantees same-sex couples "all of the constitutionally based incidents of marriage," including the right to have that marriage "officially recognized" as such by the State. Proposition 8, the court explained, left those rights largely undisturbed, reserving only "the official *designation* of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law."

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners — the official proponents of the initiative — to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and "directing the official defendants that all persons under their control or supervision" shall not enforce it.

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address "why this appeal should not be dismissed for lack of Article III standing." After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative's validity, the court concluded that "[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so."

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, "has standing to defend the constitutionality of its [laws]," and States have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests." "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm."

On the merits, the Ninth Circuit affirmed the District Court. The court held the Proposition unconstitutional under the rationale of our decision in *Romer v. Evans*, 517 U.S. 620 (1996). In the Ninth Circuit's view, *Romer* stands for the proposition that "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place." The Ninth Circuit concluded that "taking away the official designation" of "marriage" from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State. Proposition 8, in the court's view, violated the Equal Protection Clause because it served no purpose "but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships."

We granted certiorari to review that determination, and directed that the parties also brief and argue "Whether petitioners have standing under Article III, § 2, of the Constitution in this case."

II

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife* (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."

The doctrine of standing, we recently explained, "serves to prevent the judicial process from being used to usurp the powers of the political branches." In light of this "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency."

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. That means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." We therefore must decide whether petitioners had standing to appeal the District Court's order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain "official sanction" from the State, which was unavailable to them given the declaration in Proposition 8 that "marriage" in California is solely between a man and a woman.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress — they had won — and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." He must possess a "direct stake in the outcome" of the case. Here, however, petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy."

Petitioners argue that the California Constitution and its election laws give them a " 'unique,' 'special,' and 'distinct' role in the initiative process — one 'involving both authority and responsibilities that differ from other supporters of the measure.' " True enough — but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official "proponents" of Proposition 8. As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. After those signatures were collected, the proponents alone had the right to file the measure with election officials to put it on the ballot. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California's ballot pamphlets.

But once Proposition 8 was approved by the voters, the measure became "a duly enacted constitutional amendment or statute." Petitioners have no role — special or otherwise — in the enforcement of Proposition 8. They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every citizen of California.

Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.' " No matter how deeply committed petitioners may be to upholding

Proposition 8 or how "zealous [their] advocacy," that is not a "particularized" interest sufficient to create a case or controversy under Article III.

III

A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if *they* have no cognizable interest in appealing the District Court's judgment, the State of California does, and they may assert that interest on the State's behalf. It is, however, a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." There are "certain, limited exceptions" to that rule. But even when we have allowed litigants to assert the interests of others, the litigants themselves still "must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute." . . .

B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are "authorized under California law to appear and assert the state's interest" in the validity of Proposition 8. The court below agreed: "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm."

In *Karcher v. May*, 484 U.S. 72 (1987), we held that two New Jersey state legislators — Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio — could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. "Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals," we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf.

Far from supporting petitioners' standing, however, *Karcher* is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State has a cognizable interest "in the continued enforceability" of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in *Karcher*.

What is significant about *Karcher* is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President, but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, "since they no longer hold those offices, they lack authority to pursue this appeal."

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; Karcher and Orechio were permitted to proceed only

because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties. . . .

C

Both petitioners and respondents seek support from dicta in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The plaintiff in *Arizonans for Official English* filed a constitutional challenge to an Arizona ballot initiative declaring English " 'the official language of the State of Arizona.' " After the District Court declared the initiative unconstitutional, Arizona's Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative — the Arizonans for Official English Committee — sought to defend the measure in the Ninth Circuit. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the Committee was "qualified to defend [the initiative] on appeal," and affirmed the District Court.

Before finding the case mooted by other events, this Court expressed "grave doubts" about the Ninth Circuit's standing analysis. We reiterated that "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess 'a direct stake in the outcome.' " We recognized that a legislator authorized by state law to represent the State's interest may satisfy standing requirements, as in *Karcher*, but noted that the Arizona committee and its members were "not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State."

Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act " 'as agents of the people' of California." But that Court never described petitioners as "agents of the people," or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked — and the California Supreme Court answered — only whether petitioners had "the authority to assert the State's interest in the initiative's validity." All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This "does not mean that the proponents become de facto public officials"; the authority they enjoy is "simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state's interest in the validity of the initiative measure." That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State — "formal" or otherwise. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not purport to be agents of California. They argued instead that "no other party in this case w[ould] adequately represent *their interests as official proponents*." It was their "unique legal status" as official proponents — not an agency relationship with the people of California — that petitioners claimed "endow[ed] them with a significantly protectable interest" in ensuring that the District Court not "undo[] all that they ha[d] done in obtaining . . . enactment" of Proposition 8.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. "An essential element of agency is the principal's right to control the

agent's actions." Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals — or elected at all. No provision provides for their removal. As one *amicus* explains, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it."

"If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal." But petitioners owe nothing of the sort to the people of California. Unlike California's elected officials, they have taken no oath of office. As the California Supreme Court explained, petitioners are bound simply by "the same ethical constraints that apply to all other parties in a legal proceeding." They are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities. . . .

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

IV

The dissent eloquently recounts the California Supreme Court's reasons for deciding that state law authorizes petitioners to defend Proposition 8. We do not "disrespect[]" or "disparage[]" those reasons. Nor do we question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. "Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature," and ensures that the Federal Judiciary respects "the proper — and properly limited — role of the courts in a democratic society," States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

The Court's opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a proponent's standing to defend an initiative in

federal court is a question of federal law. Proper resolution of the justiciability question requires, in this case, a threshold determination of state law. The state-law question is how California defines and elaborates the status and authority of an initiative's proponents who seek to intervene in court to defend the initiative after its adoption by the electorate. Those state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California.

Under California law, a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials — the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court's decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation. In my submission, the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court.

These are the premises for this respectful dissent.

I

As the Court explains, the State of California sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution. To determine whether justiciability continues in appellate proceedings after the State Executive acquiesced in the District Court's adverse judgment, it is necessary to ascertain what persons, if any, have "authority under state law to represent the State's interests" in federal court.

As the Court notes, the California Elections Code does not on its face prescribe in express terms the duties or rights of proponents once the initiative becomes law. If that were the end of the matter, the Court's analysis would have somewhat more force. But it is not the end of the matter. It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two. That, too, is for the State to decide.

This Court, in determining the substance of state law, is "bound by a state court's construction of a state statute." And the Supreme Court of California, in response to the certified question submitted to it in this case, has determined that State Elections Code provisions directed to initiative proponents do inform and instruct state law respecting the rights and status of proponents in postelection judicial proceedings. Here, in reliance on these statutes and the California Constitution, the State Supreme Court has held that proponents do have authority "under California law to appear and assert the state's interest in the initiative's validity and appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so."

The reasons the Supreme Court of California gave for its holding have special relevance in the context of determining whether proponents have the authority to seek a federal-court remedy for the State's concrete, substantial, and continuing injury. As a class, official proponents are a small, identifiable group. Because many of their decisions must be unanimous, they are necessarily few in number. Their identities are public. Their commitment is substantial. They know and understand the purpose and operation of the proposed law, an important requisite in defending initiatives on complex matters such as taxation and insurance. Having gone to great lengths to convince voters to enact an initiative, they have a stake in the outcome and the necessary commitment to provide zealous advocacy.

Thus, in California, proponents play a "unique role . . . in the initiative process." They "have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law." Proponents' authority under state law is not a contrivance. It is not a fictional construct. It is the product of the California Constitution and the California Elections Code. There is no basis for this Court to set aside the California Supreme Court's determination of state law. . . .

II

A

The Court concludes that proponents lack sufficient ties to the state government. It notes that they "are not elected," "answer to no one," and lack " 'a fiduciary obligation' " to the State. But what the Court deems deficiencies in the proponents' connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system. The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement "the theory that all power of government ultimately resides in the people." The right to adopt initiatives has been described by the California courts as "one of the most precious rights of [the State's] democratic process." That historic role for the initiative system "grew out of dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." The initiative's "primary purpose," then, "was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt."

The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal

proceeding. Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure. And in light of the frequency with which initiatives' opponents resort to litigation, the impact of that veto could be substantial. K. Miller, Direct Democracy and the Courts 106 (2009) (185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court). As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative's proponents when the State Executive declines to do so.

Yet today the Court demands that the State follow the Restatement of Agency. There are reasons, however, why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The State may not wish to associate itself with proponents or their views outside of the "extremely narrow and limited" context of this litigation, or to bear the cost of proponents' legal fees. The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative's proponent) arguing in favor of a law's validity while state officials (e.g., the attorney general) contend in the same proceeding that it should be found invalid.

Furthermore, it is not clear who the principal in an agency relationship would be. It would make little sense if it were the Governor or attorney general, for that would frustrate the initiative system's purpose of circumventing elected officials who fail or refuse to effect the public will. If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State. But the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State.

And if the Court's concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court. It must be remembered that both elected officials and initiative proponents receive their authority to speak for the State of California directly from the people. The Court apparently believes that elected officials are acceptable "agents" of the State, but they are no more subject to ongoing supervision of their principal — i.e., the people of the State — than are initiative proponents. At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure. Finally, proponents and their attorneys, like all other litigants and counsel who appear before a federal court, are subject to duties of candor, decorum, and respect for the tribunal and co-parties alike, all of which guard against the possibility that initiative proponents will somehow fall short of the appropriate standards for federal litigation. . . .

III

There is much irony in the Court's approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, here the Court refuses to

allow a State's authorized representatives to defend the outcome of a democratic election.

The Court's opinion disrespects and disparages both the political process in California and the well-stated opinion of the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion.

Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject. As the California Supreme Court recognized, "the question before us involves a fundamental procedural issue that may arise with respect to *any* initiative measure, without regard to its subject matter." If a federal court must rule on a constitutional point that either confirms or rejects the will of the people expressed in an initiative, that is when it is most necessary, not least necessary, to insist on rules that ensure the most committed and vigorous adversary arguments to inform the rulings of the courts.

In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative's proponents to defend the law if and when the State's usual legal advocates decline to do so. The Court's opinion fails to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.

NOTE: STANDING ON APPEAL

1. In another case decided the same day as *Hollingsworth v. Perry*, the Supreme Court invalidated section 3 of the Defense Against Marriage Act (DOMA), which defined marriage for purposes of federal law as "a legal union between one man and one woman as husband and wife." In that case, *United States v. Windsor*, 133 S. Ct. 2675 (2013), Edith Windsor brought a lawsuit challenging the constitutionality of section 3 because it required the Internal Revenue Service to treat her marriage to her same-sex partner differently for federal estate tax purposes than marriages involving opposite-sex partners. Windsor's challenge stemmed from the fact that she did not receive the benefit of the marital exemption from the federal estate tax, even though the State of New York fully recognized her marriage. While Windsor's lawsuit was pending in federal district court, the President instructed the Department of Justice to continue to enforce the law but

not to defend its constitutionality in court. At that point, the district court allowed the Bipartisan Legal Advisory Group (BLAG) to intervene on behalf of the House of Representatives to defend the constitutionality of the law. Windsor prevailed at the district court, and both the United States and BLAG appealed. The Second Circuit affirmed, and the Supreme Court granted certiorari. Although both Windsor and the United States urged the Supreme Court to affirm, the United States continued to refuse to comply with the judgment.

In a 5-4 decision, Justice Kennedy, writing for the majority, concluded that the United States had standing to appeal despite its agreement with the district court's judgment that section 3 of DOMA was unconstitutional. According to the majority,

> [a]n order directing the Treasury to pay money is "a real and immediate economic injury," 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 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. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. 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.

Even though the majority concluded that the United States had standing to appeal under Article III, the majority cautioned that "[e]ven 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.' " The majority concluded that sufficient adverseness existed in *Windsor* because of the "participation of *amici curiae*" and "BLAG's sharp adversarial presentation of the issues."

2. The refusal of the United States to refund Windsor's estate taxes was crucial to the majority's conclusion that the United States had standing to appeal the district court's judgment. But *Hollingsworth* also involves the refusal of government officials to comply with a district court judgment enjoining the enforcement of a validly enacted law. As the Court notes in *Hollingsworth*, California "officials refused to defend the law, although they have continued to enforce it throughout this litigation." In light of this similarity, how can you reconcile the two cases? Are there any important facts that distinguish *Hollingsworth* from *Windsor*?

3. Would the Court have found standing to appeal in *Hollingsworth* if a California statute or the California Constitution had expressly recognized the authority of initiative proponents to defend Proposition 8's constitutionality in court on behalf of the state? If Article III standing is a question of federal law, as the majority states, what difference does it make whether (or how) state law

recognizes the authority of a group or individual to appeal a decision on the state's behalf?

4. *Hollingsworth* involves the rare situation in which standing exists at the district court level but not on appeal. Given what we now know about standing, how can standing exist at one stage of the litigation but not at another? Why did the district court permit the initiative's proponents to participate as parties if they would later lack standing to appeal the judgment?

[3] Prudential Standing

Pages 146-48: ***replace the Note with the following Note:***

NOTE: PRUDENTIAL LIMITATIONS ON STANDING

1. *Allen*, *Hein*, *Lujan*, and *Massachusetts* are all concerned with constitutional limitations on standing. However, as the Court noted in *Allen*, standing doctrine also embraces "several judicially self-imposed limits on the exercise of federal jurisdiction" that may authorize a court to deny standing to a litigant who satisfies the requirements of Article III. Although these "prudential" limitations on standing have a long pedigree, they appear to conflict with the often-stated "heavy obligation to exercise jurisdiction" that Congress or the Constitution has conferred on the federal courts. *See*, *e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (Chapter 12). In *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), the Court said the prudential limitations on standing include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."

Yet, more recently, in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Court suggested that two of the items on that list — the rule barring adjudication of generalized grievances and the zone-of-interests test — may not fall within the rubric of prudential limitations at all.

2. In *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), the Court explained the policies underlying the prudential-standing requirements as follows:

> Without such limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

As you read the cases that follow, consider whether you find these policy concerns compelling.

3. Prudential limitations on standing have often been invoked when a litigant seeks to have a federal court consider the interests or determine the rights of someone not before the court. This situation can occur in numerous contexts. First, and almost always unsuccessfully, a litigant without Article III standing might seek to protect others' rights. An example is *Tileston v. Ullman*, 318 U.S. 44 (1943), where a doctor sought to invoke the constitutional interests of his patients to receive contraceptives. The doctor did not, however, invoke any interest of his

own — not even his financial interest in practicing medicine. The Court found no standing.

Second, a litigant properly before the court could seek to have the court consider the effect of the challenged acts on others. Sometimes called "jus tertii," this form of standing can be successful. In *Craig v. Boren*, 429 U.S. 190 (1976), a vendor of 3.2% beer brought an equal protection challenge to an Oklahoma statute that allowed the sale of beer to women at age 18 but to men only at age 21. The suit had originally included an 18-year-old male plaintiff, but he had reached the age of 21 by the time the case reached the Court. The Court found that the vendor had standing to raise the equal protection challenge:

> [O]ur decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge and the parties have sought or at least have never resisted an authoritative constitutional determination. In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose. It may be that a class could be assembled, whose fluid membership always included some males with live claims. But if the assertion of the right is to be "representative" to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by the present *jus tertii* champion.
>
> In any event, we conclude that appellant has established independently her claim to assert *jus tertii* standing. The operation of [the Oklahoma statute] plainly has inflicted "injury in fact" upon appellant sufficient to guarantee her "concrete adverseness," and to satisfy the constitutionally based standing requirements imposed by Art. III. The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, "sanctions and perhaps loss of license." This Court repeatedly has recognized that such injuries establish the threshold requirements of a "case or controversy" mandated by Art. III.

> As a vendor with standing to challenge the lawfulness of [the statute], appellant is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. Otherwise, the threatened imposition of governmental sanctions might deter her and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that "enforcement of the challenged restriction against the (vendor) would result indirectly in the violation of third parties' rights." Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.

Should the Court have permitted vendors of 3.2% beer in Oklahoma to assert the rights of men between the ages of 18 and 21? Taken literally, does the standard articulated by the Court in *Craig* — requiring only the dilution or an adverse affect upon the rights of third parties — provide any meaningful limit on the type or number of cases in which third parties can assert the constitutional rights of others?

4. The policies behind the general prohibition on asserting the rights of others are discussed at length in *Singleton v. Wulff*, 428 U.S. 106 (1976), and *Kowalski v. Tesmer*, 543 U.S. 125 (2004), the next two principal cases.

Pages 163-65: ***replace the Note with the following Note:***

NOTE: THE "ZONE OF INTERESTS" TEST

In *Lujan*, the Court considered Congress's role in creating standing from an Article III perspective. But there is another strand of doctrine that may fall into the prudential realm. This is the requirement (as summarized in *Allen*) that a plaintiff's complaint fall "within the zone of interests protected by the law invoked."

Early cases discussing the idea of a "zone of interests" were based on invocation of Section 10 the Administrative Procedure Act (APA), which states:

> A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), is the landmark case. The Bank Services Corporation Act of 1962 limits the activities in which banks may engage. The Comptroller of the Currency interpreted the Act to permit banks to provide data processing services to their customers, and that interpretation was challenged by firms that provided such services commercially. These firms met the Article III requirements for injury, because the decision would inevitably increase competition for their customers. The Court then determined as a separate matter that the firms were within the "zone of interests" that Congress intended to protect with the Act.

After *Data Processing*, which treated this question of statutory interpretation as a prudential limit on standing, the Court decided a number of cases in which the zone-of-interests analysis appeared dead. More recently, it has made a return. In *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Court held that a group of voters had standing to challenge the Commission's determination that the American Israel Public Affairs Committee (AIPAC) was not

a "political committee" as defined by the Federal Election Campaign Act of 1971 (FECA), and thus not subject to disclosure requirements. The voter group opposed AIPAC's positions and sought to have the FEC declare it a political committee and regulate its finances. FECA provided that "[a]ny person who believes a violation of this Act . . . has occurred may file a complaint with the Commission," and added that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in district court seeking review of that dismissal.

The Court stated:

> History associates the word "aggrieved" with a congressional intent to cast the standing net broadly — beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. Moreover, prudential standing is satisfied when the injury asserted by a plaintiff "arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question." The injury of which respondents complain — their failure to obtain relevant information — is injury of a kind that FECA seeks to address. We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees. Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit. Consequently, respondents satisfy "prudential" standing requirements.

The Court then concluded that the voter group also met constitutional standing requirements.

Justice Scalia, joined by Justice O'Connor and Justice Thomas, dissented from the constitutional holding. The dissent made no mention of the zone-of-interests test.

More recently, in *Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), the Court clarified the low bar created by the zone-of-interests test:

> The prudential standing test . . . is not meant to be especially demanding. We apply the test in keeping with Congress's "evident intent" when enacting the APA to make agency action presumptively reviewable. We do not require any indication of congressional purpose to benefit the would-be plaintiff. And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of the doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Just two years after *Match-E-Be-Nash-She-Wish*, the Court once again changed course in its treatment of the zone-of-interests test, this time casting doubt on whether it is a prudential limitation at all. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Court considered

whether a company that manufactured microchips for use in remanufactured toner cartridges could sue Lexmark for false advertising under the Lanham Act. In answering the question in the affirmative, the Court said the following about the zone-of-interests test:

> Although we admittedly have placed [the zone-of-interests] test under the "prudential" rubric in the past, it does not belong there .... Whether a plaintiff comes within "the 'zone of interests' " is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge Silberman of the D.C. Circuit recently observed, " 'prudential standing' is a misnomer" as applied to the zone-of-interests analysis, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute."

Lexmark did not arise in the context of a challenge to agency action, as did many of the early zone-of-interests cases. Thus, given the context in which *Lexmark* arose and the reaffirmation of the zone-of-interests test as a prudential limitation on standing just two years earlier in *Match-E-Be-Nash-She-Wish*, it may be too early to tell the extent to which *Lexmark* sounds the death knell for the zone-of-interests test as a prudential limitation on the subject matter jurisdiction of federal courts.

C. MOOTNESS

Page 188: ***insert before the Problem:***

ALREADY, LLC v. NIKE, INC.

Supreme Court of the United States, 2013.
133 S. Ct. 721.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The question is whether a covenant not to enforce a trademark against a competitor's existing products and any future "colorable imitations" moots the competitor's action to have the trademark declared invalid.

I

Respondent Nike designs, manufactures, and sells athletic footwear, including a line of shoes known as Air Force 1s. Petitioner Already also designs and markets athletic footwear, including shoe lines known as "Sugars" and "Soulja Boys." Nike, alleging that the Soulja Boys infringed and diluted the Air Force 1 trademark, demanded that Already cease and desist its sale of those shoes. When Already refused, Nike filed suit in federal court alleging that the Soulja Boys as well as the Sugars infringed and diluted its Air Force 1 trademark. Already denied these allegations and filed a counterclaim contending that the Air Force 1 trademark is invalid.

In March 2010, eight months after Nike filed its complaint, and four months after Already counterclaimed, Nike issued a "Covenant Not to Sue." Its preamble stated that "Already's actions . . . no longer infringe or dilute the NIKE Mark at a level sufficient to warrant the substantial time and expense of continued litigation." The covenant promised that Nike would not raise against Already or any affiliated entity any trademark or unfair competition claim based on any of Already's existing footwear designs, or any future Already designs that constituted a "colorable imitation" of Already's current products.

After issuing this covenant, Nike moved to dismiss its claims with prejudice, and to dismiss Already's invalidity counterclaim without prejudice on the ground that the covenant had extinguished the case or controversy. Already opposed dismissal of its counterclaim, arguing that Nike had not established that its voluntary cessation had mooted the case. In support, Already presented an affidavit from its president, stating that Already had plans to introduce new versions of its shoe lines into the market; affidavits from three potential investors, asserting that they would not consider investing in Already until Nike's trademark was invalidated; and an affidavit from one of Already's executives, stating that Nike had intimidated retailers into refusing to carry Already's shoes.

The District Court dismissed Already's counterclaim, stating that because Already sought "to invoke the Court's declaratory judgment jurisdiction, it bears the burden of demonstrating that the Court has subject matter jurisdiction over its counterclaim[]." The Court read the covenant "broad[ly]," concluding that "any of [Already's] future products that arguably infringed the Nike Mark would be 'colorable imitations' " of Already's current footwear and therefore protected by the covenant. Finding no evidence that Already sought to develop any shoes not covered by the covenant, the Court held there was no longer "a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The Second Circuit affirmed. It held that in determining whether a covenant not to sue "eliminates a justiciable case or controversy," courts should look to the totality of the circumstances, including "(1) the language of the covenant, (2) whether the covenant covers future, as well as past, activity and products, and (3) evidence of intention . . . on the part of the party asserting jurisdiction" to engage in conduct not covered by the covenant. Noting that the covenant covers "both past sales and future sales of both existing products and colorable imitations," the Second Circuit found it hard to conceive of a shoe that would infringe the Air Force 1 trademark yet not fall within the covenant. Given that Already "ha[d] not asserted any intention to market any such shoe," the court concluded that Already could not show any continuing injury, and that therefore no justiciable controversy remained. We granted certiorari.

II

Article III of the Constitution grants the Judicial Branch authority to adjudicate "Cases" and "Controversies." In our system of government, courts have "no business" deciding legal disputes or expounding on law in the absence of such a case or controversy. That limitation requires those who invoke the power of a federal court to demonstrate standing — a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." We have repeatedly held that an "actual controversy" must exist not only "at the time the complaint is filed," but through "all stages" of the litigation.

A case becomes moot — and therefore no longer a "Case" or "Controversy" for purposes of Article III — "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights."

We have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could

engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* (2000).

III

At the outset of this litigation, both parties had standing to pursue their competing claims in court. Nike had standing to sue because Already's activity was allegedly infringing its rights under trademark law. Already had standing to file its counterclaim because Nike was allegedly pressing an invalid trademark to halt Already's legitimate business activity. But then Nike dismissed its claims with prejudice and issued its covenant, calling into question the existence of any continuing case or controversy.

Under our precedents, it was Nike's burden to show that it "could not reasonably be expected" to resume its enforcement efforts against Already.

That is the question the voluntary cessation doctrine poses: Could the allegedly wrongful behavior reasonably be expected to recur? Nike cannot avoid its "formidable burden" by assuming the answer to that question.

IV

A

Having determined that the voluntary cessation doctrine applies, we begin our analysis with the terms of the covenant:

> [Nike] unconditionally and irrevocably covenants to refrain from making *any* claim(s) or demand(s) . . . against Already or *any* of its . . . related business entities . . . [including] distributors . . . and employees of such entities and *all* customers . . . on account of any *possible* cause of action based on or involving trademark infringement, unfair competition, or dilution, under state or federal law . . . relating to the NIKE Mark based on the appearance of *any* of Already's current and/or previous footwear product designs, and *any* colorable imitations thereof, regardless of whether that footwear is produced . . . or otherwise used in commerce before or after the Effective Date of this Covenant.

The breadth of this covenant suffices to meet the burden imposed by the voluntary cessation test. The covenant is unconditional and irrevocable. Beyond simply prohibiting Nike from filing suit, it prohibits Nike from making any claim *or* any demand. It reaches beyond Already to protect Already's distributors and customers. And it covers not just current or previous designs, but any colorable imitations.

In addition, Nike originally argued that the Sugars and Soulja Boys infringed its trademark; in other words, Nike believed those shoes were "colorable imitations" of the Air Force 1s. Nike's covenant now allows Already to produce all of its existing footwear designs — including the Sugar and Soulja Boy — and any "colorable imitation" of those designs. We agree with the Court of Appeals that "it is hard to imagine a scenario that would potentially infringe [Nike's trademark] and yet not fall under the Covenant." Nike, having taken the position in court that

there is no prospect of such a shoe, would be hard pressed to assert the contrary down the road. If such a shoe exists, the parties have not pointed to it, there is no evidence that Already has dreamt of it, and we cannot conceive of it. It sits, as far as we can tell, on a shelf between Dorothy's ruby slippers and Perseus's winged sandals.

Given Nike's demonstration that the covenant encompasses all of its allegedly unlawful conduct, it was incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities not covered by the covenant. After all, information about Already's business activities and plans is uniquely within its possession. The case is moot if the court, considering the covenant's language and the plaintiff's anticipated future activities, is satisfied that it is "absolutely clear" that the allegedly unlawful activity cannot reasonably be expected to recur.

But when given the opportunity before the District Court, Already did not assert any intent to design or market a shoe that would expose it to any prospect of infringement liability. The only affidavit it submitted to the District Court on that question was from its president, saying little more than that Already currently has plans to introduce new shoe lines and make modifications to existing shoe lines. It never stated that these shoes would arguably infringe Nike's trademark yet fall outside the scope of the covenant. Nor did it do so on appeal to the Second Circuit. And again, it failed to do so here, even when counsel for Already was asked at oral argument whether his client had any intention to design or market a shoe that would even arguably fall outside the covenant. Given the covenant's broad language, and given that Already has asserted no concrete plans to engage in conduct not covered by the covenant, we can conclude the case is moot because the challenged conduct cannot reasonably be expected to recur.

B

Already argues, however, that there are alternative theories of Article III injuries that save the case from mootness. First, it argues that so long as Nike remains free to assert its trademark, investors will be apprehensive about investing in Already. Second, it argues that given Nike's decision to sue in the first place, Nike's trademarks will now hang over Already's operations like a Damoclean sword. Finally, and relatedly, Already argues that, as one of Nike's competitors, it inherently has standing to challenge Nike's intellectual property.

The problem for Already is that none of these injuries suffices to support Article III standing. Although the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur, we have never held that the doctrine — by imposing this burden on the defendant — allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place.

We begin with Already's argument that Nike's trademark registration "gives false color to state and federal trademark claims which expose [Already's] business to substantial and unpredictable risks," deterring investors. To demonstrate this, Already presented affidavits from potential investors stating that Nike's lawsuit dissuaded them from investing in Already or prompted them to withdraw prior investments, and that they would "consider" investing in Already only if Nike's trademark were struck down.

But once it is "absolutely clear" that challenged conduct cannot "reasonably be expected to recur," *Friends of the Earth*, the fact that some individuals may

base decisions on "conjectural or hypothetical" speculation does not give rise to the sort of "concrete" and "actual" injury necessary to establish Article III standing, *Lujan v. Defenders of Wildlife* (1992).

Already has also pointed to an affidavit from a vice president stating that Nike has "suggested" to Already's retailers that they refrain from carrying Already's shoes, lest "Nike . . . cancel its account or take other actions against the retailer, e.g., delay shipment of the retailer's Nike order or 'lose' the retailer's Nike order." Even if a plaintiff may bring an invalidity claim based on a reasonable expectation that a trademark holder will take action against the plaintiff's retailers, the covenant here extends protection to Already's distributors and customers. And even if Nike were engaging in harassment or unfair trade practices, Already has not explained how invalidating Nike's trademark would do anything to stop it.

Already also complains that it can no longer "just blithely go about its shoe business as if there were no risk of being sued again." As counsel told us at oral argument: "once bitten, twice shy." But we have never held that a plaintiff has standing to pursue declaratory relief merely on the basis of being "once bitten." Quite the opposite. Given our conclusion that Nike has met its burden of demonstrating there is no reasonable risk that Already will be sued again, there is no reason for Already to be so shy. It is the only one of Nike's competitors with a judicially enforceable covenant protecting it from litigation relating to the Air Force 1 trademark. Insofar as the injury is a threat of Air Force 1 trademark litigation, Already is Nike's least injured competitor.

Already falls back on a sweeping argument: In the context of registered trademarks, "[n]o covenant, no matter how broad, can eradicate the effects" of a registered but invalid trademark. According to Already, allowing Nike to unilaterally moot the case "subverts" the important role federal courts play in the administration of federal patent and trademark law. It allows companies like Nike to register and brandish invalid trademarks to intimidate smaller competitors, avoiding judicial review by issuing covenants in the rare case where the little guy fights back. Already and its *amici* thus contend that Already, "[a]s a company engaged in the business of designing and marketing athletic shoes," has standing to challenge Nike's trademark.

Under this approach, Nike need not even have threatened to sue first. Already, even with no plans to make anything resembling the Air Force 1, could sue to invalidate the trademark simply because Already and Nike both compete in the athletic footwear market. Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful — whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing. The cases Already cites for this remarkable proposition stand for no such thing. In each of those cases, standing was based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor.

Already's arguments boil down to a basic policy objection that dismissing this case allows Nike to bully small innovators lawfully operating in the public domain. This concern cannot compel us to adopt Already's broad theory of standing.

First of all, granting covenants not to sue may be a risky long-term strategy for a trademark holder. In addition, the Lanham Act provides some check on

abusive litigation practices by providing for an award of attorney's fees in "exceptional cases."

Accepting Already's theory may benefit the small competitor in this case. But lowering the gates for one party lowers the gates for all. As a result, larger companies with more resources will have standing to challenge the intellectual property portfolios of their more humble rivals — not because they are threatened by any particular patent or trademark, but simply because they are competitors in the same market. This would further encourage parties to employ litigation as a weapon against their competitors rather than as a last resort for settling disputes.

Already's only legally cognizable injury — the fact that Nike took steps to enforce its trademark — is now gone and, given the breadth of the covenant, cannot reasonably be expected to recur. There being no other basis on which to find a live controversy, the case is clearly moot.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, concurring.

This brief, separate concurrence is written to underscore that covenants like the one Nike filed here ought not to be taken as an automatic means for the party who first charged a competitor with trademark infringement suddenly to abandon the suit without incurring the risk of an ensuing adverse adjudication. Courts should be well aware that charges of trademark infringement can be disruptive to the good business relations between the manufacturer alleged to have been an infringer and its distributors, retailers, and investors. The mere pendency of litigation can mean that other actors in the marketplace may be reluctant to have future dealings with the alleged infringer. Nike appears to have been well aware of that dynamic in this case. In referring to Already it stated at one point: "[O]ver the past eight months, Nike has cleared out the worst offending infringers. Now Already remains as one of the last few companies that was identified on that top ten list of infringers."

Any demonstrated reluctance by investors, distributors, and retailers to maintain good relations with the alleged infringer might, in an appropriate case, be an indication that the market itself anticipates that a new line of products could be outside the covenant not to sue yet still within a zone of alleged infringement. And, as noted at the outset, it is the trademark holder who has the burden to show that this is not the case. It is not the burden of the alleged infringer to prove that the covenant not to sue is inadequate to protect its current and future products from a trademark enforcement action.

In later cases careful consideration must be given to the consequences of using a covenant not to sue as the basis for a motion to dismiss as moot. If the holder of an alleged trademark can commence suit against a competitor; in midcourse file a covenant not to sue; and then require the competitor and its business network to engage in costly, satellite proceedings to demonstrate that future production or sales might still be compromised, it would seem that the trademark holder's burden to show the case is moot may fall well short of being formidable. The very suit the trademark holder initiated and later seeks to declare moot may still cause disruption and costs to the competition. The formidable burden to show the case is moot ought to require the trademark holder, at the

outset, to make a substantial showing that the business of the competitor and its supply network will not be disrupted or weakened by satellite litigation over mootness or by any threat latent in the terms of the covenant itself. It would be most unfair to allow the party who commences the suit to use its delivery of a covenant not to sue as an opportunity to force a competitor to expose its future business plans or to otherwise disadvantage the competitor and its business network, all in aid of deeming moot a suit the trademark holder itself chose to initiate.

There are relatively few cases that have discussed the meaning and effect of covenants not to sue in the context of ongoing litigation. Courts should proceed with caution before ruling that they can be used to terminate litigation. An insistence on the proper allocation of the formidable burden on the party asserting mootness is one way to ensure that covenants are not automatic mechanisms for trademark holders to use courts to intimidate competitors without, at the same time, assuming the risk that their trademark will be found invalid and unenforceable.

With these observations, I join the opinion and judgment of the Court.

NOTE: COVENANTS NOT TO SUE

1. In *Already, LLC*, the majority concludes that the case is moot because the breadth of the covenant issued by Nike "suffices to meet the burden imposed by the voluntary cessation test." However, given that covenants can be broken or rescinded, is there really no reasonable possibility that Nike's allegedly unlawful activity will recur?

2. The concurrence suggests that a covenant like the one issued by Nike would not moot an otherwise justiciable controversy in every case. What factors should a court consider when assessing whether a covenant not to sue satisfies the voluntary cessation doctrine?

3. The majority rejects Already's "alternative theories of Article III injuries that save the case from mootness," including Already's argument that Nike's Air Force 1 trademark exposes its business to substantial and unpredictable risks. Already presented affidavits from potential investors who claimed that they were dissuaded from investing in the company while Nike's trademark remained registered. The majority dismisses the investors' fears as "conjectural or hypothetical" because it is " 'absolutely clear' that the challenged conduct cannot 'reasonably be expected to recur.' " Is the majority correct? Is the reluctance of Already's potential investors the product of an ordinary business risk, or has Nike found a way to deal a fatal blow to Already's business while simultaneously fending off adverse litigation?

4. After concluding that Nike's covenant "encompasses all of its allegedly unlawful conduct," the majority explains that "it was incumbent on Already to indicate that it engages in or has sufficient concrete plans to engage in activities not covered by the covenant." What evidence would Already have to produce to satisfy its burden? Is it possible for Already to satisfy its burden without revealing its future business plans to a major competitor?

Chapter 5
SUPREME COURT REVIEW OF STATE-COURT DECISIONS

A. THE RELATION BETWEEN STATE AND FEDERAL LAW

[4] Ambiguous Decisions and the Rule of *Michigan v. Long*

Page 336: ***insert at the end of the section:***

PROBLEM: "SQUARELY WITHIN STATE LAW"?

Acme Energy, Inc., is a corporation incorporated in the State of Anadarko, where its principal place of business is located. Acme contracts with operators of oil and gas wells in several southwestern states to provide specialized services known as "geo-tech." A few years ago, Acme hired Jett Rink, a citizen of Anadarko, to work out of its office in Oil City in Anadarko. Rink had approximately 20 years' experience in the oil and gas industry.

Upon being hired, Rink signed a confidentiality and non-competition agreement with Acme. The agreement provided that for a period of two years following separation from Acme, Rink would not be employed by any business engaged in geo-tech activities within the United States. The agreement also contained an arbitration clause that read as follows:

> Any dispute, difference or unresolved question between Acme and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Oil City, Anadarko, in accordance with the rules existing at the date hereof of the American Arbitration Association.

Rink worked for Acme for two years, but disputes arose over compensation paid and hours worked, and Rink resigned.

A few months later, Acme learned that Rink had taken a job with Excelsior, Inc., a competing company that provides geo-tech services. Claiming that Rink had breached the non-competition agreement, Acme served him with a demand for arbitration. Rink did not respond; instead, he filed suit in the trial court of general jurisdiction of Anadarko asking the court to declare the non-competition agreement null and void and to enjoin its enforcement. Rink relied on the Anadarko Freedom of Contract Act, which severely limits covenants not to compete.

Acme moved to dismiss Rink's complaint on the ground that any dispute as to the enforceability of the contract was a question for the arbitrator. In its supporting memorandum, Acme relied on the Federal Arbitration Act (FAA) and United States Supreme Court decisions interpreting the FAA.

The FAA provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As Acme pointed out, the United States Supreme Court has said that the FAA declares "a national policy favoring arbitration." The Court's decisions have also established two more specific propositions: first, that

the FAA applies in state as well as federal courts; and second, that "when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court."

Acme asserted, in reliance on this line of cases, that because the contract contained a valid arbitration clause, federal law required that the arbitrator, and not the court, settle the parties' disagreement. The state trial court agreed with Acme and dismissed Rink's complaint.

Rink appealed, and the Anadarko Supreme Court reversed. The court held that the non-competition clause was void as against public policy under the Anadarko Freedom of Contract Act. The state supreme court opinion read as follows:

> Acme argues that the issue of the validity of the covenant not to compete is for the arbitrator. In doing so, Acme relies upon United States Supreme Court jurisprudence. Rink asserts that jurisdiction lies in this Court based on our pronouncements addressing the issue. We agree with Rink.
>
> Our jurisprudence controls this issue. First, this court held in *Harmon v. Utex, Inc.*, 205 Ana. 356 (2007), that the Federal Arbitration Act does not prohibit an Anadarko court from reviewing a contract submitted to arbitration where one party asserts that the underlying agreement is void and unenforceable. We reaffirmed our precedents establishing that the public right to be free from restraint of trade "cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration. A void provision provides no legal basis for enforcement whether through arbitration or judicial pronouncement."
>
> Second, we rely on the well-established principle in Anadarko law that where two statutes address the same subject, one specific and one general, the specific will govern over the general. Two years ago, we held in *Pratt v. Hospicecare, Inc.*, 212 Ana. 402 (2011), that the specific statute in the Nursing Home Care Act addressing the right to commence an action and to have a jury trial would govern over the more general statute favoring arbitration. Here, we are presented with similar circumstances. The Anadarko Legislature has enacted a specific statute addressing non-competition agreements. Here, as in *Pratt*, the more specific statute addressing the validity of covenants not to compete must govern over the more general statute favoring arbitration.
>
> Most instructive on Acme's arguments is *Biddle v. Gruner Co.*, 200 Ana. 347 (2005). *Biddle* contains an exhaustive overview of the United States Supreme Court decisions construing the Federal Arbitration Act and state arbitration law. The Supreme Court decisions discussed therein, and relied upon by Acme here, were found not to inhibit our review of the underlying contract's validity. We therefore hold that the existence of an arbitration

> agreement in an employment contract does not prohibit judicial review of the underlying agreement.
>
> [Here the court dropped a footnote: "In reaching our decision today, we consider extant federal and state precedent. Nevertheless, our determinations rest squarely within Anadarko law which provides bona fide, separate, adequate, and independent grounds for our decision. *Michigan v. Long*, 463 U.S. 1032 (1983)."]
>
> We turn now to the question of the validity of the covenant not to compete. Acme argues that the covenant is reasonable and necessary to protect the confidential information and technical knowledge imparted to Rink during training. We reject that argument.
>
> Although the prohibition in the Freedom of Contract Act is not absolute, the non-competition provisions in the Acme contract go well beyond the bounds of what is allowable under the statute and therefore violate the legislatively expressed public policy. [Extensive discussion omitted.]
>
> The judgment of the trial court is reversed, and case is remanded with directions to grant the relief requested by the plaintiff.

You are an associate in the law firm that represents Acme. The senior partner says, "It looks to me as though the Anadarko Supreme Court decision violates federal law. But the decision says it's based on state law. I would like to take the case to the United States Supreme Court if it's possible, but I don't want to waste our client's money if the Court doesn't have jurisdiction. You've studied this stuff recently; I'd like to know if this case is reviewable by the Supreme Court and, if so, what issues it can decide."

Please write a memorandum that answers the partner's question.

Chapter 9
THE "FEDERAL QUESTION" JURISDICTION

B. THE STATE-CREATED CAUSE OF ACTION WITH A FEDERAL "INGREDIENT"

Page 638: ***insert before the Problem:***

GUNN v. MINTON

Supreme Court of the United States, 2013.
133 S. Ct. 1059.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Federal courts have exclusive jurisdiction over cases "arising under any Act of Congress relating to patents." 28 U.S.C. § 1338(a). The question presented is whether a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court.

I

In the early 1990s, respondent Vernon Minton developed a computer program and telecommunications network designed to facilitate securities trading. In March 1995, he leased the system — known as the Texas Computer Exchange Network, or TEXCEN — to R.M. Stark & Co., a securities brokerage. A little over a year later, he applied for a patent for an interactive securities trading system that was based substantially on TEXCEN. The U.S. Patent and Trademark Office issued the patent in January 2000.

Patent in hand, Minton filed a patent infringement suit in Federal District Court against the National Association of Securities Dealers, Inc. (NASD) and the NASDAQ Stock Market, Inc. He was represented by Jerry Gunn and the other petitioners. NASD and NASDAQ moved for summary judgment on the ground that Minton's patent was invalid under the "on sale" bar, 35 U.S.C. § 102(b). That provision specifies that an inventor is not entitled to a patent if "the invention was . . . on sale in [the United States], more than one year prior to the date of the application," and Minton had leased TEXCEN to Stark more than one year prior to filing his patent application. Rejecting Minton's argument that there were differences between TEXCEN and the patented system that precluded application of the on-sale bar, the District Court granted the summary judgment motion and declared Minton's patent invalid.

Minton then filed a motion for reconsideration in the District Court, arguing for the first time that the lease agreement with Stark was part of ongoing testing of TEXCEN and therefore fell within the "experimental use" exception to the on-sale bar. See generally *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1998) (describing the exception). The District Court denied the motion.

Minton appealed to the U.S. Court of Appeals for the Federal Circuit. That court affirmed, concluding that the District Court had appropriately held Minton's experimental-use argument waived.

Minton, convinced that his attorneys' failure to raise the experimental-use argument earlier had cost him the lawsuit and led to invalidation of his

patent, brought this malpractice action in Texas state court. His former lawyers defended on the ground that the lease to Stark was not, in fact, for an experimental use, and that therefore Minton's patent infringement claims would have failed even if the experimental-use argument had been timely raised. The trial court agreed, holding that Minton had put forward "less than a scintilla of proof" that the lease had been for an experimental purpose. It accordingly granted summary judgment to Gunn and the other lawyer defendants.

On appeal, Minton raised a new argument: Because his legal malpractice claim was based on an alleged error in a patent case, it "aris[es] under" federal patent law for purposes of 28 U.S.C. § 1338(a). And because, under § 1338(a), "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents," the Texas court — where Minton had originally brought his malpractice claim — lacked subject matter jurisdiction to decide the case. Accordingly, Minton argued, the trial court's order should be vacated and the case dismissed, leaving Minton free to start over in the Federal District Court.

A divided panel of the Court of Appeals of Texas rejected Minton's argument. Applying the test we articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005), it held that the federal interests implicated by Minton's state law claim were not sufficiently substantial to trigger § 1338 "arising under" jurisdiction. It also held that finding exclusive federal jurisdiction over state legal malpractice actions would, contrary to *Grable*'s commands, disturb the balance of federal and state judicial responsibilities. Proceeding to the merits of Minton's malpractice claim, the Court of Appeals affirmed the trial court's determination that Minton had failed to establish experimental use and that arguments on that ground therefore would not have saved his infringement suit.

The Supreme Court of Texas reversed, relying heavily on a pair of cases from the U.S. Court of Appeals for the Federal Circuit, *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262 (2007), and *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (2007)). The Court concluded that Minton's claim involved "a substantial federal issue" within the meaning of *Grable* "because the success of Minton's malpractice claim is reliant upon the viability of the experimental use exception as a defense to the on-sale bar." Adjudication of Minton's claim in federal court was consistent with the appropriate balance between federal and state judicial responsibilities, it held, because "the federal government and patent litigants have an interest in the uniform application of patent law by courts well-versed in that subject matter."

Justice Guzman, joined by Justices Medina and Willett, dissented. The dissenting justices would have held that the federal issue was neither substantial nor disputed, and that maintaining the proper balance of responsibility between state and federal courts precluded relegating state legal malpractice claims to federal court.

We granted certiorari.

II

"Federal courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). There is no dispute that the Constitution permits Congress to extend federal court jurisdiction to a case such as this one, see *Osborn v. Bank of United States*, 9 Wheat. 738 (1824) [Chapter 2]; the question is whether Congress has done so.

As relevant here, Congress has authorized the federal district courts to exercise original jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and, more particularly, over "any civil action arising under any Act of Congress relating to patents," § 1338(a). Adhering to the demands of "[l]inguistic consistency," we have interpreted the phrase "arising under" in both sections identically, applying our § 1331 and § 1338(a) precedents interchangeably. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). For cases falling within the patent-specific arising under jurisdiction of § 1338(a), however, Congress has not only provided for federal jurisdiction but also eliminated state jurisdiction, decreeing that "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents." § 1338(a). To determine whether jurisdiction was proper in the Texas courts, therefore, we must determine whether it would have been proper in a federal district court — whether, that is, the case "aris[es] under any Act of Congress relating to patents."

For statutory purposes, a case can "aris[e] under" federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) ("A suit arises under the law that creates the cause of action"). As a rule of inclusion, this "creation" test admits of only extremely rare exceptions, see, *e.g.*, *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), and accounts for the vast bulk of suits that arise under federal law. Minton's original patent infringement suit against NASD and NASDAQ, for example, arose under federal law in this manner because it was authorized by 35 U.S.C. §§ 271, 281.

But even where a claim finds its origins in state rather than federal law — as Minton's legal malpractice claim indisputably does — we have identified a "special and small category" of cases in which arising under jurisdiction still lies. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.

In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"? *Grable*. That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of

these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

III

Applying *Grable*'s inquiry here, it is clear that Minton's legal malpractice claim does not arise under federal patent law. Indeed, for the reasons we discuss, we are comfortable concluding that state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law for purposes of § 1338(a). Although such cases may necessarily raise disputed questions of patent law, those cases are by their nature unlikely to have the sort of significance for the federal system necessary to establish jurisdiction.

A

To begin, we acknowledge that resolution of a federal patent question is "necessary" to Minton's case. Under Texas law, a plaintiff alleging legal malpractice must establish four elements: (1) that the defendant attorney owed the plaintiff a duty; (2) that the attorney breached that duty; (3) that the breach was the proximate cause of the plaintiff 's injury; and (4) that damages occurred. See *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004). In cases like this one, in which the attorney's alleged error came in failing to make a particular argument, the causation element requires a "case within a case" analysis of whether, had the argument been made, the outcome of the earlier litigation would have been different. To prevail on his legal malpractice claim, therefore, Minton must show that he would have prevailed in his federal patent infringement case if only petitioners had timely made an experimental-use argument on his behalf. That will necessarily require application of patent law to the facts of Minton's case.

B

The federal issue is also "actually disputed" here — indeed, on the merits, it is the central point of dispute. Minton argues that the experimental-use exception properly applied to his lease to Stark, saving his patent from the on-sale bar; petitioners argue that it did not. This is just the sort of "'dispute . . . respecting the . . . effect of [federal] law'" that *Grable* envisioned.

C

Minton's argument founders on *Grable*'s next requirement, however, for the federal issue in this case is not substantial in the relevant sense. In reaching the opposite conclusion, the Supreme Court of Texas focused on the importance of the issue to the plaintiff 's case and to the parties before it. [The court said that] "because the success of Minton's malpractice claim is reliant upon the viability of the experimental use exception as a defense to the on-sale bar, we hold that it is a substantial federal issue." As our past cases show, however, it is not enough that the federal issue be significant to the particular parties in the immediate suit; that will *always* be true when the state claim "necessarily raise[s]" a disputed federal issue, as *Grable*

separately requires. The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole.

In *Grable* itself, for example, the Internal Revenue Service had seized property from the plaintiff and sold it to satisfy the plaintiff's federal tax delinquency. Five years later, the plaintiff filed a state law quiet title action against the third party that had purchased the property, alleging that the IRS had failed to comply with certain federally imposed notice requirements, so that the seizure and sale were invalid. In holding that the case arose under federal law, we primarily focused not on the interests of the litigants themselves, but rather on the broader significance of the notice question for the Federal Government. We emphasized the Government's "strong interest" in being able to recover delinquent taxes through seizure and sale of property, which in turn "require[d] clear terms of notice to allow buyers . . . to satisfy themselves that the Service has touched the bases necessary for good title." The Government's "direct interest in the availability of a federal forum to vindicate its own administrative action" made the question "an important issue of federal law that sensibly belong[ed] in a federal court."

A second illustration of the sort of substantiality we require comes from *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), which *Grable* described as "[t]he classic example" of a state claim arising under federal law. In *Smith*, the plaintiff argued that the defendant bank could not purchase certain bonds issued by the Federal Government because the Government had acted unconstitutionally in issuing them. We held that the case arose under federal law, because the "decision depends upon the determination" of "the constitutional validity of an act of Congress which is directly drawn in question." Again, the relevant point was not the importance of the question to the parties alone but rather the importance more generally of a determination that the Government "securities were issued under an unconstitutional law, and hence of no validity." *Ibid.*; see also *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986).

Here, the federal issue carries no such significance. Because of the backward-looking nature of a legal malpractice claim, the question is posed in a merely hypothetical sense: *If* Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding have been different? No matter how the state courts resolve that hypothetical "case within a case," it will not change the real-world result of the prior federal patent litigation. Minton's patent will remain invalid.

Nor will allowing state courts to resolve these cases undermine "the development of a uniform body of [patent] law." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Congress ensured such uniformity by vesting exclusive jurisdiction over actual patent cases in the federal district courts and exclusive appellate jurisdiction in the Federal Circuit. See 28 U.S.C. §§ 1338(a), 1295(a)(1). In resolving the nonhypothetical patent questions those cases present, the federal courts are of course not bound by state court case-within-a-case patent rulings. See *Tafflin v. Levitt*, 493 U.S. 455 (1990) [Chapter 4]. In any event, the state court case-within-a-case inquiry asks what would have happened in the prior

federal proceeding if a particular argument had been made. In answering that question, state courts can be expected to hew closely to the pertinent federal precedents. It is those precedents, after all, that would have applied had the argument been made. Cf. *ibid.* ("State courts adjudicating civil RICO claims will . . . be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law").

As for more novel questions of patent law that may arise for the first time in a state court "case within a case," they will at some point be decided by a federal court in the context of an actual patent case, with review in the Federal Circuit. If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not arise frequently, it is unlikely to implicate substantial federal interests. The present case is "poles apart from *Grable*," in which a state court's resolution of the federal question "would be controlling in numerous other cases."

Minton also suggests that state courts' answers to hypothetical patent questions can sometimes have real-world effect on other patents through issue preclusion. Minton, for example, has filed what is known as a "continuation patent" application related to his original patent. He argues that, in evaluating this separate application, the patent examiner could be bound by the Texas trial court's interpretation of the scope of Minton's original patent. It is unclear whether this is true. . . . In fact, Minton has not identified any case finding such preclusive effect based on a state court decision. But even assuming that a state court's case-within-a-case adjudication may be preclusive under some circumstances, the result would be limited to the parties and patents that had been before the state court. Such "fact-bound and situation-specific" effects are not sufficient to establish federal arising under jurisdiction.

Nor can we accept the suggestion that the federal courts' greater familiarity with patent law means that legal malpractice cases like this one belong in federal court. It is true that a similar interest was among those we considered in *Grable*. But the possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger the federal courts' exclusive patent jurisdiction, even if the potential error finds its root in a misunderstanding of patent law.

There is no doubt that resolution of a patent issue in the context of a state legal malpractice action can be vitally important to the particular parties in that case. But something more, demonstrating that the question is significant to the federal system as a whole, is needed. That is missing here.

D

It follows from the foregoing that *Grable*'s fourth requirement is also not met. That requirement is concerned with the appropriate "balance of federal and state judicial responsibilities." We have already explained the absence of a substantial federal issue within the meaning of *Grable*. The States, on the other hand, have "a special responsibility for maintaining standards among members of the licensed professions." Their "interest . . . in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have

historically been officers of the courts." We have no reason to suppose that Congress — in establishing exclusive federal jurisdiction over patent cases — meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue.

* * *

As we recognized a century ago, "[t]he Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy." In this case, although the state courts must answer a question of patent law to resolve Minton's legal malpractice claim, their answer will have no broader effects. It will not stand as binding precedent for any future patent claim; it will not even affect the validity of Minton's patent. Accordingly, there is no "serious federal interest in claiming the advantages thought to be inherent in a federal forum," *Grable*. Section 1338(a) does not deprive the state courts of subject matter jurisdiction.

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

It is so ordered.

NOTE: CLARIFYING *GRABLE* — AND NARROWING IT?

1. As in *Christianson* (Casebook p. 625), the Court is interpreting 28 U.S.C. § 1338, not § 1331. But once again the Court treats § 1331 and § 1338 precedents interchangeably. Note too that although the Court makes no mention of it, § 1338 was amended in 2011, and the second sentence — quoted in Part II of the Court's opinion — was changed. See Casebook Chapter 4, section A.

2. Although the *Grable* opinion did not explicitly say that it was establishing a four-part test, some courts and commentators read it that way. *Gunn* confirms that reading. Chief Justice Roberts, after quoting *Grable*, restates the "inquiry" as a set of four numbered requirements. But are the four requirements really that distinct? Consider the questions below.

3. The Court acknowledges that the federal patent issue is "necessary" to plaintiff Minton's legal-malpractice case and also that it is "actually disputed." In explaining its conclusion on the latter point, the Court says that Minton argues that the experimental-use exception properly applied to the lease; Gunn (the malpractice defendant) argues that it did not. But does the well-pleaded complaint rule allow the court to consider the defendant's argument? At the jurisdictional stage, how does a court know that the defendant is disputing the "experimental use" issue rather than, for example, conceding the point (at least for the sake of argument) and arguing that the malpractice claim fails because of some state-law rule?

4. Most of the Court's analysis is devoted to explaining why the "substantiality" prong is not met. "The substantiality inquiry under *Grable*," the Court explains, looks "to the importance of the issue *to the federal system as a whole*." (Emphasis added.) Was that why the Court in *Merrell Dow* held that the federal issue was not "substantial?"

5. In rejecting the argument that the "case within a case" might involve novel questions of federal law that would satisfy the "substantiality" requirement, the Court says, "If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not

arise frequently, it is unlikely to implicate substantial federal interests." Why doesn't that argument also apply in *Grable* and *Smith*?

6. After explaining at length why Minton's malpractice claim does not satisfy the "substantiality" prong, the Court continues: "It follows from the foregoing that *Grable*'s fourth requirement is also not met." What kind of case might satisfy the third requirement but not the fourth — or vice versa?

7. How would the Problems in this section of the Casebook be analyzed under *Gunn*?

8. On June 11, 2015, the House Judiciary Committee voted to favorably report H.R. 9, the Innovation Act. Section 9(e) of the Act is titled "Clarification of Jurisdiction," and it provides as follows:

> (1) IN GENERAL. — An action or claim arises under an Act of Congress relating to patents if such action or claim —
>
> (A) necessarily requires resolution of a disputed question as to the validity of a patent or the scope of a patent claim; or
>
> (B) is an action or claim for legal malpractice that arises from an attorney's conduct in relation to an action or claim arising under an Act of Congress relating to patents (including as described in paragraph (1)). [Sic; the reference probably should be to paragraph (1)(A).]

Would this provision completely override *Gunn v. Minton*? Does the legislation cast doubt on the *Gunn* Court's conclusion that allowing Minton's legal malpractice claim to be heard in federal court under § 1338(a) would "disrupt[] the federal-state balance approved by Congress"?

Chapter 10
DIVERSITY JURISDICTION

A. CORPORATIONS AND OTHER ENTITIES AS PARTIES

Page 710: ***insert after the Notes:***

NOTE: *CARDEN* REAFFIRMED

How should the citizenship for diversity purposes be determined for a legal entity that has the same characteristics as a corporation but is nevertheless unincorporated? The Court addressed that issue in *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016), in which a real estate investment trust organized under Maryland law sought to invoke diversity jurisdiction. Under Maryland law, such trusts are similar to corporations — shareholders own the trust, and they have voting rights regarding the trust — but they are considered "unincorporated." Reaffirming *Carden*'s distinction between corporations and other legal entities, the Court held that those trusts do not have its own citizenship; instead, the citizenship of these trusts depends on the citizenship of the shareholders.

Chapter 15
STATE SOVEREIGN IMMUNITY

B. ENFORCING THE CONSTITUTION THROUGH SUITS AGAINST STATE OFFICERS

[1] Suits for Injunctions

Insert on page 949 after the notes:

NOTE: *EX PARTE YOUNG* AND THE SUPREMACY CLAUSE

Ex parte Young authorizes private suits seeking an order requiring state officials to comply with federal law. State officials must comply with federal law because of the Supremacy Clause of Article VI of the Constitution. U.S. CONST. art. VI § 2. But in *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015), the Supreme Court explained that, although the Supremacy Clause obligates state officials to comply with federal law, the Clause "does not create a cause of action." Instead, the Clause simply "creates a rule of decision" under which courts "must not give effect to state laws that conflict with federal law."

So what is the source of an *Ex Parte Young* action? The equitable powers of the court. As the *Armstrong* Court explained,

> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.

The Court described its holding as consistent with its earlier decision in *Seminole Tribe of Florida v. Florida* [Casebook p. 959], which recognized Congress's power to foreclose an *Ex parte Young* action, even indirectly through the creation of an alternative remedial scheme.

Chapter 17
LIMITS ON THE JURISDICTION

C. THE *YOUNGER* DOCTRINE

Page 1171: ***replace*** **Gilbertson v. Albright** ***and the Note following it with the following new case and Note:***

SPRINT COMMUNICATIONS, INC. v. JACOBS

Supreme Court of the United States, 2013.
134 S. Ct. 548.

JUSTICE GINSBURG delivered the opinion of the Court.

This case involves two proceedings, one pending in state court, the other in federal court. Each seeks review of an Iowa Utilities Board (IUB or Board) order. And each presents the question whether Windstream Iowa Communications, Inc. (Windstream), a local telecommunications carrier, may impose on Sprint Communications, Inc. (Sprint), intrastate access charges for telephone calls transported via the Internet. Federal-court jurisdiction over controversies of this kind was confirmed in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002). Invoking *Younger v. Harris*, 401 U.S. 37 (1971), the U.S. District Court for the Southern District of Iowa abstained from adjudicating Sprint's complaint in deference to the parallel state-court proceeding, and the Court of Appeals for the Eighth Circuit affirmed the District Court's abstention decision.

We reverse the judgment of the Court of Appeals. In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter. *New Orleans Public Service, Inc. Council of City of New Orleans*, 491 U.S. 350 (*NOPSI*) ("[T]here is no doctrine that . . . pendency of state judicial proceedings excludes the federal courts."). This Court has recognized, however, certain instances in which the prospect of undue interference with state proceedings counsels against federal relief.

Younger exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. This Court has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), or that implicate a State's interest in enforcing the orders and judgments of its courts, see *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987). We have cautioned, however, that federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not "refus[e] to decide a case in deference to the States." *NOPSI*.

Circumstances fitting within the *Younger* doctrine, we have stressed, are "exceptional"; they include, as catalogued in *NOPSI*, "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." Because this case presents none of the circumstances the Court has ranked as "exceptional," the general rule governs: "[T]he pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal

court having jurisdiction." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

I

Sprint, a national telecommunications service provider, has long paid intercarrier access fees to the Iowa communications company Windstream . . . for certain long distance calls placed by Sprint customers to Windstream's in-state customers. In 2009, however, Sprint decided to withhold payment for a subset of those calls, classified as Voice over Internet Protocol (VoIP), after concluding that the Telecommunications Act of 1996 preempted intrastate regulation of VoIP traffic. In response, Windstream threatened to block all calls to and from Sprint customers.

Sprint filed a complaint against Windstream with the IUB asking the Board to enjoin Windstream from discontinuing service to Sprint. In Sprint's view, Iowa law entitled it to withhold payment while it contested the access charges and prohibited Windstream from carrying out its disconnection threat. In answer to Sprint's complaint, Windstream retracted its threat to discontinue serving Sprint, and Sprint moved, successfully, to withdraw its complaint. Because the conflict between Sprint and Windstream over VoIP calls was "likely to recur," however, the IUB decided to continue the proceedings to resolve the underlying legal question, i.e., whether VoIP calls are subject to intrastate regulation. The question retained by the IUB, Sprint argued, was governed by federal law, and was not within the IUB's adjudicative jurisdiction. The IUB disagreed, ruling that the intrastate fees applied to VoIP calls.[2]

Seeking to overturn the Board's ruling, Sprint commenced two lawsuits. First, Sprint sued the members of the IUB (respondents here)[3] in their official capacities in the United States District Court for the Southern District of Iowa. In its federal-court complaint, Sprint sought a declaration that the Telecommunications Act of 1996 preempted the IUB's decision; as relief, Sprint requested an injunction against enforcement of the IUB's order. Second, Sprint petitioned for review of the IUB's order in Iowa state court. The state petition reiterated the preemption argument Sprint made in its federal-court complaint; in addition, Sprint asserted state law and procedural due process claims. Because Eighth Circuit precedent effectively required a plaintiff to exhaust state remedies before proceeding to federal court, see *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (1990), Sprint urges that it filed the state suit as a protective measure. Failing to do so, Sprint explains, risked losing the opportunity to obtain any review, federal or state, should the federal court decide to abstain after the expiration of the Iowa statute of limitations. See Brief for Petitioner 7-8.[4]

As Sprint anticipated, the IUB filed a motion asking the Federal District Court to abstain in light of the state suit, citing *Younger*. The District Court

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[2] At the conclusion of the IUB proceedings, Sprint paid Windstream all contested fees.

[3] For convenience, we refer to respondents collectively as the IUB.

[4] Since we granted certiorari, the Iowa state court issued an opinion rejecting Sprint's preemption claim on the merits. The Iowa court decision does not, in the parties' view, moot this case. Because Sprint intends to appeal the state-court decision, the "controversy . . . remains live." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005).

granted the IUB's motion and dismissed the suit. The IUB's decision, and the pending state-court review of it, the District Court said, composed one "uninterruptible process" implicating important state interests. On that ground, the court ruled, *Younger* abstention was in order.

For the most part, the Eighth Circuit agreed with the District Court's judgment. The Court of Appeals rejected the argument, accepted by several of its sister courts, that *Younger* abstention is appropriate only when the parallel state proceedings are "coercive," rather than "remedial," in nature. Instead, the Eighth Circuit read this Court's precedent to require *Younger* abstention whenever "an ongoing state judicial proceeding . . . implicates important state interests, and . . . the state proceedings provide adequate opportunity to raise [federal] challenges." 690 F.3d at 867 (citing *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982)). Those criteria were satisfied here, the appeals court held, because the ongoing state-court review of the IUB's decision concerned Iowa's "important state interest in regulating and enforcing its intrastate utility rates." Recognizing the "possibility that the parties [might] return to federal court," however, the Court of Appeals vacated the judgment dismissing Sprint's complaint. In lieu of dismissal, the Eighth Circuit remanded the case, instructing the District Court to enter a stay during the pendency of the state-court action.

We granted certiorari to decide whether, consistent with our delineation of cases encompassed by the *Younger* doctrine, abstention was appropriate here.

II

A

Neither party has questioned the District Court's jurisdiction to decide whether federal law preempted the IUB's decision, and rightly so. In *Verizon Md.*, we reviewed a similar federal-court challenge to a state administrative adjudication. In that case, as here, the party seeking federal-court review of a state agency's decision urged that the Telecommunications Act of 1996 preempted the state action. We had "no doubt that federal courts ha[d federal question] jurisdiction under [28 U.S.C.] § 1331 to entertain such a suit," and nothing in the Telecommunications Act detracted from that conclusion.

Federal courts, it was early and famously said, have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264 (1821). Jurisdiction existing, this Court has cautioned, a federal court's "obligation" to hear and decide a case is "virtually unflagging." *Colorado River*. Parallel state-court proceedings do not detract from that obligation.

In *Younger*, we recognized a "far-from-novel" exception to this general rule. *NOPSI*. The plaintiff in *Younger* sought federal-court adjudication of the constitutionality of the California Criminal Syndicalism Act. Requesting an injunction against the Act's enforcement, the federal-court plaintiff was at the time the defendant in a pending state criminal prosecution under the Act. In those circumstances, we said, the federal court should decline to enjoin the prosecution, absent bad faith, harassment, or a patently invalid state statute. . . .

We have since applied *Younger* to bar federal relief in certain civil actions. *Huffman* is the pathmarking decision. There, Ohio officials brought a civil action in state court to abate the showing of obscene movies in Pursue's theater. Because

the State was a party and the proceeding was "in aid of and closely related to [the State's] criminal statutes," the Court held *Younger* abstention appropriate.

More recently, in *NOPSI*, the Court had occasion to review and restate our *Younger* jurisprudence. NOPSI addressed and rejected an argument that a federal court should refuse to exercise jurisdiction to review a state council's ratemaking decision. "[O]nly exceptional circumstances," we reaffirmed, "justify a federal court's refusal to decide a case in deference to the States." Those "exceptional circumstances" exist, the Court determined after surveying prior decisions, in three types of proceedings. First, *Younger* precluded federal intrusion into ongoing state criminal prosecutions. Second, certain "civil enforcement proceedings" warranted abstention. Finally, federal courts refrained from interfering with pending "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S. at 368 (citing *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987)). We have not applied *Younger* outside these three "exceptional" categories, and today hold, in accord with *NOPSI*, that they define *Younger*'s scope.

B

The IUB does not assert that the Iowa state court's review of the Board decision, considered alone, implicates *Younger*. Rather, the initial administrative proceeding justifies staying any action in federal court, the IUB contends, until the state review process has concluded. The same argument was advanced in *NOPSI*. We will assume without deciding, as the Court did in *NOPSI*, that an administrative adjudication and the subsequent state court's review of it count as a "unitary process" for *Younger* purposes. The question remains, however, whether the initial IUB proceeding is of the "sort . . . entitled to *Younger* treatment."

The IUB proceeding, we conclude, does not fall within any of the three exceptional categories described in NOPSI and therefore does not trigger *Younger* abstention. The first and third categories plainly do not accommodate the IUB's proceeding. That proceeding was civil, not criminal in character, and it did not touch on a state court's ability to perform its judicial function. Cf. *Juidice* (civil contempt order); *Pennzoil* (requirement for posting bond pending appeal).

Nor does the IUB's order rank as an act of civil enforcement of the kind to which *Younger* has been extended. Our decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings "akin to a criminal prosecution" in "important respects." *Huffman*. See also *Middlesex* (*Younger* abstention appropriate where "noncriminal proceedings bear a close relationship to proceedings criminal in nature"). Such enforcement actions are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act. See, *e.g.*, *Middlesex* (state-initiated disciplinary proceedings against lawyer for violation of state ethics rules). In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. See, *e.g.*, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state-initiated administrative proceedings to enforce state civil rights laws); *Moore v. Sims*, 442 U.S. 415, 419-20 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil proceeding "brought by the State in its sovereign capacity" to recover welfare payments defendants had allegedly obtained by fraud); *Huffman* (state-initiated proceeding to enforce obscenity laws). Investigations are commonly

involved, often culminating in the filing of a formal complaint or charges. See, *e.g.*, *Dayton* (noting preliminary investigation and complaint); *Middlesex* (same).

The IUB proceeding does not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention. It is not "akin to a criminal prosecution." *Huffman*. Nor was it initiated by "the State in its sovereign capacity." *Trainor*. A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint.

In its brief, the IUB emphasizes Sprint's decision to withdraw the complaint that commenced proceedings before the Board. At that point, the IUB argues, Sprint was no longer a willing participant, and the proceedings became, essentially, a civil enforcement action.[6] The IUB's adjudicative authority, however, was invoked to settle a civil dispute between two private parties, not to sanction Sprint for commission of a wrongful act. Although Sprint withdrew its complaint, administrative efficiency, not misconduct by Sprint, prompted the IUB to answer the underlying federal question. By determining the intercarrier compensation regime applicable to VoIP calls, the IUB sought to avoid renewed litigation of the parties' dispute. Because the underlying legal question remained unsettled, the Board observed, the controversy was "likely to recur." IUB Order 6. Nothing here suggests that the IUB proceeding was "more akin to a criminal prosecution than are most civil cases." *Huffman*.

In holding that abstention was the proper course, the Eighth Circuit relied heavily on this Court's decision in *Middlesex*. *Younger* abstention was warranted, the Court of Appeals read *Middlesex* to say, whenever three conditions are met: There is (1) "an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) . . . provide[s] an adequate opportunity to raise [federal] challenges." . . .

The Court of Appeals and the IUB attribute to this Court's decision in *Middlesex* extraordinary breadth. We invoked *Younger* in *Middlesex* to bar a federal court from entertaining a lawyer's challenge to a New Jersey state ethics committee's pending investigation of the lawyer. Unlike the IUB proceeding here, the state ethics committee's hearing in *Middlesex* was indeed "akin to a criminal proceeding." As we noted, an investigation and formal complaint preceded the hearing, an agency of the State's Supreme Court initiated the hearing, and the purpose of the hearing was to determine whether the lawyer should be disciplined for his failure to meet the State's standards of professional conduct. The three Middlesex conditions recited above were not dispositive; they were, instead, additional factors appropriately considered by the federal court before invoking *Younger*.

Divorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest. That result

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[6] To determine whether a state proceeding is an enforcement action under *Younger*, several Courts of Appeals, as noted, inquire whether the underlying state proceeding is "coercive" rather than "remedial." Though we referenced this dichotomy once in a footnote, see *Dayton*, we do not find the inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation.

is irreconcilable with our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the "exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In short, to guide other federal courts, we today clarify and affirm that *Younger* extends to the three "exceptional circumstances" identified in *NOPSI*, but no further.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is Reversed.

NOTE: THE EXTENSION OF *YOUNGER* BEYOND CRIMINAL PROCEEDINGS

1. The Court's unanimous decision in *Sprint Communications* does much to clarify — and to limit — the scope of *Younger* abstention outside the criminal context. Justice Ginsburg's opinion makes clear that ordinary parallel civil litigation in a state court or administrative agency does not trigger *Younger* abstention, even if the case touches on important state interests and the parties have a full opportunity to litigate their federal claims in the state proceedings. Instead, the Court appears to restrict *Younger* to civil enforcement proceedings closely analogous to criminal prosecutions. The Court identifies three key features of such actions: (1) they are initiated by the State in its sovereign capacity; (2) they sanction the federal-court plaintiff for some wrongful act; and (3) they involve an investigation and the filing of a formal complaint or charge.

Yet in describing the kind of "quasi-criminal" civil cases to which *Younger* extends, the Court does not state that all of those features are essential. It uses words like "generally," "characteristically," "routinely," "often," and "common" to describe them. After *Sprint*, should federal district courts insist that all of those features be present in a state civil proceeding before invoking *Younger*? Or has the Court left them some wiggle room?

2. Along those lines, consider the Ninth Circuit's approach to *Younger* in civil cases, as reflected in *Gilbertson v. Albright* (Casebook pp. 1171-1179). *Gilbertson* was handed down ten years before *Sprint* but after the decision in *New Orleans Public Service, Inc. v. Council of New Orleans* (1989) (*NOPSI*), relied on by the Court in *Sprint*. After recounting the post-*Younger* civil cases, Judge Rymer offered the following summary:

> *If* a state-initiated proceeding is ongoing, and *if* it implicates important state interests (as refined by *NOPSI*), and *if* the federal litigant is not barred from litigating federal constitutional issues in that proceeding, *then* a federal court action that would enjoin the proceeding, or have the practical effect of doing so, would interfere in a way that *Younger* disapproves.

That language bears a strong resemblance to the Eighth Circuit test rejected by the Supreme Court in *Sprint*. But look closely: they are not exactly the same, and it appears that the Ninth Circuit insists upon at least some of the features that the Court identified. Is that enough to salvage the *Gilbertson* formulation?

In light of *Sprint*, did the Ninth Circuit correctly decide *Gilbertson*? Read the introduction and Parts II and III of *Gilbertson* (Casebook pp. 1171, 1178-1179) for some background on the civil proceedings in state court and before a state board at the time of the federal lawsuit. Do the disciplinary proceeding and subsequent

judicial review have enough of the features of a civil enforcement action identified in *Sprint* to trigger *Younger* abstention, as the court held?

3. Another important holding of *Gilbertson* was that *Younger* abstention may be warranted when the plaintiff seeks money damages, rather than an injunction or declaratory judgment. Read Part I.C of *Gilbertson* (Casebook pp. 1176-1178) to understand the court's reasoning.

Do you agree with the *Gilbertson* court that abstention should apply when a plaintiff seeks damages rather than injunctive relief? Why do you suppose the Supreme Court has avoided this question?

4. Does a claim that the state proceeding is completely preempted by federal law preclude *Younger* abstention? In *NOPSI*, the Court concluded it does not:

> NOPSI argues that *Younger* does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law. Such a claim, NOPSI contends, calls into question the prerequisite of *Younger* abstention that the State have a legitimate, substantial interest in its pending proceedings. . . .
>
> We disagree. There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than preemption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction. That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of a particular case — which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State. . . . [T]he appropriate question here is not whether Louisiana has a substantial, legitimate interest in reducing NOPSI's retail rate below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates. It clearly does. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."

Chapter 18
FEDERAL HABEAS CORPUS

B. THE SCOPE AND STANDARD OF REVIEW ON COLLATERAL ATTACK

[3] The Effect of AEDPA

Page 1224: ***omit*** **Williams v. Taylor** ***and the Note following it.***

Page 1244: ***insert the following new case and new Note before section C:***

WHITE v. WOODALL

Supreme Court of the United States, 2014.
134 U.S. 1697.

JUSTICE SCALIA delivered the opinion of the Court.

Respondent brutally raped, slashed with a box cutter, and drowned a 16-year-old high-school student. After pleading guilty to murder, rape, and kidnaping, he was sentenced to death. The Kentucky Supreme Court affirmed the sentence, and we denied certiorari. Ten years later, the Court of Appeals for the Sixth Circuit granted respondent's petition for a writ of habeas corpus on his Fifth Amendment claim. In so doing, it disregarded the limitations of 28 U.S.C. § 2254(d) — a provision of law that some federal judges find too confining, but that all federal judges must obey. We reverse.

I

On the evening of January 25, 1997, Sarah Hansen drove to a convenience store to rent a movie. When she failed to return home several hours later, her family called the police. Officers eventually found the vehicle Hansen had been driving a short distance from the convenience store. They followed a 400- to 500-foot trail of blood from the van to a nearby lake, where Hansen's unclothed, dead body was found floating in the water. Hansen's "throat had been slashed twice with each cut approximately 3.5 to 4 inches long," and "[h]er windpipe was totally severed."

Authorities questioned respondent when they learned that he had been in the convenience store on the night of the murder. Respondent gave conflicting statements regarding his whereabouts that evening. Further investigation revealed that respondent's "fingerprints were on the van the victim was driving," "[b]lood was found on [respondent's] front door," "[b]lood on his clothing and sweatshirt was consistent with the blood of the victim," and "DNA on . . . vaginal swabs" taken from the victim "was consistent with" respondent's.

Faced with overwhelming evidence of his guilt, respondent pleaded guilty to capital murder. He also pleaded guilty to capital kidnaping and first-degree rape, the statutory aggravating circumstance for the murder. At the ensuing penalty-phase trial, respondent called character witnesses but declined to testify himself. Defense counsel asked the trial judge to instruct the jury that "[a] defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." The trial judge denied the request, and the Kentucky Supreme Court affirmed that denial. While recognizing that the Fifth Amendment requires a no-adverse-inference instruction to protect a

nontestifying defendant at the guilt phase, see *Carter v. Kentucky*, 450 U.S. 288 (1981), the court held that *Carter* and our subsequent cases did not require such an instruction here. We denied respondent's petition for a writ of certiorari from that direct appeal.

In 2006, respondent filed this petition for habeas corpus in Federal District Court. The District Court granted relief, holding, as relevant here, that the trial court's refusal to issue a no-adverse-inference instruction at the penalty phase violated respondent's Fifth Amendment privilege against self-incrimination. The Court of Appeals affirmed and ordered Kentucky to either resentence respondent within 180 days or release him. Judge Cook dissented.

We granted certiorari.

II

A

Section 2254(d) of Title 28 provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "This standard," we recently reminded the Sixth Circuit, "is 'difficult to meet.'" *Metrish v. Lancaster*, 133 S. Ct. 1781 (2013). "'[C]learly established Federal law'" for purposes of § 2254(d)(1) includes only "'the holdings, as opposed to the dicta, of this Court's decisions.'" *Howes v. Fields*, 132 S. Ct. 1181 (2012) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000) [Casebook p. 1224]). And an "unreasonable application of" those holdings must be "objectively unreasonable," not merely wrong; even "clear error" will not suffice. *Lockyer v. Andrade*, 538 U.S. 63 (2003). Rather, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770 (2011) [Casebook p. 1233].

Both the Kentucky Supreme Court and the Court of Appeals identified as the relevant precedents in this area our decisions in *Carter*, *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999). *Carter* held that a no-adverse-inference instruction is required at the *guilt* phase. *Estelle* concerned the introduction at the penalty phase of the results of an involuntary, un-Mirandized pretrial psychiatric examination. And *Mitchell* disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting the circumstances and details of the crime."

It is clear that the Kentucky Supreme Court's conclusion is not "contrary to" the actual holding of any of these cases. 28 U.S.C. § 2254(d)(1). The Court of Appeals held, however, that the "Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of" those cases. In its view,

"reading *Carter*, *Estelle*, and *Mitchell* together, the only reasonable conclusion is that" a no-adverse-inference instruction was required at the penalty phase.[2]

We need not decide here, and express no view on, whether the conclusion that a no-adverse-inference instruction was required would be correct in a case not reviewed through the lens of § 2254(d)(1). For we are satisfied that the issue was, at a minimum, not "beyond any possibility for fairminded disagreement." *Harrington*.

We have, it is true, held that the privilege against self-incrimination applies to the penalty phase. See *Estelle* [and] *Mitchell*. But it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase. We have "never directly held that *Carter* applies at a sentencing phase where the Fifth Amendment interests of the defendant are different."

Indeed, *Mitchell* itself leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence. In that case, the District Judge had actually *drawn* from the defendant's silence an adverse inference about the drug quantity attributable to the defendant. We held that this ran afoul of the defendant's "right to remain silent at sentencing." But we framed our holding narrowly, in terms implying that it was limited to inferences pertaining to the facts of the crime: "We decline to adopt an exception for the sentencing phase of a criminal case *with regard to factual determinations respecting the circumstances and details of the crime*." *Mitchell* (emphasis added). "The Government retains," we said, *"the burden of proving facts relevant to the crime* . . . and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." (Emphasis added). And *Mitchell* included an express reservation of direct relevance here: "Whether silence bears upon the determination of a lack of remorse . . . is a separate question. It is not before us, and we express no view on it."[3]

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[2] The Court of Appeals also based its conclusion that respondent "was entitled to receive a no adverse inference instruction" on one of its own cases, *Finney v. Rothgerber*, 751 F.2d 858 (CA6 1985). That was improper. As we cautioned the Sixth Circuit two Terms ago, a lower court may not "consul[t] its own precedents, rather than those of this Court, in assessing" a habeas claim governed by § 2254. *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*).

[3] The Courts of Appeals have recognized that *Mitchell* left this unresolved; their diverging approaches to the question illustrate the possibility of fairminded disagreement. Compare *United States v. Caro*, 597 F.3d 608 (CA4 2010) reasoning that "*Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the nonstatutory aggravating factor of lack of remorse"), with *Lee v. Crouse*, 451 F.3d 598 (CA10 2006) ("[T]he circuit courts have readily confined *Mitchell* to its stated holding, and have allowed sentencing courts to rely on, or draw inferences from, a defendant's exercise of his Fifth Amendment rights for purposes other than determining the facts of the offense of conviction").

Indeed, the Sixth Circuit itself has previously recognized that *Mitchell* "explicitly limited its holding regarding inferences drawn from a defendant's silence to facts about the substantive offense and did not address other inferences that may be drawn from a defendant's silence." *United States v. Kennedy*, 499 F.3d 547 (2007).

Mitchell's reservation is relevant here for two reasons. First, if *Mitchell* suggests that *some* actual inferences might be permissible at the penalty phase, it certainly cannot be read to require a *blanket* no-adverse-inference instruction at every penalty-phase trial. And it was a blanket instruction that was requested and denied in this case; respondent's requested instruction would have informed the jury that "[a] defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him *in any way*." (Emphasis added). Counsel for respondent conceded at oral argument that remorse was at issue during the penalty-phase trial, yet the proposed instruction would have precluded the jury from considering respondent's silence as indicative of his lack of remorse. Indeed, the trial judge declined to give the no-adverse-inference instruction precisely because he was "aware of no case law that precludes the jury from considering the defendant's lack of expression of remorse . . . in sentencing." This alone suffices to establish that the Kentucky Supreme Court's conclusion was not "objectively unreasonable." *Andrade*.

Second, regardless of the scope of respondent's proposed instruction, any inferences that could have been drawn from respondent's silence would arguably fall within the class of inferences as to which *Mitchell* leaves the door open. Respondent pleaded guilty to all of the charges he faced, including the applicable aggravating circumstances. Thus, Kentucky could not have shifted to respondent its "burden of proving facts relevant to the crime": Respondent's own admissions had already established every relevant fact on which Kentucky bore the burden of proof. There are reasonable arguments that the logic of *Mitchell* does not apply to such cases.

The dissent insists that *Mitchell* is irrelevant because it merely declined to create an exception to the "normal rule," supposedly established by *Estelle*, "that a defendant is entitled to a requested no-adverse-inference instruction" at sentencing. That argument disregards perfectly reasonable interpretations of *Estelle* and *Mitchell* and hence contravenes § 2254(d)'s deferential standard of review. *Estelle* did not involve an adverse inference based on the defendant's silence or a corresponding jury instruction. Thus, whatever *Estelle* said about the Fifth Amendment, its holding[4] — the only aspect of the decision relevant here — does not "requir[e]" the categorical rule the dissent ascribes to it. Likewise, fairminded jurists could conclude that *Mitchell*'s reservation regarding remorse and acceptance of responsibility would have served no meaningful purpose

[4] The dissent says *Estelle* "held that 'so far as the protection of the Fifth Amendment is concerned,' it could 'discern no basis to distinguish between the guilt and penalty phases of a defendant's 'capital murder trial.'" *Post* (quoting *Estelle*). Of course, it did not "hold" that. Rather, it held that the defendant's Fifth Amendment "rights were abridged by the State's introduction of" a pretrial psychiatric evaluation that was administered without the preliminary warning required by *Miranda v. Arizona*, 384 U.S. 436 (1966). In any event, even *Estelle*'s dictum did not assume an entitlement to a blanket no-adverse-inference instruction. The quoted language is reasonably read as referring to the *availability* of the Fifth Amendment privilege at sentencing rather than the precise *scope* of that privilege when applied in the sentencing context. Indeed, it appears in a passage responding to the State's argument that the defendant "was not entitled to the protection of the Fifth Amendment" in the first place.

if *Estelle* had created an across-the-board rule against adverse inferences; we are, after all, hardly in the habit of reserving "separate question[s]," *Mitchell*, that have already been definitively answered. In these circumstances, where the " 'precise contours' " of the right remain " 'unclear,' " state courts enjoy "broad discretion" in their adjudication of a prisoner's claims.

B

In arguing for a contrary result, respondent leans heavily on the notion that a state-court "'determination may be set aside . . . if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.'" Brief for Respondent (quoting *Ramdass v. Angelone*, 530 U.S. 156 (2000) (plurality opinion)). The Court of Appeals and District Court relied on the same proposition in sustaining respondent's Fifth Amendment claim.

The unreasonable-refusal-to-extend concept originated in a Fourth Circuit opinion we discussed at length in *Williams*, our first in-depth analysis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We described the Fourth Circuit's interpretation of § 2254(d)(1)'s "unreasonable application" clause as "generally correct," and approved its conclusion that "a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." But we took no position on the Fourth Circuit's further conclusion that a state court commits AEDPA error if it "unreasonably refuse[s] to extend a legal principle to a new context where it should apply." We chose not "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)" because the Fourth Circuit's proposed rule for resolving them presented several "problems of precision."

Two months later, a plurality paraphrased and applied the unreasonable-refusal-to-extend concept in *Ramdass*. It did not, however, grant the habeas petitioner relief on that basis, finding that there was no unreasonable refusal to extend. Moreover, Justice O'Connor, whose vote was necessary to form a majority, cited *Williams* and made no mention of the unreasonable-refusal-to-extend concept in her separate opinion concurring in the judgment. *Ramdass* therefore did not alter the interpretation of § 2254(d)(1) set forth in *Williams*. Aside from one opinion *criticizing* the unreasonable-refusal-to-extend doctrine, see *Yarborough v. Alvarado*, 541 U.S. 652 (2004), we have not revisited the issue since *Williams* and *Ramdass*. During that same 14-year stretch, however, we have repeatedly restated our "hold[ing]" in *Williams* that a state-court decision is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case.

Thus, this Court has never adopted the unreasonable-refusal-to-extend rule on which respondent relies. It has not been so much as endorsed in a majority opinion, let alone relied on as a basis for granting habeas relief. To the extent the unreasonable-refusal-to-extend rule differs from the one embraced in *Williams* and reiterated many times since, we reject it. Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error. See Scheidegger,

Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). Thus, "if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." AEDPA's carefully constructed framework "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."

This is not to say that § 2254(d)(1) requires an "identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930 (2007). To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case. "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*. The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fairminded disagreement" on the question, *Harrington*.

Perhaps the logical next step from *Carter*, *Estelle*, and *Mitchell* would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides — which is all Kentucky needs to prevail in this AEDPA case. The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1).

* * *

Because the Kentucky Supreme Court's rejection of respondent's Fifth Amendment claim was not objectively unreasonable, the Sixth Circuit erred in granting the writ. We therefore need not reach its further holding that the trial court's putative error was not harmless. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

During the penalty phase of his capital murder trial, respondent Robert Woodall asked the court to instruct the jury not to draw any adverse inferences from his failure to testify. The court refused, and the Kentucky Supreme Court agreed that no instruction was warranted. The question before us is whether the Kentucky courts unreasonably applied clearly established Supreme Court law in concluding that the Fifth Amendment did not entitle Woodall to a no-adverse-inference instruction. See 28 U.S.C. § 2254(d)(1). In my view, the answer is yes.

I

This Court's decisions in *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Estelle v. Smith*, 451 U.S. 454 (1981), clearly establish that a criminal defendant is entitled to a requested no-adverse-inference instruction in the penalty phase of a capital trial. First consider *Carter*. The Court held that a trial judge "has the constitutional obligation, upon proper request," to give a requested no-adverse-inference instruction in order "to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." This is because when "the

jury is left to roam at large with only its untutored instincts to guide it," it may "draw from the defendant's silence broad inferences of guilt." A trial court's refusal to give a requested no-adverse-inference instruction thus "exacts an impermissible toll on the full and free exercise of the [Fifth Amendment] privilege."

Now consider *Estelle.* The Court held that "so far as the protection of the Fifth Amendment privilege is concerned," it could "discern no basis to distinguish between the guilt and penalty phases" of a defendant's "capital murder trial." The State had introduced at the penalty phase the defendant's compelled statements to a psychiatrist, in order to show the defendant's future dangerousness. Defending the admission of those statements, the State argued that the defendant "was not entitled to the protection of the Fifth Amendment because [his statements were] used only to determine punishment after conviction, not to establish guilt." This Court rejected the State's argument on the ground that the Fifth Amendment applies equally to the penalty phase and the guilt phase of a capital trial.

What is unclear about the resulting law? If the Court holds in Case A that the First Amendment prohibits Congress from discriminating based on viewpoint, and then holds in Case B that the Fourteenth Amendment incorporates the First Amendment as to the States, then it is clear that the First Amendment prohibits the States from discriminating based on viewpoint. By the same logic, because the Court held in *Carter* that the Fifth Amendment requires a trial judge to give a requested no-adverse-inference instruction during the guilt phase of a trial, and held in *Estelle* that there is no basis for distinguishing between the guilt and punishment phases of a capital trial for purposes of the Fifth Amendment, it is clear that the Fifth Amendment requires a judge to provide a requested no-adverse-inference instruction during the penalty phase of a capital trial.

II

The Court avoids this logic by reading *Estelle* too narrowly. First, it contends that *Estelle*'s holding that the Fifth Amendment applies equally to the guilt and penalty phases was mere dictum. But this rule was essential to the resolution of the case, so it is binding precedent, not dictum.

Second, apparently in the alternative, the majority acknowledges that *Estelle* "held that the privilege against self-incrimination *applies* to the penalty phase," but it concludes that *Estelle* said nothing about the *content* of the privilege in the penalty phase. This interpretation of *Estelle* ignores its rationale. The reason that *Estelle* concluded that the Fifth Amendment applies to the penalty phase of a capital trial is that the Court saw "no basis to distinguish between the guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." And as there is no basis to distinguish between the two contexts for Fifth Amendment purposes, there is no basis for varying either the application or the content of the Fifth Amendment privilege in the two contexts.

The majority also reads our decision in *Mitchell v. United States*, 526 U.S. 314 (1999), to change the legal landscape where it expressly declined to do so. In *Mitchell*, the Court considered whether to create an exception to the "normal rule in a criminal case . . . that no negative inference from the defendant's failure to testify is permitted." We refused: "We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Mitchell* thus reiterated what *Carter* and *Estelle* had already established. The "normal rule" is that Fifth

Amendment protections apply during trial and sentencing. Because the Court refused "to adopt an *exception*" to this default rule, (emphasis added), the law before and after *Mitchell* remained the same.

The majority seizes upon the limited nature of *Mitchell*'s holding, concluding that by refusing to adopt an exception to the normal rule for *certain* "factual determinations," *Mitchell* suggested that inferences about *other* matters might be permissible at the penalty phase. The majority seems to believe that *Mitchell* somehow casts doubt upon whether *Estelle*'s Fifth Amendment rule applies to matters unrelated to the "circumstances and details of the crime," such as remorse, or as to which the State does not bear the burden of proof.

As an initial matter, *Mitchell* would have had to overrule — or at least substantially limit — *Estelle* to create an exception for matters unrelated to the circumstances and details of the crime or for matters on which the defendant bears the burden of proof. Sentencing proceedings, particularly capital sentencing proceedings, often focus on factual matters that do not directly concern facts of the crime. Was the defendant subject to flagrant abuse in his growing-up years? Is he suffering from a severe physical or mental impairment? Was he supportive of his family? Is he remorseful? *Estelle* itself involved compelled statements introduced to establish the defendant's future dangerousness — another fact often unrelated to the circumstances or details of a defendant's crime. In addition, States typically place the burden to prove mitigating factors at the penalty phase on the defendant. A reasonable jurist would not believe that *Mitchell*, by refusing to create an exception to *Estelle*, intended to undermine the very case it reaffirmed.

Mitchell held, simply and only, that the normal rule of *Estelle* applied in the circumstances of the particular case before the Court. That holding does not destabilize settled law beyond its reach. We frequently resist reaching beyond the facts of a case before us, and we often say so. That does not mean that we throw cases involving all other factual circumstances into a shadow-land of legal doubt.

The majority also places undue weight on dictum in *Mitchell* reserving judgment as to whether to create additional exceptions to the normal rule of *Estelle* and *Carter*. We noted: "Whether silence bears upon the determination of a lack of remorse . . . is a separate question. It is not before us, and we express no view on it." This dictum, says the majority, suggests that some inferences, including about remorse (which was at issue in Woodall's case), may be permissible.

When the Court merely reserves a question that is "not before us" for a future case, we do not cast doubt on legal principles that are already clearly established. The Court often identifies questions that it is *not* answering in order to clarify the question it *is* answering. In so doing — that is, in "express[ing] no view" on questions that are not squarely before us — we do not create a state of uncertainty as to those questions. And in respect to *Mitchell*, where the Court reserved the question whether to create an exception to the normal rule, this is doubly true. The normal rule that a defendant is entitled to a requested no-adverse-inference instruction at the penalty phase as well as the guilt phase remained clearly established after *Mitchell*.

III

In holding that the Kentucky courts did not unreasonably apply clearly established law, the majority declares that if a court must "extend" the rationale of a case in order to apply it, the rationale is not clearly established. I read this to mean simply that if there may be "fairminded disagreement" about whether a rationale applies to a certain set of facts, a state court will not unreasonably apply the law by failing to apply that rationale, and I agree. See *Harrington v. Richter*, 131 S. Ct. 770 (2011). I do not understand the majority to suggest that reading two legal principles together would necessarily "extend" the law, which would be a proposition entirely inconsistent with our case law. As long as fair-minded jurists would conclude that two (or more) legal rules considered together would dictate a particular outcome, a state court unreasonably applies the law when it holds otherwise.

That is the error the Kentucky Supreme Court committed here. Failing to consider together the legal principles established by *Carter* and *Estelle*, the state court confined those cases to their facts. It held that *Carter* did not apply because Woodall had already pleaded guilty — that is, because Woodall requested a no-adverse-inference instruction at the penalty phase rather than the guilt phase of his trial. And it concluded that *Estelle* did not apply because *Estelle* was not a "jury instruction case." The Kentucky Supreme Court unreasonably failed to recognize that together *Carter* and *Estelle* compel a requested no-adverse-inference instruction at the penalty phase of a capital trial. And reading *Mitchell* to rein in the law in contemplation of never-before-recognized exceptions to this normal rule would be an unreasonable *retraction* of clearly established law, not a proper failure to "extend" it. Because the Sixth Circuit correctly applied clearly established law in granting Woodall's habeas petition, I would affirm.

With respect I dissent from the Court's contrary conclusion.

NOTE: UNREASONABLE APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW UNDER AEDPA

1. The Supreme Court's docket is necessarily constrained. In the 2013-2014 Term, the Court announced just 73 decisions on the merits — its lowest tally in seven years — of which only a tiny fraction addressed the kind of criminal procedure issues relevant to habeas litigation. By contrast, lower federal courts address tens of thousands of habeas petitions, and state courts conduct hundreds of thousands of criminal trials and guilty pleas, appeals, petitions for post-conviction relief, and other criminal proceedings. Yet AEDPA specifies that habeas relief may be granted only when a state-court decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added).

As a result, the problem that confronted the Court in *White v. Woodall* is one that arises frequently under § 2254(d)(1): does a state court "unreasonabl[y] appl[y]" clearly established law when its decision contravenes a broad rule or principle articulated by the Supreme Court, but when the facts of the case could plausibly be distinguished from Supreme Court precedent? The Justices in *Woodall* agreed on the relevant body of "clearly established" law. The Court had held in *Carter v. Kentucky*, 450 U.S. 288 (1981), that the Fifth Amendment's privilege against self-incrimination entitles a defendant in a criminal trial to an "adverse inference" instruction directing the jury that a failure to testify cannot be

used as evidence of guilt. It had further held that the Fifth Amendment prohibits the admission of compulsory statements in a capital sentencing proceeding, *Estelle v. Smith*, 451 U.S. 454 (1981), and an adverse inference at sentencing from a defendant's silence with respect to the facts and circumstances of the crime, *Mitchell v. United States*, 526 U.S. 314 (1999). But the Court had never confronted a case exactly like *Woodall*, in which the defendant requested a blanket instruction prohibiting any adverse inference at sentencing, including an inference that his silence indicated a lack of remorse. The question, as Justice Breyer puts it in dissent, is whether "two (or more) legal rules read together would dictate a particular outcome," and the dueling opinions in *Woodall* illustrate the challenges that lower courts confront in evaluating whether a state court's inferences from incomplete Supreme Court precedent on a subject are reasonable.

2. The Court *Woodall* unanimously rejects the suggestion, floated in some of its earlier cases, that a state court's unreasonable "failure to extend" existing Supreme Court precedent satisfies 28 U.S.C. § 2254(d). But in two ways, the majority and dissent divide over how to identify an "unreasonable application" of clearly established federal law.

First, the majority and dissent disagree about the import of a passage from *Estelle* in which the Court stated that it could "discern no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63. The majority characterizes that passage as dictum, noting that *Estelle* involved only the admission of compulsory pretrial statements. The dissent, by contrast, views that passage as essential to the outcome of the case and therefore part of the holding. Whose account of *Estelle* is more persuasive? Is the dissent really saying that, in *Estelle*, the Court resolved every future Fifth Amendment question at sentencing by holding that the privilege always operates in exactly the same way as it does at trial? Why should it matter, as both opinions note, that the disputed passage appears in a portion of *Estelle* in which the Court rejected the argument that the Fifth Amendment is categorically irrelevant at the sentencing stage?

Second, the majority and dissent disagree about the import of passages in *Mitchell* framing the decision as one about "factual determinations respecting the circumstances and details of the crime," and expressly reserving judgment on the "separate question" whether the Fifth Amendment prohibits an adverse inference from silence as to remorse or acceptance of responsibility. Is the majority really saying that when the Court reserves judgment on a question, any answer by a state court is reasonable under § 2254(d)(1)? Why should it matter, as both opinions acknowledge, that the Court described itself in *Mitchell* as declining to create an "exception" at sentencing for facts about the crime?

3. The Supreme Court had never confronted a case quite like *Woodall* before, but many lower federal courts and state courts had. Indeed, as the majority notes, at least three federal courts of appeals — including the Sixth Circuit — had reached the same conclusion as the Kentucky Supreme Court, reasoning that the logic of *Estelle* and *Mitchell* did not extend to adverse inferences about facts unrelated to the circumstances of the crime, such as a lack of remorse. Does that kind of circuit conflict prove that there is room for "fairminded disagreement" within the meaning of *Harrington*, and thus effectively foreclose habeas relief? For a discussion of how the Court has addressed similar questions in the qualified immunity context, see Chapter 16 (Casebook p. 1124).

4. *Harrington* and *Williams* assume that *Teague v. Lane* (Casebook pp. 1207-1223) survives the enactment of AEDPA. But do *Teague* and AEDPA require distinct analyses? In *Horn v. Banks*, 536 U.S. 266 (2002), the Court reversed a grant of the writ where the Third Circuit had found the Pennsylvania Supreme Court's application of a United States Supreme Court precedent unreasonable. The Pennsylvania court had applied a Supreme Court decision without asking whether it applied retroactively to Banks's claim. Because the state court had not considered retroactivity, the Third Circuit did not either. In a per curiam opinion without oral argument, the Supreme Court reversed:

> While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d) ("[a]n application . . . shall not be granted . . . *unless*" the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts of the responsibility for addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct.

5. We have now encountered several contexts in which federal courts are asked to decide, not merely whether the defendant violated the law, but whether the violation was objectively unreasonable. The law of qualified immunity (Casebook pp. 1106-1125) affords defendants in § 1983 and *Bivens* actions a defense to liability where their actions, although unlawful, did not violate "clearly established" law. That objective inquiry turns on whether the defendant's actions were unreasonable in light of existing law and precedent. Similarly, the retroactivity rules announced in *Teague* foreclose habeas relief when a prisoner's claim depends on a "new rule" of criminal procedure. Distinguishing between new rules and old rules requires an objective assessment of whether the state-court decision was unreasonable based on law and precedent in effect at the time the conviction and sentence became final.

Are there meaningful differences in the Court's approach to "unreasonable applications" of federal law under § 2254(d)(1), its objective standard in evaluating qualified immunity, and its standard for identifying "new rules" under *Teague*? Does each of these inquiries, at bottom, ask essentially the same question about the range of reasonable interpretations of existing precedent? Or does the Court's approach in some contexts strike you as more deferential than in others?

One important difference concerns the source of precedent that may be consulted in assessing the state of the law at the time of the defendant's actions. Section 2254(d)(1) explicitly limits the body of relevant federal law to determinations by "the Supreme Court of the United States." In qualified immunity cases, by contrast, officials' actions may be deemed objectively unreasonable based on the decisions of federal circuit courts of appeals. *See, e.g.*, *Lane v. Franks*, 2014 U.S. LEXIS 4302 (2014), in which the Court's ruling on qualified immunity turned principally on the state of Eleventh Circuit precedent at the time of the defendant's actions.

Should there be meaningful differences in the Court's approach in each of those contexts? Should it matter, for example, that qualified immunity and

Teague's retroactivity rules were developed by judges in a common-law fashion, whereas § 2254(d)(1) was enacted by Congress? Should it matter that *Teague* and § 2254(d)(1) evaluate decisions by state-court judges, who have extensive legal training and ample time to consider their judgments, whereas qualified immunity evaluates decisions by executive officials such as police officers, who have less legal training and sometimes must make swift decisions on the fly? Should *Teague*'s exceptions for "watershed rules" and substantive rules be extended to qualified immunity and § 2254(d)(1) cases?

E. THE RELEVANCE OF INNOCENCE

Page 1280: ***insert the following new case and new Note before section F:***

McQUIGGIN v. PERKINS

Supreme Court of the United States, 2013.
133 S. Ct. 1924.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the "actual innocence" gateway to federal habeas review applied in *Schlup v. Delo* (1995), and further explained in *House v. Bell*, 547 U.S. 518 (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. Here, the question arises in the context of 28 U.S.C. § 2244(d)(1), the statute of limitations on federal habeas petitions prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the petitioner does not file her federal habeas petition, at the latest, within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime?

We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*; see *House* (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup*.

In the instant case, the Sixth Circuit acknowledged that habeas petitioner Perkins (respondent here) had filed his petition after the statute of limitations ran out, and had "failed to diligently pursue his rights." Nevertheless, the Court of Appeals reversed the decision of the District Court denying Perkins' petition, and held that Perkins' actual-innocence claim allowed him to pursue his habeas petition as if it had been filed on time. The appeals court apparently considered a petitioner's delay irrelevant to appraisal of an actual-innocence claim.

We vacate the Court of Appeals' judgment and remand the case. Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute

barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

I

A

On March 4, 1993, respondent Floyd Perkins attended a party in Flint, Michigan, in the company of his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three men left the party together. Henderson was later discovered on a wooded trail, murdered by stab wounds to his head.

Perkins was charged with the murder of Henderson. At trial, Jones was the key witness for the prosecution. He testified that Perkins alone committed the murder while Jones looked on. App. 55.

Chauncey Vaughn, a friend of Perkins and Henderson, testified that, prior to the murder, Perkins had told him he would kill Henderson, and that Perkins later called Vaughn, confessing to his commission of the crime. A third witness, Torriano Player, also a friend of both Perkins and Henderson, testified that Perkins told him, had he known how Player felt about Henderson, he would not have killed Henderson.

Perkins, testifying in his own defense, offered a different account of the episode. He testified that he left Henderson and Jones to purchase cigarettes at a convenience store. When he exited the store, Perkins related, Jones and Henderson were gone. Perkins said that he then visited his girlfriend. About an hour later, Perkins recalled, he saw Jones standing under a streetlight with blood on his pants, shoes, and plaid coat.

The jury convicted Perkins of first-degree murder. He was sentenced to life in prison without the possibility of parole on October 27, 1993. The Michigan Court of Appeals affirmed Perkins' conviction and sentence, and the Michigan Supreme Court denied Perkins leave to appeal on January 31, 1997. Perkins' conviction became final on May 5, 1997.

B

Under [AEDPA] a state prisoner ordinarily has one year to file a federal petition for habeas corpus, starting from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). If the petition alleges newly discovered evidence, however, the filing deadline is one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(D).

Perkins filed his federal habeas corpus petition on June 13, 2008, more than 11 years after his conviction became final. He alleged, *inter alia*, ineffective assistance on the part of his trial attorney, depriving him of his Sixth Amendment right to competent counsel. To overcome AEDPA's time limitations, Perkins asserted newly discovered evidence of actual innocence. He relied on three affidavits, each pointing to Jones, not Perkins, as Henderson's murderer.

The first affidavit, dated January 30, 1997, was submitted by Perkins' sister, Ronda Hudson. Hudson stated that she had heard from a third party, Louis Ford, that Jones bragged about stabbing Henderson and had taken his clothes to the cleaners after the murder. The second affidavit, dated March 16, 1999, was subscribed to by Demond Louis, Chauncey Vaughn's younger brother. Louis stated that, on the night of the murder, Jones confessed to him that he had just

killed Henderson. Louis also described the clothes Jones wore that night, bloodstained orange shoes and orange pants, and a colorful shirt. The next day, Louis added, he accompanied Jones, first to a dumpster where Jones disposed of the bloodstained shoes, and then to the cleaners. Finally, Perkins presented the July 16, 2002 affidavit of Linda Fleming, an employee at Pro-Clean Cleaners in 1993. She stated that, on or about March 4, 1993, a man matching Jones's description entered the shop and asked her whether bloodstains could be removed from the pants and a shirt he brought in. The pants were orange, she recalled, and heavily stained with blood, as was the multicolored shirt left for cleaning along with the pants.

The District Court found the affidavits insufficient to entitle Perkins to habeas relief. Characterizing the affidavits as newly discovered evidence was "dubious," the District Court observed, in light of what Perkins knew about the underlying facts at the time of trial. But even assuming qualification of the affidavits as evidence newly discovered, the District Court next explained, [the petition was untimely]. "[If] the statute of limitations began to run as of the date of the latest of th[e] affidavits, July 16, 2002," the District Court noted, then "absent tolling, [Perkins] had until July 16, 2003 in which to file his habeas petition." Perkins, however, did not file until nearly five years later, on June 13, 2008.

. . . [The district court further determined: (1) that Perkins had established neither "exceptional circumstances" nor diligence in pursuing his rights, both of which were preconditions for equitable tolling of the limitations period; and (2) that the new affidavits did not establish, in light of all the evidence, that it is more likely than not that no reasonable juror would have convicted him.]

Perkins appealed the District Court's judgment. Although recognizing that AEDPA's statute of limitations had expired and that Perkins had not diligently pursued his rights, the Sixth Circuit granted a certificate of appealability limited to a single question: Is reasonable diligence a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits?

On consideration of the certified question, the Court of Appeals reversed, [holding] that Perkins' gateway actual-innocence allegations allowed him to present his ineffective-assistance-of-counsel claim as if it were filed on time. On remand, the Court of Appeals instructed, "the [D]istrict [C]ourt [should] fully consider whether Perkins assert[ed] a credible claim of actual innocence."

We granted certiorari to resolve a Circuit conflict on whether AEDPA's statute of limitations can be overcome by a showing of actual innocence.

II

A

In *Holland v. Florida*, 130 S. Ct. 2549 (2010), this Court addressed the circumstances in which a federal habeas petitioner could invoke the doctrine of "equitable tolling." *Holland* held that "a [habeas] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." As the courts below comprehended, Perkins does not qualify for equitable tolling. In possession of all three affidavits by July 2002, he waited nearly six years to seek federal postconviction relief. "Such a delay falls far short of demonstrating the . . . diligence" required to entitle a petitioner to equitable tolling.

Perkins, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable *exception* to § 2244(d)(1), not an extension of the time statutorily prescribed.

Decisions of this Court support Perkins' view of the significance of a convincing actual-innocence claim. We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993). We have recognized, however, that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*.

We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, see *McCleskey v. Zant*, 499 U.S. 467 (1991), failure to develop facts in state court, see *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and failure to observe state procedural rules, including filing deadlines, see *Coleman v. Thompson*, 501 U.S. 722 (1991).

The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In *Calderon v. Thompson*, 523 U.S. 538 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. *Id.* ("The miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). In *Bousley v. United States*, 523 U.S. 614 (1998), we held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in *House*, we reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error.

These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.

As just noted, we have held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines. *Coleman*. A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under state timeliness rules. The State's reading of AEDPA's time prescription would thus accord greater force to a federal deadline than to a similarly designed state deadline. It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter

enforcement of federal procedural rules than procedural rules established and enforced by the *States*.

B

The State ties to § 2244(d)'s text its insistence that AEDPA's statute of limitations precludes courts from considering late-filed actual-innocence gateway claims. "Section 2244(d)(1)(D)," the State contends, "forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim." That is so, the State maintains, because AEDPA prescribes a comprehensive system for determining when its one-year limitations period begins to run. "Included within that system," the State observes, "is a specific trigger for the precise circumstance presented here: a constitutional claim based on new evidence." Section 2244(d)(1)(D) runs the clock from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." In light of that provision, the State urges, "there is no need for the courts to act in equity to provide additional time for persons who allege actual innocence as a gateway to their claims of constitutional error." Perkins' request for an equitable exception to the statute of limitations, the State charges, would "rende[r] superfluous this carefully scripted scheme."

The State's argument in this regard bears blinders. AEDPA's time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Schlup*. Section 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by § 2244(d)(1)(D)'s triggering provision. That provision, in short, will hardly be rendered superfluous by recognition of the miscarriage of justice exception.

The State further relies on provisions of AEDPA other than s 2244(d)(1)(D), namely, §§ 2244(b)(2)(B) and 2254(e)(2), to urge that Congress knew how to incorporate the miscarriage of justice exception when it was so minded. Section 2244(b)(2)(B), the State observes, provides that a petitioner whose first federal habeas petition has already been adjudicated when new evidence comes to light may file a second-or-successive petition when, and only when, the facts underlying the new claim would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). And § 2254(e)(2), which generally bars evidentiary hearings in federal habeas proceedings initiated by state prisoners, includes an exception for prisoners who present new evidence of their innocence. See §§ 2254(e)(2)(A)(ii), (B) (permitting evidentiary hearings in federal court if "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

But Congress did not simply incorporate the miscarriage of justice exception into §§ 2244(b)(2)(B) and 2254(e)(2). Rather, Congress constrained the application of the exception. Prior to AEDPA's enactment, a court could grant relief on a second-or-successive petition, then known as an "abusive" petition, if the petitioner could show that "a fundamental miscarriage of justice would result from a failure

to entertain the claim." *McCleskey*. Section 2244(b)(2)(B) limits the exception to cases in which "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the petitioner can establish that no reasonable factfinder "would have found [her] guilty of the underlying offense" by "clear and convincing evidence." Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ("clear and convincing evidence") and to satisfy a diligence requirement that did not exist prior to AEDPA's passage.

Likewise, petitioners asserting actual innocence pre-AEDPA could obtain evidentiary hearings in federal court even if they failed to develop facts in state court. See *Keeney* ("A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."). Under AEDPA, a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence. §§ 2254(e)(2)(A)(ii), (B).

Sections 2244(b)(2)(B) and 2254(e)(2) thus reflect Congress' will to *modify* the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court. These provisions do not demonstrate Congress' intent to preclude courts from applying the exception, unmodified, to "the type of petition at issue here" — an untimely first federal habeas petition alleging a gateway actual-innocence claim. *House*. The more rational inference to draw from Congress' incorporation of a modified version of the miscarriage of justice exception in §§ 2244(b)(2)(B) and 2254(e)(2) is simply this: In a case not governed by those provisions, i.e., a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.[2]

Our reading of the statute is supported by the Court's opinion in *Holland*. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," *Holland* reminded, and affirmed that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." The text of § 2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition. As we observed in *Holland*,

> AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law. . . . When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights. *Id.* (internal quotation marks omitted).

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[2] Prior to AEDPA, it is true, this Court had not ruled that a credible claim of actual innocence could supersede a federal statute of limitations. The reason why that is so is evident: Pre-AEDPA, petitions for federal habeas relief were not governed by any statute of limitations. . . .

[In a footnote, the Court added:] For eight pages, the dissent stridently insists that federal (although not state) statutes of limitations allow no exceptions not contained in the text. Well, not quite so, the dissent ultimately acknowledges. Even AEDPA's statute of limitations, the dissent admits, is subject to equitable tolling. [The reference is to Part III of the dissent.] But that is because equitable tolling "can be seen as a reasonable assumption of genuine legislative intent." Why is it not an equally reasonable assumption that Congress would want a limitations period to yield when what is at stake is a State's incarceration of an individual for a crime, it has become clear, no reasonable person would find he committed? For all its bluster, the dissent agrees with the Court on a crucial point: Congress legislates against the backdrop of existing law. At the time of AEDPA's enactment, multiple decisions of this Court applied the miscarriage of justice exception to overcome various threshold barriers to relief. It is hardly "unprecedented," therefore, to conclude that "Congress intended or could have anticipated [a miscarriage of justice] exception" when it enacted AEDPA.

III

Having rejected the State's argument that § 2244(d)(1)(D) precludes a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence, we turn to the State's further objection to the Sixth Circuit's opinion. Even if a habeas petitioner asserting a credible claim of actual innocence may overcome AEDPA's statute of limitations, the State argues, the Court of Appeals erred in finding that no threshold diligence requirement at all applies to Perkins' petition.

While formally distinct from its argument that § 2244(d)(1)(D)'s text forecloses a late-filed claim alleging actual innocence, the State's contention makes scant sense. Section 2244(d)(1)(D) requires a habeas petitioner to file a claim within one year of the time in which new evidence "could have been discovered through the exercise of due diligence." It would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar § 2244(d)(1)(D) erects, yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition.

While we reject the State's argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold, we hold that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner's proof of innocence. To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*. Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Perkins so acknowledges.

Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence. The State fears that a prisoner might "lie in wait and use stale evidence to collaterally attack his conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence." The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim. And frivolous petitions should occasion instant dismissal. See 28 U.S.C. § 2254 Rule 4. Focusing on the merits of a petitioner's actual-innocence

claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception — i.e., ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*.

IV

We now return to the case at hand. The District Court proceeded properly in first determining that Perkins' claim was filed well beyond AEDPA's limitations period and that equitable tolling was unavailable to Perkins because he could demonstrate neither exceptional circumstances nor diligence. The District Court then found that Perkins' alleged newly discovered evidence, i.e., the information contained in the three affidavits, was "substantially available to [Perkins] at trial." Moreover, the proffered evidence, even if "new," was hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted Perkins.

The Sixth Circuit granted a certificate of appealability limited to the question whether reasonable diligence is a precondition to reliance on actual innocence as a gateway to adjudication of a federal habeas petition on the merits. We have explained that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence. On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation. We stress once again that the *Schlup* standard is demanding. The gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."

* * *

For the reasons stated, the judgment of the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE ALITO joins as to Parts I, II, and III, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a "1-year period of limitation shall apply" to a state prisoner's application for a writ of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1). The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what it concedes is an "exception" to this clear statutory command?

That question is unanswered because there is no answer. This Court has no such power, and not one of the cases cited by the opinion says otherwise. The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case.

I

A

"Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a procedural bar. Never before have we applied the exception to circumvent a categorical *statutory* bar to relief. We have not done so because we have no power to do so. Where Congress has erected a

constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect.

Before AEDPA, the Supreme Court had developed an array of doctrines, see, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977) (procedural default); *McCleskey v. Zant*, 499 U.S. 467 (1991) (abuse of the writ), to limit the habeas practice that it had radically expanded in the early or mid-20th century to include review of the merits of conviction and not merely jurisdiction of the convicting court, see *Stone v. Powell* (1976). For example, the doctrine of procedural default holds that a state prisoner's default of his federal claims "in state court pursuant to an independent and adequate state procedural rule" bars federal habeas review of those claims. *Coleman v. Thompson* (1991). That doctrine is not a statutory or jurisdictional command; rather, it is a "prudential" rule "grounded in considerations of comity and concerns for the orderly administration of criminal justice." *Dretke v. Haley*, 541 U.S. 386 (2004).

And what courts have created, courts can modify. One judge-made exception to procedural default allows a petitioner to proceed where he can demonstrate "cause" for the default and "prejudice." See *Coleman*. As relevant here, we have also expressed a willingness to excuse a petitioner's default, even absent a showing of cause, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier* (1986); see *Schlup*; *House v. Bell*, 547 U.S. 518 (2006).

There is nothing inherently inappropriate (as opposed to merely unwise) about judge-created exceptions to judge-made barriers to relief. Procedural default, for example, raises "no question of a federal district court's power to entertain an application for a writ of habeas corpus." *Francis v. Henderson*, 425 U.S. 536 (1976). Where a petitioner would, but for a judge-made doctrine like procedural default, have a good habeas claim, it offends no command of Congress's for a federal court to consider the petition. But that free-and-easy approach has no place where a statutory bar to habeas relief is at issue. "[T]he power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75 (1807) (Marshall, C.J.), and "judgments about the proper scope of the writ are 'normally for Congress to make,' " *Felker v. Turpin*, 518 U.S. 651 (1996). One would have thought it too obvious to mention that this Court is duty bound to enforce AEDPA, not amend it.

B

Because we have no "equitable" power to discard statutory barriers to habeas relief, we cannot simply extend judge-made exceptions to judge-made barriers into the statutory realm. The Court's insupportable leap from judge-made procedural bars to *all* procedural bars, including *statutory* bars, does all the work in its opinion — and there is not a whit of precedential support for it. *McCleskey v. Zant* applied a "miscarriage of justice" exception to the judge-made abuse-of-the-writ doctrine. *Coleman v. Thompson* and *Murray v. Carrier* applied it to the judge-made procedural-default doctrine. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), applied it to a variant of procedural default: a state prisoner's failure adequately to develop material facts in state court. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), a plurality opinion, applied it to a statute that merely said lower federal courts "need not" entertain successive petitions, thus leaving them with "*discretion* to entertain successive petitions under some circumstances." *Id.* (emphasis added). Not one of

the cases on which the Court relies today supports the extraordinary premise that courts can create out of whole cloth an exception to a statutory bar to relief.

The opinion for the Court also trots out post-AEDPA cases to prove the irrelevant point that "[t]he miscarriage of justice exception . . . survived AEDPA's passage." What it ignores, yet again, is that after AEDPA's passage, as before, the exception applied only to *nonstatutory* obstacles to relief. *Bousley v. United States* and *House v. Bell* were applications of the judge-made doctrine of procedural default. *Calderon v. Thompson*, 523 U.S. 538 (1998), a non-AEDPA case, involved the courts of appeals' "inherent power to recall their mandates, subject to review for an abuse of discretion"; it stands only for the proposition that the miscarriage-of-justice exception is an appropriate "means of channeling" that discretion.

The Court's opinion, in its way, acknowledges the dearth of precedential support for its holding. "Prior to AEDPA," it concedes, "this Court had not ruled that a credible claim of actual innocence could supersede a federal statute of limitations." Its explanation for this lack of precedent is that before AEDPA, "petitions for federal habeas relief were not governed by any statute of limitations." That is true but utterly unprobative. There are many statutory bars to relief other than statutes of limitations, and we had never (and before today, have never) created an actual-innocence exception to *any* of them. The reason why is obvious: Judicially amending a validly enacted statute in this way is a flagrant breach of the separation of powers.

II

The Court has no qualms about transgressing such a basic principle. It does not even attempt to cloak its act of judicial legislation in the pretense that it is merely construing the statute; indeed, it freely admits that its opinion recognizes an "exception" that the statute does not contain. [The reference apparently is to the second paragraph of Part II-A of the Court's opinion.] And it dismisses, with a series of transparent non sequiturs, Michigan's overwhelming textual argument that the statute provides no such exception and envisions none.

The key textual point is that two provisions of § 2244, working in tandem, provide a comprehensive path to relief for an innocent prisoner who has newly discovered evidence that supports his constitutional claim. Section 2244(d)(1)(D) gives him a fresh year in which to file, starting on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," while § 2244(b)(2)(B) lifts the bar on second or successive petitions. Congress clearly anticipated the scenario of a habeas petitioner with a credible innocence claim and addressed it by crafting an exception (and an exception, by the way, more restrictive than the one that pleases the Court today). One cannot assume that Congress left room for other, judge-made applications of the actual-innocence exception, any more than one would add another gear to a Swiss watch on the theory that the watchmaker surely would have included it if he had thought of it. In both cases, the intricate craftsmanship tells us that the designer arranged things just as he wanted them.

The Court's feeble rejoinder is that its (judicially invented) version of the "actual innocence" exception applies only to a "severely confined category" of cases. Since cases qualifying for the actual-innocence exception will be rare, it explains, the statutory path for innocent petitioners will not "be rendered superfluous." That is no answer at all. That the Court's exception would not *entirely* frustrate Congress's design does not weaken the force of the State's

argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent. By the Court's logic, a statute banning littering could simply be deemed to contain an exception for cigarette butts; after all, the statute as thus amended would still cover *something*. That is not how a court respectful of the separation of powers should interpret statutes.

Even more bizarre is the Court's concern that applying AEDPA's statute of limitations without recognizing an atextual actual-innocence exception would "accord greater force to a federal deadline than to a similarly designed state deadline." The Court terms that outcome "passing strange," but it is not strange at all. Only *federal* statutes of limitations bind federal habeas courts with the force of law; a state statute of limitations is given effect on federal habeas review only by virtue of the *judge-made* doctrine of procedural default.[1] See *Coleman*. With its eye firmly fixed on something it likes — a shiny new exception to a statute unloved in the best circles — the Court overlooks this basic distinction, which would not trouble a second-year law student armed with a copy of Hart & Wechsler. The Court simply ignores basic legal principles where they pose an obstacle to its policy-driven, free-form improvisation.

The Court's statutory-construction blooper reel does not end there. Congress's express inclusion of innocence-based exceptions in two neighboring provisions of the Act confirms, one would think, that there is no actual-innocence exception to § 2244(d)(1). Section 2244(b)(2)(B), as already noted, lifts the bar on claims presented in second or successive petitions where "the factual predicate for the claim could not have been discovered previously through . . . due diligence" and "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found" the petitioner guilty. Section 2254(e)(2) permits a district court to hold an evidentiary hearing where a diligent state prisoner's claim relies on new facts that "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found" him guilty. Ordinarily, we would draw from the express enumeration of these two actual-innocence exceptions the inference that no others were intended.

The Court's twisting path to the contrary conclusion is not easy to follow, but I will try. In the Court's view, the key fact here is that these two provisions of AEDPA codified what had previously been judge-made barriers to relief and applied to them a stricter actual-innocence standard than the courts had been applying. From this, the Court reasons that Congress made a conscious choice not also to apply the more restrictive actual-innocence standard to the statute of limitations. Ergo, the Court concludes, we are free to apply the more lenient version of the actual-innocence exception.

That clever account ignores the background against which Congress legislated. *Of course* Congress did not "constrain" application of the actual-innocence exception to the statute of limitations. It felt no need to do so, because it had no reason whatsoever to suspect that *any* version of the exception would *apply* to the statute of limitations. The collective efforts of respondent and the majority

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[1] If the Court is really troubled by this disparity, there is a way to resolve it that is consistent with the separation of powers: Revise our judge-made procedural-default doctrine to give absolute preclusive effect to state statutes of limitations.

have turned up not a single instance where this Court has applied the actual-innocence exception to *any* statutory barrier to habeas relief, much less to a statute of limitations. What has been said of equitable tolling applies in spades to non-tolling judicial inventions: "Congress cannot intend to incorporate, by silence, various forms of equitable tolling that were not generally recognized in the common law at the time of enactment." Bain & Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493 (2004). The only conceivable relevance of §§ 2244(b)(2)(B) and 2254(e)(2) is (1) as we have said, that no other actual-innocence exception was intended, and (2) that *if* Congress had anticipated that this Court would amend § 2244(d)(1) to add an actual-innocence exception (which it surely did not), it would have desired the more stringent formulation and not the expansive formulation applied today, which it specifically rejected for those other provisions.

III

Three years ago, in *Holland v. Florida*, 130 S. Ct. 2549 (2010), we held that AEDPA's statute of limitations is subject to equitable tolling. That holding offers no support for importing a novel actual-innocence exception. Equitable tolling — extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute — seeks to vindicate what might be considered the genuine intent of the statute. By contrast, suspending the statute because of a separate policy that the court believes should trump it ("actual innocence") is a blatant overruling. Moreover, the doctrine of equitable tolling is centuries old, and dates from a time when the separation of the legislative and judicial powers was incomplete. . . .

American courts' later adoption of the English equitable-tolling practice need not be regarded as a violation of the separation of powers, but can be seen as a reasonable assumption of genuine legislative intent. . . . In any case, equitable tolling surely represents such a reasonable assumption today. "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43 (2002). Congress, being well aware of the longstanding background presumption of equitable tolling, "may provide otherwise if it wishes to do so." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The majority and dissenting opinions in *Holland* disputed whether that presumption had been overcome, but all agreed that the presumption existed and was a legitimate tool for construing statutes of limitations.

Here, by contrast, the Court has ambushed Congress with an utterly unprecedented (and thus unforeseeable) maneuver. Congressional silence, "while permitting an inference that Congress intended to apply *ordinary* background" principles, "cannot show that it intended to apply an unusual modification of those rules." *Meyer v. Holley*, 537 U.S. 280 (2003).[2] Because there is no plausible basis

[2] The Court concedes that "Congress legislates against the backdrop of existing law," but protests that "[a]t the time of AEDPA's enactment, multiple decisions of this Court applied the miscarriage of justice exception to overcome various threshold barriers to relief." That is right, of course, but only at an uninformative level of generality; the relevant inquiry is, to

for inferring that Congress intended or could have anticipated this exception, its adoption here amounts to a pure judicial override of the statute Congress enacted. "It is wrong for us to reshape" AEDPA "on the very lathe of judge-made habeas jurisprudence it was designed to repair." *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (Scalia, J., dissenting).

* * *

Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence — and how many prisoners asking to be let out of jail do not? — the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim. The Court notes "that tenable actual-innocence gateway pleas are rare." That discouraging reality, intended as reassurance, is in truth "the condemnation of the procedure which has encouraged frivolous cases." *Brown* (Jackson, J., concurring in result).

It has now been 60 years since *Brown v. Allen*, in which we struck the Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. "[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones." *Id.*

The "inundation" that Justice Jackson lamented in 1953 "consisted of 541" federal habeas petitions filed by state prisoners. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). By 1969, that number had grown to 7,359. In the year ending on September 30, 2012, 15,929 such petitions were filed. Today's decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.

I respectfully dissent.

NOTE: "INNOCENCE" AND AEDPA

1. *Perkins* announces an important new role for evidence of innocence in federal habeas corpus proceedings. The Court holds that a sufficient showing of "actual innocence" operates not only to excuse a state-law procedural default, *Schlup v. Delo* (1995), but also to excuse a failure to comply with AEDPA's one-year limitation period, 28 U.S.C. § 2244(d)(1).

Both parties grounded their arguments in part in concerns for federalism. Michigan, along with 17 other States as *amici curiae*, contended that an exception to the one-year limitation period would result in substantial costs and delays for state criminal-justice systems. But Justice Ginsburg's opinion for the majority says that, in the absence of such an exception, AEDPA would accord "greater force to a federal deadline" (the one-year limitation period) than to "a similarly designed

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which barriers had we applied the exception? Whistling past the graveyard, the Court refuses to engage with this question.

state deadline" (such as a state-law filing deadline that results in procedural default). In the Court's view, that would be "passing strange" considering that AEDPA "seek[s] to promote federalism and comity." Who has the better of the argument about which rule would best vindicate AEDPA's interest in federalism?

2. Justice Scalia, writing in dissent, faults the Court for failing to answer a crucial question: "What is the source of the Court's power to fashion what it concedes is an 'exception' to [a] clear statutory command?" Can you explain how the majority would answer that question? Or does the majority object to the premise of the question?

3. The majority and dissent disagree over the proper interpretation of AEDPA's limitation period. Which opinion best comports with Congress's intent in creating that time limit? Did Congress specifically consider an exception for this kind of petition — "an untimely first federal habeas petition alleging a gateway actual-innocence claim" — and consciously reject it by using unqualified language in § 2244(d)(1)? If not, how can the dissenting Justices accuse the Court of "a flagrant breach of the separation of powers"?

4. In addition to the one-year statute of limitations, AEDPA imposes various other limits on federal courts' power to grant habeas relief to prisoners in custody pursuant to a state-court judgment:

- Federal courts "shall entertain" such a petition "only on the ground that [the person] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
- A petition "shall not be granted" unless the petitioner "has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1), (b)(1)(A).
- As discussed at length *Williams v. Taylor* (2000) (Casebook pp. 1224-1231), a petition "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings" unless the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d), (d)(1).
- The ineffective assistance of counsel in collateral post-conviction proceedings, whether in federal or state court, "shall not be a ground for relief." 28 U.S.C. § 2254(i).

None of those provisions contains language expressly addressing whether newly discovered evidence of innocence is relevant to the denial of relief.

Does *Perkins* authorize federal courts to extend the "actual innocence" gateway to those provisions as well? What additional information about those statutory limits might be needed to resolve the question?

Chapter 21
CONGRESSIONAL POWER TO CONTROL JUDICIAL DECISIONMAKING

Page 1379: ***insert after the Note:***

BANK MARKAZI v. PETERSON ET AL.

Supreme Court of the United States, 2016.
136 S. Ct. 1310.

JUSTICE GINSBURG delivered the opinion of the Court.*

A provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772, makes available for postjudgment execution a set of assets held at a New York bank for Bank Markazi, the Central Bank of Iran. The assets would partially satisfy judgments gained in separate actions by over 1,000 victims of terrorist acts sponsored by Iran. The judgments remain unpaid. Section 8772 is an unusual statute: It designates a particular set of assets and renders them available to satisfy the liability and damages judgments underlying a consolidated enforcement proceeding that the statute identifies by the District Court's docket number. The question raised by petitioner Bank Markazi: Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?

Section 8772, we hold, does not transgress constraints placed on Congress and the President by the Constitution. The statute, we point out, is not fairly portrayed as a "one case-only regime." Rather, it covers a category of postjudgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars. Section 8772 subjects the designated assets to execution "to satisfy *any* judgment" against Iran for damages caused by specified acts of terrorism. § 8772(a)(1). Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.

Adding weight to our decision, Congress passed, and the President signed, § 8772 in furtherance of their stance on a matter of foreign policy. Action in that realm warrants respectful review by courts. The Executive has historically made case-specific sovereign-immunity determinations to which courts have deferred. And exercise by Congress and the President of control over claims against foreign governments, as well as foreign-government-owned property in the United States, is hardly a novelty. In accord with the courts below, we perceive in § 8772 no violation of separation-of-powers principles, and no threat to the independence of the Judiciary.

I

A

. . . American nationals may file suit against state sponsors of terrorism in the courts of the United States. See 28 U.S.C. § 1605A. . . .

* JUSTICE THOMAS joins all but Part II–C of this opinion.

Victims of state-sponsored terrorism . . . may obtain a judgment against a foreign state on "establish[ing] [their] claim[s] . . . by evidence satisfactory to the court." § 1608(e). . . .

[T]he Terrorism Risk Insurance Act of 2002 (TRIA) authorizes execution of [such] judgments . . . against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." A "blocked asset" is any asset seized by the Executive Branch pursuant to either the Trading with the Enemy Act (TWEA) or the International Emergency Economic Powers Act (IEEPA). Both measures, TWEA and IEEPA, authorize the President to freeze the assets of "foreign enemy state[s]" and their agencies and instrumentalities. . . .

Invoking his authority under the IEEPA, the President, in February 2012, issued an Executive Order blocking "[a]ll property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States." Exec. Order No. 13599. The availability of these assets for execution, however, was contested.

To place beyond dispute the availability of some of the Executive Order No. 13599-blocked assets for satisfaction of judgments rendered in terrorism cases, Congress passed the statute at issue here: § 22 U.S.C. § 8772. Enacted as a freestanding measure, not as an amendment to the FSIA or the TRIA, § 8772 provides that, if a court makes specified findings, "a financial asset . . . shall be subject to execution . . . in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by" the acts of terrorism enumerated in the FSIA's terrorism exception. § 8772(a)(1). Section 8772(b) defines as available for execution by holders of terrorism judgments against Iran "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings."

Before allowing execution against an asset described in § 8772(b), a court must determine that the asset is:

> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) . . . ; and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran . . . . § 8772(a)(1).

In addition, the court in which execution is sought must determine "whether Iran holds equitable title to, or the beneficial interest in, the assets . . . and that no other person possesses a constitutionally protected interest in the assets . . . under the Fifth Amendment to the Constitution of the United States."

B

Respondents are victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members. Numbering more than 1,000, respondents [brought lawsuits against Iran]. Upon finding a clear evidentiary basis

for Iran's liability to each suitor, the [District Court] entered judgments by default. "Together, [respondents] have obtained billions of dollars in judgments against Iran, the vast majority of which remain unpaid." The validity of those judgments is not in dispute.

To enforce their judgments, [Respondents] moved under Federal Rule of Civil Procedure 69 for turnover of about $1.75 billion in bond assets held in a New York bank account — assets that, respondents alleged, were owned by Bank Markazi. This turnover proceeding began in 2008 when the terrorism judgment holders in *Peterson* filed writs of execution and the District Court restrained the bonds. Other groups of terrorism judgment holders — some of which had filed their own writs of execution against the bonds — were joined in the *Peterson* enforcement proceeding. . . . It is this judgment-enforcement proceeding and assets restrained in that proceeding that § 8772 addresses.

Although the enforcement proceeding was initiated prior to the issuance of Executive Order No. 13599 and the enactment of § 8772, the judgment holders updated their motions in 2012 to include execution claims under § 8772. Making the findings necessary under § 8772, the District Court ordered the requested turnover.

In reaching its decision, the court reviewed the financial history of the assets and other record evidence showing that Bank Markazi owned the assets. . . .

[The district court rejected Bank Markazi's argument that] "in passing § 8772, Congress effectively dictated specific factual findings in connection with a specific litigation — invading the province of the courts." The ownership determinations § 8772 required, the court said, "[were] not mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that Clearstream and/or UBAE ha[d] some form of beneficial or equitable interest." . . . . The Court of Appeals for the Second Circuit unanimously affirmed.

II

Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Necessarily, that endowment of authority blocks Congress from "requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc.* (1995) [Chapter 21]. Congress, no doubt, "may not usurp a court's power to interpret and apply the law to the [circumstances] before it," for "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule," *Marbury*.[17] And our decisions place off limits to Congress "vest[ing] review of the decisions of Article III courts in officials of the Executive Branch." Congress, we have also held, may not "retroactively comman[d] the federal courts to reopen final judgments." *Plaut*.

[17] Consistent with this limitation, respondents rightly acknowledged at oral argument that Congress could not enact a statute directing that, in "Smith v. Jones," "Smith wins." Such a statute would create no new substantive law; it would instead direct the court how pre-existing law applies to particular circumstances.

A

Citing *United States v. Klein* (1872) [Chapter 20] Bank Markazi urges a further limitation. Congress treads impermissibly on judicial turf, the Bank maintains, when it "prescribe[s] rules of decision to the Judicial Department . . . in [pending] cases." According to the Bank, § 8772 fits that description. *Klein* has been called "a deeply puzzling decision." More recent decisions, however, have made it clear that *Klein* does not inhibit Congress from "amend[ing] applicable law." *Robertson v. Seattle Audubon Soc.* (1992) [Chapter 21 Note]. Section 8772, we hold, did just that.

Klein involved Civil War legislation providing that persons whose property had been seized and sold in wartime could recover the proceeds of the sale in the Court of Claims upon proof that they had "never given any aid or comfort to the present rebellion." In 1863, President Lincoln pardoned "persons who . . . participated in the . . . rebellion" if they swore an oath of loyalty to the United States. One of the persons so pardoned was a southerner named Wilson, whose cotton had been seized and sold by Government agents. Klein was the administrator of Wilson's estate. In *United States v. Padelford* this Court held that the recipient of a Presidential pardon must be treated as loyal, *i.e.*, the pardon operated as "a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion." Thereafter, Klein prevailed in an action in the Court of Claims, yielding an award of $125,300 for Wilson's cotton.

During the pendency of an appeal to this Court from the Court of Claims judgment in *Klein*, Congress enacted a statute providing that no pardon should be admissible as proof of loyalty. Moreover, acceptance of a pardon without disclaiming participation in the rebellion would serve as conclusive evidence of disloyalty. The statute directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon. Affirming the judgment of the Court of Claims, this Court held that Congress had no authority to "impai[r] the effect of a pardon," for the Constitution entrusted the pardon power "[t]o the executive alone." The Legislature, the Court stated, "cannot change the effect of . . . a pardon any more than the executive can change a law." Lacking authority to impair the pardon power of the Executive, Congress could not "direc[t] [a] court to be instrumental to that end." In other words, the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon — standards Congress was powerless to prescribe.

Bank Markazi, as earlier observed, argues that § 8772 conflicts with *Klein*. The Bank points to a statement in the *Klein* opinion questioning whether "the legislature may prescribe rules of decision to the Judicial Department . . . in cases pending before it." One cannot take this language from *Klein* "at face value," however, "for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized." As we explained in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the restrictions that the Constitution places on retroactive legislation "are of limited scope":

> The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing . . . laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and

> other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application.

"Absent a violation of one of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope." So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.

Bank Markazi argues most strenuously that § 8772 did not simply amend pre-existing law. Because the judicial findings contemplated by § 8772 were "foregone conclusions," the Bank urges, the statute "effectively" directed certain factfindings and specified the outcome under the amended law. Recall that the District Court, closely monitoring the case, disagreed.

In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. "When a plaintiff brings suit to enforce a legal obligation it is not any less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." In *Schooner Peggy*, 1 Cranch 103 (1801) for example, this Court applied a newly ratified treaty that, by requiring the return of captured property, effectively permitted only one possible outcome. And in *Robertson* a statute replaced governing environmental-law restraints on timber harvesting with new legislation that permitted harvesting in all but certain designated areas. Without inquiring whether the new statute's application in pending cases was a "foregone conclusio[n]," we upheld the legislation because it left for judicial determination whether any particular actions violated the new prescription. In short, § 8772 changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.

Resisting this conclusion, THE CHIEF JUSTICE compares § 8772 to a hypothetical "law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings." Of course, the hypothesized law would be invalid — as would a law directing judgment for Smith, for instance, if the court finds that the sun rises in the east. For one thing, a law so cast may well be irrational and, therefore, unconstitutional for reasons distinct from the separation-of-powers issues considered here. For another, the law imagined by the dissent does what *Robertson* says Congress cannot do: Like a statute that directs, in "Smith v. Jones," "Smith wins," it "compel[s] . . . findings or results under old law," for it fails to supply any new legal standard effectuating the lawmakers' reasonable

policy judgment.[22] By contrast, § 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets. Applying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.

B

Section 8772 remains "unprecedented," Bank Markazi charges, because it "prescribes a rule for a single pending case — identified by caption and docket number." The amended law in *Robertson*, however, also applied to cases identified by caption and docket number and was nonetheless upheld. Moreover, § 8772, as already described facilitates execution of judgments in 16 suits, together encompassing more than 1,000 victims of Iran-sponsored terrorist attacks. Although consolidated for administrative purposes at the execution stage, the judgment-execution claims brought pursuant to Federal Rule of Civil Procedure 69 were not independent of the original actions for damages and each claim retained its separate character.

The Bank's argument is further flawed, for it rests on the assumption that legislation must be generally applicable, that "there is something wrong with particularized legislative action." We have found that assumption suspect:

> While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid — or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that [the Clause] requires not merely "singling out" but also *punishment* [or] a case [holding] that Congress may legislate "a legitimate class of one."

This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects.

C

We stress, finally, that § 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the

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[22] The dissent also analogizes § 8772 to a law that makes "conclusive" one party's flimsy evidence of a boundary line in a pending property dispute, notwithstanding that the governing law ordinarily provides that an official map establishes the boundary. Section 8772, however, does not restrict the evidence on which a court may rely in making the required findings. A more fitting analogy for depicting § 8772's operation might be: In a pending property dispute, the parties contest whether an ambiguous statute makes a 1990 or 2000 county map the relevant document for establishing boundary lines. To clarify the matter, the legislature enacts a law specifying that the 2000 map supersedes the earlier map.

disposition of foreign-state property in the United States. In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia*, blocking them or governing their availability for attachment. Such measures have never been rejected as invasions upon the Article III judicial power.

Particularly pertinent, the Executive, prior to the enactment of the FSIA, regularly made case-specific determinations whether sovereign immunity should be recognized, and courts accepted those determinations as binding. [It] is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." This practice, too, was never perceived as an encroachment on the federal courts' jurisdiction.

Enacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. But it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress. By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets.

* * *

For the reasons stated, we are satisfied that § 8772 — a statute designed to aid in the enforcement of federal-court judgments — does not offend "separation of powers principles . . . protecting the role of the independent Judiciary within the constitutional design."

Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SOTOMAYOR joins, dissenting.

Imagine your neighbor sues you, claiming that your fence is on his property. His evidence is a letter from the previous owner of your home, accepting your neighbor's version of the facts. Your defense is an official county map, which under state law establishes the boundaries of your land. The map shows the fence on your side of the property line. You also argue that your neighbor's claim is six months outside the statute of limitations.

Now imagine that while the lawsuit is pending, your neighbor persuades the legislature to enact a new statute. The new statute provides that for your case, and your case alone, a letter from one neighbor to another is conclusive of property boundaries, and the statute of limitations is one year longer. Your neighbor wins. Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to ensure your neighbor's victory, or the court, which presided over the *fait accompli*?

That question lies at the root of the case the Court confronts today. Article III of the Constitution commits the power to decide cases to the Judiciary alone. Yet, in this case, Congress arrogated that power to itself.

Contrary to the majority, I would hold that § 8772 violates the separation of powers. No less than if it had passed a law saying "respondents win," Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.

II

A

* * *

[Our decisions have recognized] three kinds of "unconstitutional restriction[s] upon the exercise of judicial power." Two concern the effect of judgments once they have been rendered: "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch," for to do so would make a court's judgment merely "an advisory opinion in its most obnoxious form." And Congress cannot "retroactively command[ ] the federal courts to reopen final judgments," because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy." Neither of these rules is directly implicated here.

This case is about the third type of unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 does precisely that, changing the law — for these proceedings alone — simply to guarantee that respondents win. The law serves no other purpose — a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute "'sweeps away . . . any . . . federal or state law impediments that might otherwise exist'" to bar respondents from obtaining Bank Markazi's assets. In the District Court, Bank Markazi had invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976. Section 8772(a)(1) eliminates that immunity. Section 8772(d)(3) ensures that the Bank is liable. Section 8772(a)(1) makes its assets subject to execution. And lest there be any doubt that Congress's sole concern was deciding this particular case, rather than establishing any generally applicable rules, § 8772 provided that nothing in the statute "shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than" these. § 8772(c).

B

There has never been anything like § 8772 before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings. That fact alone is "[p]erhaps the most telling indication of the severe constitutional problem" with the law. Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut*.

Section 8772 violates the bedrock rule of Article III that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *United States v. Klein*. . . .

The majority characterizes *Klein* as a delphic, puzzling decision whose central holding — that Congress may not prescribe the result in pending cases — cannot be taken at face value. It is true that *Klein* can be read too broadly, in a way that would swallow the rule that courts generally must apply a retroactively applicable statute to pending cases. See *United States v. Schooner Peggy*. But *Schooner Peggy* can be read too broadly, too. Applying a retroactive law that says "Smith wins" to the pending case of *Smith v. Jones* implicates profound issues of separation of powers, issues not adequately answered by a citation to *Schooner*

Peggy. And just because *Klein* did not set forth clear rules defining the limits on Congress's authority to legislate with respect to a pending case does not mean — as the majority seems to think — that Article III itself imposes no such limits.

The same "record of history" that drove the Framers to adopt Article III to implement the separation of powers ought to compel us to give meaning to their design. The nearly two centuries of experience with legislative assumption of judicial power meant that "[t]he Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities." Article III vested the judicial power in the Judiciary alone to protect against that threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot.

The Court says it would reject a law that says "Smith wins" because such a statute "would create no new substantive law." Of course it would: Prior to the passage of the hypothetical statute, the law did not provide that Smith wins. After the passage of the law, it does. Changing the law is simply how Congress acts. The question is whether its action constitutes an exercise of judicial power. Saying Congress "creates new law" in one case but not another simply expresses a conclusion on that issue; it does not supply a reason.

"Smith wins" is a new law, tailored to one case in the same way as § 8772 and having the same effect. All that both statutes "effectuat[e]," in substance, is lawmakers' "policy judgment" that one side in one case ought to prevail. The cause for concern is that though the statutes are indistinguishable, it is plain that the majority recognizes no limit under the separation of powers beyond the prohibition on statutes as brazen as "Smith wins." . . . .

It is true that some of the precedents cited by the majority have allowed Congress to approach the boundary between legislative and judicial power. None, however, involved statutes comparable to § 8772. In *Robertson v. Seattle Audubon Soc.*, for example, the statute at issue referenced particular cases only as a shorthand for describing certain environmental law requirements, not to limit the statute's effect to those cases alone. And in *Plaut*, the Court explicitly distinguished the statute before it — which directed courts to reopen final judgments in an entire class of cases — from one that "'single[s] out' any defendant for adverse treatment (or any plaintiff for favorable treatment)." *Plaut*, in any event, held the statute before it invalid, concluding that it violated Article III based on the same historical understanding of the judicial power outlined above.

I readily concede, without embarrassment, that it can sometimes be difficult to draw the line between legislative and judicial power. That should come as no surprise; Chief Justice Marshall's admonition "that 'it is a *constitution* we are expounding' is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution — that of separation of powers." But however difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there being such a line.

C

Finally, the majority suggests that § 8772 is analogous to the Executive's historical power to recognize foreign state sovereign immunity on a case-by-case basis. As discussed above, however, § 8772 does considerably more than withdraw the Bank's sovereign immunity. It strips the Bank of any protection that federal common law, international law, or New York State law might have offered against

respondents' claims. That is without analogue or precedent. In any event, the practice of applying case-specific Executive submissions on sovereign immunity was not judicial acquiescence in an intrusion on the Judiciary's role. It was instead the result of substantive sovereign immunity law, developed and applied by the courts, which treated such a submission as a dispositive fact.

* * *

At issue here is a basic principle, not a technical rule. Section 8772 decides this case no less certainly than if Congress had directed entry of judgment for respondents. As a result, the potential of the decision today "to effect important change in the equilibrium of power" is "immediately evident." Hereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases. Today's decision will indeed become a "blueprint for extensive expansion of the legislative power" at the Judiciary's expense feeding Congress's tendency to "extend[ ] the sphere of its activity and draw[ ] all power into its impetuous vortex."

I respectfully dissent.

NOTE: CONGRESS'S POWER TO CONTROL DECISIONMAKING AFTER *MARKAZI*

1. The *Markazi* majority reads *Klein*'s statement that Congress may not "prescribe rules of decision to the Judicial Department . . . in [pending] cases" to mean that Congress may not "attempt[] to direct the result" of a case "without altering the legal standards." Is that all that *Klein*'s statement stands for after *Markazi*? Or can *Klein*'s statement be read to impose broader limitations on Congress?

2. In footnote 17, the *Markazi* majority says that Congress cannot enact a statute directing that "in Smith v. Jones, Smith wins," because that statute would "create no new substantive law" but instead would "direct the court how pre-existing law applies to particular circumstances." After *Markazi*, could Congress enact a statute stating that "the statute applicable in Smith v. Jones is hereby amended so that Smith wins?"

3. In his dissent, Chief Justice Roberts says that if Congress enacted a statute stating that "Smith wins" would change the substantive law, reasoning that before the enactment of the statute, the law did not provide that Smith wins, but after the enactment, it does. Is this reasoning persuasive, or does it erase the distinction between changing the law and deciding a case?

4. In upholding § 8772, the *Markazi* majority stresses that the statute relates to foreign policy, an area in which the political branches have broad authority. After *Markazi*, does Congress have broader authority to affect the outcomes in judicial proceedings relating to foreign policy than in other types of proceedings?

Chapter 22
NON-ARTICLE III COURTS AND JUDGES

A. THE FORMAL APPROACH

Page 1405: ***insert before the Note:***

NOTE: IMPLEMENTING *STERN*

In *Stern*, the Court did not answer the question of how bankruptcy courts should handle those "core proceedings" over which they lack the constitutional authority to enter final judgment. That question was answered just three years later in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). Specifically, the Court concluded in *Arkison* that, with respect to "core proceedings" that fall within the ambit of *Stern*'s constitutional holding, bankruptcy courts should treat such proceedings as non-core and "submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment" rather than enter final judgment on their own.

B. THE PRAGMATIC APPROACH

Page 1418: ***insert after the Note:***

WELLNESS INTERNATIONAL NETWORK, LTD. v. SHARIF

Supreme Court of the United States, 2015.
135 S. Ct. 1932.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Article III, § 1, of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress has in turn established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished. Because these protections help to ensure the integrity and independence of the Judiciary, "we have long recognized that, in general, Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law, or inequity, or in admiralty." *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. The number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships. And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.

Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and more recently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication. This case presents the question whether Article III allows bankruptcy judges to adjudicate such claims

with the parties' consent. We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.

I

A

[Under] the Bankruptcy Amendments and Federal Judgeship Act of 1984, . . . district courts have original jurisdiction over bankruptcy cases and related proceedings. 28 U.S.C. §§ 1334(a), (b). But "each district court may provide that any or all" bankruptcy cases and related proceedings "shall be referred to the bankruptcy judges for the district." Bankruptcy judges are "judicial officers of the United States district court," appointed to 14-year terms by the courts of appeals, and subject to removal for cause. "The district court may withdraw" a reference to the bankruptcy court "on its own motion or on timely motion of any party, for cause shown."

When a district court refers a case to a bankruptcy judge, that judge's statutory authority depends on whether Congress has classified the matter as a "core proceeding" or a "non-core proceeding." . . . Congress identified as "core" a nonexclusive list of 16 types of proceedings, in which it thought bankruptcy courts could constitutionally enter judgment. Congress gave bankruptcy courts the power to "hear and determine" core proceedings and to "enter appropriate orders and judgments," subject to appellate review by the district court. . . .

B

Petitioner Wellness International Network is a manufacturer of health and nutrition products. Wellness and respondent Sharif entered into a contract under which Sharif would distribute Wellness' products. The relationship quickly soured, and in 2005, Sharif sued Wellness in the United States District Court for the Northern District of Texas. Sharif repeatedly ignored Wellness' discovery requests and other litigation obligations, resulting in an entry of default judgment for Wellness. The District Court eventually sanctioned Sharif by awarding Wellness over $650,000 in attorney's fees. This case arises from Wellness' long-running — and so far unsuccessful — efforts to collect on that judgment.

In February 2009, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois. The bankruptcy petition listed Wellness as a creditor. Wellness requested documents concerning Sharif's assets, which Sharif did not provide. Wellness later obtained a loan application Sharif had filed in 2002, listing more than $5 million in assets. When confronted, Sharif informed Wellness and the Chapter 7 trustee that he had lied on the loan application. The listed assets, Sharif claimed, were actually owned by the Soad Wattar Living Trust (Trust), an entity Sharif said he administered on behalf of his mother, and for the benefit of his sister. Wellness pressed Sharif for information on the Trust, but Sharif again failed to respond.

Wellness filed a five-count adversary complaint against Sharif in the Bankruptcy Court. . . . Count V of the complaint sought a declaratory judgment that the Trust was Sharif's alter ego and that its assets should therefore be treated as part of Sharif's bankruptcy estate. In his answer, Sharif admitted that the adversary proceeding was a "core proceeding" — *i.e.,* a proceeding in which the Bankruptcy Court could enter final judgment subject to appeal. Indeed, Sharif requested judgment in his favor on all counts of Wellness' complaint and urged the Bankruptcy Court to "find that the Soad Wattar Living Trust is not property of the

[bankruptcy] estate." In July 2010, the Bankruptcy Court . . . declared, as requested by count V of Wellness' complaint, that the assets supposedly held by the Trust were in fact property of Sharif's bankruptcy estate because Sharif "treats [the Trust's] assets as his own property."

Sharif appealed to the District Court. Six weeks before Sharif filed his opening brief in the District Court, this Court decided *Stern*. In *Stern*, the Court held that Article III prevents bankruptcy courts from entering final judgment on claims that seek only to "augment" the bankruptcy estate and would otherwise "exist without regard to any bankruptcy proceeding." [The District Court affirmed the Bankruptcy Court's judgment. The Seventh Circuit reversed with respect to count V. It concluded] that count V of the complaint alleged a so-called "*Stern* claim," that is, "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." The Seventh Circuit therefore ruled that the Bankruptcy Court lacked constitutional authority to enter final judgment on count V.

II

Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts.

A

Adjudication by consent is nothing new. Indeed, "during the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." Brubaker, The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications, 32 Bkrtcy. L. Letter No. 12, at 6 (Dec. 2012).

The foundational case in the modern era is *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). The Commodity Futures Trading Commission (CFTC), which Congress had authorized to hear customer complaints against commodities brokers, issued a regulation allowing itself to hear state-law counterclaims as well. William Schor filed a complaint with the CFTC against his broker, and the broker, which had previously filed claims against Schor in federal court, refiled them as counterclaims in the CFTC proceeding. The CFTC ruled against Schor on the counterclaims. This Court upheld that ruling against both statutory and constitutional challenges.

On the constitutional question (the one relevant here) the Court began by holding that Schor had "waived any right he may have possessed to the full trial of [the broker's] counterclaim before an Article III court." The Court then explained why this waiver legitimated the CFTC's exercise of authority: "As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights" — such as the right to a jury — "that dictate the procedures by which civil and criminal matters must be tried."

The Court went on to state that a litigant's waiver of his "personal right" to an Article III court is not always dispositive because Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . , but also serves as 'an inseparable element of the constitutional system of checks and balances.' . . . To the extent that this structural

principle is implicated in a given case" — but only to that extent — "the parties cannot by consent cure the constitutional difficulty . . . ."

Leaning heavily on the importance of Schor's consent, the Court found no structural concern implicated by the CFTC's adjudication of the counterclaims against him. While "Congress gave the CFTC the authority to adjudicate such matters," the Court wrote,

> the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

The option for parties to submit their disputes to a non-Article III adjudicator was at most a "*de minimis*" infringement on the prerogative of the federal courts.

A few years after *Schor*, the Court decided a pair of cases — *Gomez v. United States*, 490 U.S. 858 (1989), and *Peretz v. United States*, 501 U.S. 923 (1991) — that reiterated the importance of consent to the constitutional analysis. Both cases concerned whether the Federal Magistrates Act authorized magistrate judges to preside over jury selection in a felony trial; the difference was that Peretz consented to the practice while Gomez did not. That difference was dispositive.

In *Gomez*, the Court interpreted the statute as not allowing magistrate judges to supervise *voir dire* without consent, emphasizing the constitutional concerns that might otherwise arise. In *Peretz*, the Court upheld the Magistrate Judge's action, stating that "the defendant's consent significantly changes the constitutional analysis." The Court concluded that allowing a magistrate judge to supervise jury selection — with consent — does not violate Article III, explaining that "litigants may waive their personal right to have an Article III judge preside over a civil trial," and that "the most basic rights of criminal defendants are similarly subject to waiver." And "even assuming that a litigant may not waive structural protections provided by Article III," the Court found "no such structural protections . . . implicated by" a magistrate judge's supervision of *voir dire*:

> Magistrates are appointed and subject to removal by Article III judges. The "ultimate decision" whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties. The decision whether to empanel the jury whose selection a magistrate has supervised also remains entirely with the district court. Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger that use of the magistrate involves a 'congressional attempt "to transfer

> jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts.' "[9]

The lesson of *Schor*, *Peretz*, and the history that preceded them is plain: The entitlement to an Article III adjudicator is "a personal right" and thus ordinarily "subject to waiver." Article III also serves a structural purpose, "barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts and thereby prevent[ing] 'the encroachment or aggrandizement of one branch at the expense of the other.' " But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.

B

The question here, then, is whether allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threaten the institutional integrity of the Judicial Branch." *Schor*. And that question must be decided not by "formalistic and unbending rules," but "with an eye to the practical effect that the" practice "will have on the constitutionally assigned role of the federal judiciary." The Court must weigh

> the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Applying these factors, we conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts. Bankruptcy judges, like magistrate judges, "are appointed and subject to removal by Article III judges," *Peretz*. They "serve as judicial officers of the United States district court," [28 U.S.C. §] 151, and collectively "constitute a unit of the district court" for that district, § 152(a)(1). Just as "the 'ultimate decision' whether to invoke [a] magistrate [judge]'s assistance is made by the district court," *Peretz*, bankruptcy courts hear matters solely on a district court's reference, which the district court may withdraw *sua sponte* or at the request of a party. "Separation of powers concerns are diminished" when, as here, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains in place. *Schor*.

Furthermore, like the CFTC in *Schor*, bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to "a narrow class of common law claims

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[9] Discounting the relevance of *Gomez* and *Peretz*, the principal dissent emphasizes that neither case concerned the entry of final judgment by a non-Article III actor. Here again, the principal dissent's insistence on formalism leads it astray. As we explained in *Peretz*, the "responsibility and importance [of] presiding over *voir dire* at a felony trial" is equivalent to the "supervision of entire civil and misdemeanor trials," tasks in which magistrate judges may "order the entry of judgment" with the parties' consent.

as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function." "In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*."

Finally, there is no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary. As in *Peretz*, "because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger that use of the [bankruptcy court] involves a 'congressional attempt "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts.' "[10]

Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of district judgeships. Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.

C

Our recent decision in *Stern*, on which Sharif and the principal dissent rely heavily, does not compel a different result. That is because *Stern* — like its predecessor, *Northern Pipeline* — turned on the fact that the litigant "did not truly consent to" resolution of the claim against it in a non-Article III forum. . . . Because *Stern* was premised on non-consent to adjudication by the Bankruptcy Court, the "constitutional bar" it announced, simply does not govern the question whether litigants may validly consent to adjudication by a bankruptcy court. In sum, the cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court. The Court has never done what Sharif and the principal dissent would have us do — hold that a litigant who has the right to an Article III court may not waive that right through his consent.

D

The principal dissent warns darkly of the consequences of today's decision. To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court. The response to these ominous predictions is the same now as it was when Justice Brennan, dissenting in *Schor*, first made them nearly 30 years ago:

> This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative

[10] The principal dissent accuses us of making Sharif's consent " 'dispositive' in curing [a] structural separation of powers violation," contrary to the holding of *Schor*. That argument misapprehends both *Schor* and the nature of our analysis. What *Schor* forbids is using consent to excuse an actual violation of Article III. But *Schor* confirms that consent remains highly relevant when determining, as we do here, whether a particular adjudication in fact raises constitutional concerns. Thus, we do not rely on Sharif's consent to "cur[e]" a violation of Article III. His consent shows, in part, why no such violation has occurred.

> necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. But this case obviously bears no resemblance to such a scenario . . . .

Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise.

III

Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express. We disagree.

Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent; it states only that a bankruptcy court must obtain "the consent" — consent *simpliciter* — "of all parties to the proceeding" before hearing and determining a non-core claim. § 157(c)(2). And a requirement of express consent would be in great tension with our decision in *Roell v. Withrow*, 538 U.S. 580 (2003). That case concerned the interpretation of § 636(c), which authorizes magistrate judges to "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case," with "the consent of the parties." The specific question in *Roell* was whether, as a statutory matter, the "consent" required by § 636(c) had to be express. The dissent argued that "reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also" avoids constitutional concerns by "ensur[ing] that the parties knowingly and voluntarily waive their right to an Article III judge." But the majority — thus placed on notice of the constitutional concern — was untroubled by it, opining that "the Article III right is substantially honored" by permitting waiver based on "actions rather than words."

The implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157. Applied in the bankruptcy context, that standard possesses the same pragmatic virtues — increasing judicial efficiency and checking gamesmanship — that motivated our adoption of it for consent-based adjudications by magistrate judges. It bears emphasizing, however, that a litigant's consent — whether express or implied — must still be knowing and voluntary. . . .

IV

[The Court remanded to the Seventh Circuit for it to determine whether Sharif consented to adjudication by the Bankruptcy Court.]

It is so ordered.

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

I join the opinion of the Court insofar as it holds that a bankruptcy judge's resolution of a "*Stern* claim" with the consent of the parties does not violate Article III of the Constitution. The Court faithfully applies *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986). No one believes that an arbitrator exercises "the judicial Power of the United States," Art. III, § 1, in an ordinary, run-of-the mill arbitration. And whatever differences there may be between an arbitrator's "decision" and a bankruptcy court's "judgment," those differences would seem to fall within the Court's previous rejection of "formalistic and unbending rules."

Whatever one thinks of *Schor*, it is still the law of this Court, and the parties do not ask us to revisit it.

Unlike the Court, however, I would not decide whether consent may be implied. [Justice Alito asserted that Sharif forfeited the argument that he did not consent.]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, and with whom JUSTICE THOMAS joins as to Part I, dissenting.

I

. . . The Court granted certiorari on two questions in this case. The first is whether the Bankruptcy Court's entry of final judgment on Wellness's claim violated Article III based on *Stern*. The second is whether an Article III violation of the kind recognized in *Stern* can be cured by consent. Because the first question can be resolved on narrower grounds, I would answer it alone.

B

. . . In my view, Article III likely poses no barrier to the Bankruptcy Court's resolution of Wellness's claim. At its most basic level, bankruptcy is "an adjudication of interests claimed in a *res*." *Katchen v. Landy*, 382 U.S. 323 (1966). Wellness asked the Bankruptcy Court to declare that assets held by Sharif are part of that res. Defining what constitutes the estate is the necessary starting point of every bankruptcy; a court cannot divide up the estate without first knowing what's in it. As the Solicitor General explains, "Identifying the property of the estate is therefore inescapably central to the restructuring of the debtor-creditor relationship."

II

The Court "expresses no view" on whether Wellness's claim was a *Stern* claim. Instead, the Court concludes that the Bankruptcy Court had constitutional authority to enter final judgment on Wellness's claim either way. The majority rests its decision on Sharif's purported consent to the Bankruptcy Court's adjudication. But Sharif has no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III. His consent therefore cannot cure a constitutional violation.

A

"If there is a principle in our Constitution . . . more sacred than another," James Madison said on the floor of the First Congress, "it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581 (1789). . . . By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability.

We have emphasized that the values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole. A branch's consent to a diminution of its constitutional powers therefore does not mitigate the harm or cure the wrong. . . . When the Executive and the Legislature agreed to bypass the Article I, § 7, requirements of bicameralism and presentment by creating a Presidential line-item veto — a very pragmatic proposal — the Court held that the arrangement violated the Constitution notwithstanding the voluntary participation of both branches. *Clinton v. City of New York*, 524 U.S. 417 (1998). Likewise, the Court struck down a one-House "legislative veto" that violated Article I, § 7, even though Presidents and

Congresses had agreed to include similar provisions in hundreds of laws for more than 50 years. *INS v. Chadha*, 462 U.S. 919 (1983).

In neither of these cases did the branches' willing embrace of a separation of powers violation weaken the Court's scrutiny. To the contrary, the branches' "enthusiasm" for the offending arrangements " 'sharpened rather than blunted' our review." *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (Scalia, J., concurring in judgment). In short, because the structural provisions of the Constitution protect liberty and not just government entities, "the separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.' " *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010).

B

If a branch of the Federal Government may not consent to a violation of the separation of powers, surely a private litigant may not do so. Just as a branch of Government may not consent away the individual liberty interest protected by the separation of powers, so too an individual may not consent away the institutional interest protected by the separation of powers. To be sure, a private litigant may consensually relinquish *individual* constitutional rights. A federal criminal defendant, for example, may knowingly and voluntarily waive his Sixth Amendment right to a jury trial by pleading guilty to a charged offense. But that same defendant may not agree to stand trial on federal charges before a state court, a foreign court, or a moot court, because those courts have no constitutional authority to exercise judicial power over his case, and he has no power to confer it. . . .

As the majority recognizes, the Court's most extensive discussion of litigant consent in a separation of powers case occurred in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). There the Court held that Article III confers both a "personal right" that can be waived through consent and a structural component that "safeguards the role of the Judicial Branch in our tripartite system." "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." . . .

. . . Thus, the key inquiry in this case — as the majority puts it — is "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threaten the institutional integrity of the Judicial Branch.' "

One need not search far to find the answer. In *Stern*, this Court applied the analysis from *Schor* to bankruptcy courts and concluded that they lack Article III authority to enter final judgments on matters now known as *Stern* claims. The Court noted that bankruptcy courts, unlike the administrative agency in *Schor*, were endowed by Congress with "substantive jurisdiction reaching any area of the *corpus juris*," power to render final judgments enforceable without any action by Article III courts, and authority to adjudicate counterclaims entirely independent of the bankruptcy itself. The Court concluded that allowing Congress to bestow such authority on non-Article III courts would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." If there was any room for doubt about the basis for its holding, the Court dispelled it by asking a question: "Is there really a threat to the separation of powers where

Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy?" "The short but emphatic answer is yes."

In other words, allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threaten the institutional integrity of the Judicial Branch.". . .

The majority also relies heavily on the supervision and control that Article III courts exercise over bankruptcy courts. As the majority notes, court of appeals judges appoint bankruptcy judges, and bankruptcy judges receive cases only on referral from district courts (although every district court in the country has adopted a standing rule automatically referring all bankruptcy filings to bankruptcy judges. The problem is that Congress has also given bankruptcy courts authority to enter final judgments subject only to deferential appellate review, and Article III precludes those judgments when they involve *Stern* claims. The fact that Article III judges played a role in the Article III violation does not remedy the constitutional harm. We have already explained why.

It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions. Such delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised. Article III judges have no constitutional authority to delegate the judicial power — the power to "render dispositive judgments" — to non-Article III judges, no matter how closely they control or supervise their work. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) [Chapter 21].

C

Eager to change the subject from *Stern*, the majority devotes considerable attention to defending the authority of magistrate judges, who may conduct certain proceedings with the consent of the parties under 28 U.S.C. § 636. No one here challenges the constitutionality of magistrate judges or disputes that they, like bankruptcy judges, may issue reports and recommendations that are reviewed *de novo* by Article III judges. The cases about magistrate judges cited by the majority therefore have little bearing on this case, because none of them involved a constitutional challenge to the entry of final judgment by a non-Article III actor.

The majority also points to 19th-century cases in which courts referred disputes to non-Article III referees, masters, or arbitrators. In those cases, however, it was the Article III court that ultimately entered final judgment. *E.g., Thornton v. Carson*, 7 Cranch 596 (1813). Article III courts do refer matters to non-Article III actors for assistance from time to time. This Court does so regularly in original jurisdiction cases. But under the Constitution, the "ultimate responsibility for deciding" the case must remain with the Article III court.

The concurrence's comparison of bankruptcy judges to arbitrators is similarly inapt. Arbitration is "a matter of contract" by which parties agree to resolve their disputes in a private forum. Such an arrangement does not implicate Article III any more than does an agreement between two business partners to submit a difference of opinion to a mutually trusted friend. Arbitration agreements, like most private contracts, can be enforced in court. And Congress, pursuant to its Commerce Clause power, has authorized district courts to enter judgments enforcing arbitration awards under certain circumstances. See 9 U.S.C. § 9. But this ordinary scheme of contract enforcement creates no constitutional

concern. As the concurrence acknowledges, only Article III judges — not arbitrators — may enter final judgments enforcing arbitration awards.

In *Stern*, the Court cautioned that Congress "may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." The majority sees no reason to fret, however, so long as two private parties consent. But such parties are unlikely to carefully weigh the long-term structural independence of the Article III judiciary against their own short-term priorities. Perhaps the majority's acquiescence in this diminution of constitutional authority will escape notice. Far more likely, however, it will amount to the kind of "blueprint for extensive expansion of the legislative power" that we have resisted in the past.

I respectfully dissent.

JUSTICE THOMAS, dissenting.

[Omitted]

NOTE: CONSENT AND STRUCTURAL PROTECTIONS

1. All four of the opinions in *Wellness* refer to "*Stern* claims." Recall what is meant by the phrase: claims designated by statute for final adjudication by the bankruptcy courts, but which cannot constitutionally be decided by those courts under the holding in *Stern*. In *Wellness*, the Court created an exception to the restriction on adjudication by bankruptcy courts, stating that *Stern* claims can be adjudicated by bankruptcy courts if the litigants consent.

2. In applying the balancing test announced in *Schor* to analyze the structural protections of Article III, the *Wellness* majority distinguishes *Schor* from *Stern* on the ground that the litigants in *Schor* consented to resolution of their claims in a non-Article III forum while the litigants in *Stern* did not. After *Wellness*, does the *Schor* balancing test apply only when litigants consent to litigation by non-Article III tribunals? Or may courts apply the *Schor* test in evaluating the structural protections of Article III in cases in which the litigants have not consented to adjudication by a non-Article III tribunal?

3. The *Wellness* majority says not only that a litigant's consent may waive the "personal right" to an Article III tribunal, but also that the litigant's consent is "highly relevant" to determining whether adjudication by a non-Article III court violates the structural protections of Article III. How does a litigant's consent bear on whether adjudication by an Article I tribunal violates Article III's structural protections? Can *Wellness*'s approach be squared with the rule that litigants cannot waive Article III's justiciability doctrines through consent?

4. Chief Justice Roberts, in dissent, accuses the Court of "chang[ing] the subject" by "defending the authority of magistrate judges." He argues that the cases cited by the majority upholding the authority of magistrate judges do not support allowing bankruptcy judges to decide *Stern* claims, because in none of those cases did the magistrate judge enter final judgments. In response, the majority argues in footnote nine that magistrate judges may enter final judgment in civil and misdemeanor cases and may preside at felony trials over *voir dire*, an important part of trial. Do magistrate judges and bankruptcy judges necessarily implicate the same Article III concerns?

5. In his dissent in *Wellness*, Justice Thomas calls attention to the distinction between public and private rights, describing public rights as rights held by the "public at large" and private rights as rights held by individuals. Justice Thomas asserts that cases involving public rights can be adjudicated in non-Article III

tribunals, but that it is unclear whether non-Article III tribunals can adjudicate cases involving private rights. Further discussion of the distinction between public and private rights can be found on page 1404 of the Casebook.