The U.S. Legal System
THE BASICS

SUPPLEMENT

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Preface

This supplement accompanies *The U.S. Legal System: The Basics* and is intended to give faculty flexibility in how they use the text. Some may use the text as a freestanding book. Others may want to adopt it as a casebook and this supplement of cases and materials is intended to allow *The U.S. Legal* System to be used for that purpose. This set of materials relates directly to the text, and the teaching manual explains how each of the cases fits in with the broader material.

Faculty members who adopt *The U.S. Legal System* also receive a PowerPoint deck of more than 200 slides which, along with this case supplement and the teacher manual, enables exceptionally easy adoption and use of the book.

THE U.S. LEGAL SYSTEM: THE BASICS
CASES AND MATERIALS SUPPLEMENT

TONI JAEGER-FINE

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The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pensylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section 1

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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;— between a State and Citizens of another State;— between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section.3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendment 1 (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 2 (1791)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 3 (1791)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4 (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7 (1791)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8 (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9 (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10 (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 11 (1795)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 12 (1804)

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;

The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;

The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment 13 (1865)

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Amendment 14 (1868)

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of

the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment 15 (1870)

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 16 (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment 17 (1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment 18 (1919)

1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 19 (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment 20 (1933)

1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment 21 (1933)

1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 22 (1951)

1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment 23 (1961)

1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 24 (1964)

1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 25 (1967)

1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment 26 (1971)

1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 27 (1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Selections from

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS et al., Petitioners,
v.
Kathleen SEBELIUS, Secretary of Health and Human Services, et al.

Decided June 28, 2012.

Chief Justice ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.

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

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland,* 4 Wheat. 316, 405 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden,* 9 Wheat. 1, 195 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch, supra,* at 405.

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

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The

Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, *e.g., United States v. Comstock,* 560 U.S. 126 (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, *e.g., United States v. Morrison,* 529 U.S. 598, 618–619 (2000).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States,* 505 U.S. 144, 181 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States,* 564 U.S. 211, 222 (2011).

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison, supra*, at 609 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn,* 317 U.S. 111 (1942); *Perez v. United States,* 402 U.S. 146 (1971).

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, *e.g., License Tax Cases,* 5 Wall. 462, 471 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, *e.g., College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 686 (1999). These offers may well induce the States to adopt policies that

the Federal Government itself could not impose. See, *e.g., South Dakota v. Dole,* 483 U.S. 203 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch,* 4 Wheat., at 421.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris,* 106 U.S. 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall's Defense of *McCulloch v. Maryland* 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury v. Madison, supra,* at 175–176.

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Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Antonio J. MORRISON, et al.

Decided May 15, 2000.

Chief Justice REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decision[] in *United States v. Lopez,* 514 U.S. 549 (1995), … we affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, "You better not have any ... diseases." Complaint ¶ 22. In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and...." *Id.,* ¶ 31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2–semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21,

1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was " 'excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy,' " *Brzonkala v. Virginia Polytechnic and State Univ.,* 132 F.3d 949, 955 (4th Cir. 1997). Virginia Tech did not inform Brzonkala of this decision. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972, 86 Stat. 373–375, 20 U.S.C. §§ 1681–1688. Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99–5, intervened to defend § 13981's constitutionality.

The District Court dismissed Brzonkala's Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted. See *Brzonkala v. Virginia Polytechnic and State Univ.,* 935 F.Supp. 772 (W.D.Va.1996). It then held that Brzonkala's complaint stated a claim against Morrison and Crawford under § 13981, but dismissed the complaint because it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Brzonkala v. Virginia Polytechnic and State Univ.,* 935 F.Supp. 779 (W.D.Va.1996).

A divided panel of the Court of Appeals reversed the District Court, reinstating Brzonkala's § 13981 claim …. *Brzonkala v. Virginia Polytechnic and State Univ.,* 132 F.3d 949 (4th Cir. 1997). The full Court of Appeals vacated the panel's opinion and reheard the case en banc. The en banc court … by a divided vote affirmed the District Court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. *Brzonkala v. Virginia Polytechnic and State Univ.,* 169 F.3d 820 (4th Cir. 1999). Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 U.S. 1068 (1999).

Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941–1942. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). To enforce that right, subsection (c) declares:

> "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." § 13981(d)(1). It also provides that the term "crime of violence" includes any

> "(A) ... act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime,

territorial, or prison jurisdiction of the United States;" and

"(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." § 13981(d)(2).

Further clarifying the broad scope of § 13981's civil remedy, subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a § 13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of § 13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states that "[n]othing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." Subsection (e)(4) further states that § 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "Federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress ... under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U.S.C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez,* 514 U.S., at 568, 577–578 (KENNEDY, J., concurring); *United States v. Harris,* 106 U.S., at 635. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the section, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez,* our interpretation of the Commerce Clause has changed as our Nation has developed. See 514 U.S., at 552–557; *id.,* at 568–574 (KENNEDY, J., concurring); *id.,* at 584, 593–599 (THOMAS, J., concurring). We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez,* 514 U.S., at 555–556; *id.,* at 573–574 (KENNEDY, J., concurring).

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce

Clause, Congress' regulatory authority is not without effective bounds. *Id.,* at 557.

> "[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' " *Id.,* at 556–557 (quoting *Jones & Laughlin Steel, supra,* at 37).[3]

[3] Justice SOUTER's dissent takes us to task for allegedly abandoning *Jones & Laughlin Steel* in favor of an inadequate "federalism of some earlier time." *Post,* at 1766–1767, 1774. As the foregoing language from *Jones & Laughlin Steel* makes clear however, this Court has always recognized a limit on the commerce power inherent in "our dual system of government." 301 U.S., at 37. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in *Jones & Laughlin Steel* against allowing that power to "effectually obliterate the distinction between what is national and what is local." *Ibid.*

As we observed in *Lopez,* modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." 514 U.S., at 558, (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276–277 (1981); *Perez v. United States,* 402 U.S. 146, 150 (1971)). "First, Congress may regulate the use of the channels of interstate commerce." 514 U.S., at 558 (citing *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 256 (1964); *United States v. Darby,* 312 U.S. 100, 114 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S., at 558 (citing *Shreveport Rate Cases,* 234 U.S. 342 (1914); *Southern R. Co. v. United States,* 222 U.S. 20 (1911); *Perez, supra,* at 150). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.,* those activities that substantially affect interstate commerce." 514 U.S., at 558–559 (citing *Jones & Laughlin Steel, supra,* at 37).

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez,* we held that the Gun–Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 U.S., at 551. Several significant considerations contributed to our decision.

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.,* at 561. Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *Id.,* at 559. Although we cited only a few examples, including *Wickard v. Filburn,*

317 U.S. 111 (1942); *Hodel, supra; Perez, supra; Katzenbach v. McClung,* 379 U.S. 294 (1964); and *Heart of Atlanta Motel, supra,* we stated that the pattern of analysis is clear. *Lopez,* 514 U.S., at 559–560. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.,* at 560.

Both petitioners and Justice SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, *e.g., id.,* at 551 ("The Act [does not] regulat[e] a commercial activity"), 560 ("Even *Wickard,* which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity"), 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty' "), 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); see also *id.,* at 573–574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"), 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"), 580 ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. See *id.,* at 559–560.[4]

[4] Justice SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. See *post,* at 1764–1767. However, the dissent cannot persuasively contradict *Lopez's* conclusion that, in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, 317 U.S. 111 (1942), the regulated activity was of an apparent commercial character. See, *e.g., Lopez,* 514 U.S., at 559–560, 580.

The second consideration that we found important in analyzing § 922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.,* at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

Third, we noted that neither § 922(q) " 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Ibid.* (quoting Brief for United States, O.T.1994, No. 93–1260, pp. 5–6). While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," 514 U.S., at

562 (citing *McClung, supra,* at 304; *Perez,* 402 U.S., at 156), the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." 514 U.S., at 563.

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Id.,* at 563–567. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id.,* at 563–564 (citation omitted). The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive work force, which will negatively affect national productivity and thus interstate commerce. *Ibid.*

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.,* at 564. We noted that, under this but-for reasoning:

> "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Ibid.*

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, *e.g., id.,* at 559–560, and the cases cited therein.

Like the Gun–Free School Zones Act at issue in *Lopez,* § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.[5]

[5] Title 42 U.S.C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S. Rep. No. 103–138, p. 43 (1993). That criminal provision has been codified at 18 U.S.C. § 2261(a)(1), which states:

> "A person who travels across a State line or enters or leaves Indian country with the intent to injure,

> harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)."

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that "[t]he provision properly falls within the first of *Lopez's* categories as it regulates the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move." *United States v. Lankford,* 196 F.3d 563, 571–572 (5th Cir. 1999) (collecting cases) (internal quotation marks omitted).

In contrast with the lack of congressional findings that we faced in *Lopez,* § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e.g.,* H.R. Conf. Rep. No. 103–711, p. 385 (1994), U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853; S.Rep. No. 103–138, p. 40 (1993); S.Rep. No. 101–545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez,* " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " 514 U.S., at 557, n. 2 (quoting *Hodel,* 452 U.S., at 311 (REHNQUIST, J., concurring in judgment)). Rather, " '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' " 514 U.S., at 557, n. 2 (quoting *Heart of Atlanta Motel,* 379 U.S., at 273 (Black, J., concurring)).

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103–711, at 385, U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853.

Accord, S.Rep. No. 103–138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez, supra,* at 564. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez,* be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context.[6] See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the

limitation of congressional authority is not solely a matter of legislative grace.[7] See *Lopez, supra,* at 575–579 (KENNEDY, J., concurring); *Marbury,* 1 Cranch, at 176–178.

[6] We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez,* 514 U.S., at 567, we quoted Justice Cardozo's concurring opinion in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935):

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.' " *Id.,* at 554 (quoting *United States v. A.L.A. Schechter Poultry Corp.,* 76 F.2d 617, 624 (2d Cir. 1935) (L. Hand, J., concurring)).

[7] Justice SOUTER's theory that *Gibbons v. Ogden,* 9 Wheat. 1 (1824), *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), and the Seventeenth Amendment provide the answer to these cases, see *post,* at 1768–1772, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power. See, *e.g., Arizona v. Evans,* 514 U.S. 1, 30 (1995) (GINSBURG, J., dissenting); *Gregory v. Ashcroft,* 501 U.S. 452, 458–459 (1991) (cataloging the benefits of the federal design); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties' ") (quoting *Garcia, supra,* at 572 (Powell, J., dissenting)). Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint. See, *e.g., Marbury v. Madison,* 1 Cranch 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). It is thus a " 'permanent and indispensable feature of our constitutional system' " that " 'the federal judiciary is supreme in the exposition of the law of the Constitution.' " *Miller v. Johnson,* 515 U.S. 900, 922–923 (1995) (quoting *Cooper v. Aaron,* 358 U.S. 1, 18 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon,* 418 U.S. 683 (1974): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.... Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " *Id.,* at 703 (citation omitted).

Contrary to Justice SOUTER's suggestion, see *post,* at 1769–1772, and n. 14, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds.* As the language surrounding that relied upon by Justice SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary. See *Gibbons, supra,* at 194–195 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different

> parts of the same State, and which does not extend to or affect other States.... Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. *Lopez,* 514 U.S., at 568 (citing *Jones & Laughlin Steel,* 301 U.S., at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 426, 428, (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear ... that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[8] See, *e.g., Lopez,* 514 U.S., at 566 ("The Constitution ... withhold[s] from Congress a plenary police power"); *id.,* at 584–585 (THOMAS, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596–597, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

[8] Justice SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. See *post,* at 1768–1769, and n. 14. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. See, *e.g., New York v. United States,* 505 U.S. 144, 156–157 (1992). And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. See n. 7, *supra.* Moreover, the principle that " '[t]he Constitution created a Federal Government of limited powers,' " while reserving a generalized police power to the States, is deeply ingrained in our constitutional history. *New York, supra,* at 155 (quoting *Gregory v. Ashcroft, supra,* at 457); see also *Lopez,* 514 U.S., at 584–599 (THOMAS, J., concurring) (discussing the history of the debates surrounding the adoption of the Commerce Clause and our subsequent interpretation of the Clause); *Maryland v. Wirtz,* 392 U.S. 183, 196 (1968).

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IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can[not] be sustained … under the Commerce Clause. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

Justice THOMAS, concurring.

[Omitted]

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn,* 317 U.S. 111, 124–128 (1942); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 277 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.,* but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez,* 514 U.S. 549 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.[2] Passage of the Act in 1994 was preceded by four years of hearings,[3] which included testimony from physicians and law professors;[4]from survivors of rape and domestic violence;[5]and from representatives of state law enforcement and private business.[6] The record includes reports on gender bias from task forces in 21 States,[7] and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.[8] Cf. *Hodel,* 452 U.S., at 278–279 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration").

[2] It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender"—presumably a somewhat narrower subset of acts. See 42 U.S.C. § 13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955).

[3] See, *e.g.,* Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102–369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

[4] See, *e.g.,* S. Hearing 103–596, at 1–4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102–369, at 103–105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103–878, at 7–11 (testimony of American Medical Assn. president-elect Robert McAfee).

[5] See, *e.g., id.,* at 13–17 (testimony of Lisa); *id.,* at 40–42 (testimony of Jennifer Tescher).

[6] See, *e.g.,* S. Hearing 102–369, at 24–36, 71–87 (testimony of attorneys general of Iowa and Illinois); *id.,* at 235–245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103–596, at 15–17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

[7] See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (July 1996) (edited version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept.1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar.1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U. L. Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb.1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan.1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 1989); Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, Final Report (Dec.1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L. Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice for Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar.1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June 1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar.1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan.1991); Washington State Task Force on Gender and Justice in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan.1991).

[8] See S.Rep. No. 101–545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S.Rep. No. 102–197

(1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S.Rep. No. 103–138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H.R.Rep. No. 103–395 (1993); H.R. Conf. Rep. No. 103–711 (1994).

With respect to domestic violence, Congress received evidence for the following findings:

> "Three out of four American women will be victims of violent crimes sometime during their life." H.R.Rep. No. 103–395, p. 25 (1993) (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed.1988)).
>
> "Violence is the leading cause of injuries to women ages 15 to 44...." S.Rep. No. 103–138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, U.S. Public Health Services, 267 JAMA 3132 (1992)).
>
> "[A]s many as 50 percent of homeless women and children are fleeing domestic violence." S.Rep. No. 101–545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).
>
> "Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S.Rep. No. 101–545, at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).
>
> "[B]attering 'is the single largest cause of injury to women in the United States.' " S.Rep. No. 101–545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989)).
>
> "An estimated 4 million American women are battered each year by their husbands or partners." H.R.Rep. No. 103–395, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992)).
>
> "Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners." S.Rep. No. 101–545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982)).
>
> "Between 2,000 and 4,000 women die every year from [domestic] abuse." S.Rep. No. 101–545, at 36 (citing Schneider, *supra*).
>
> "[A]rrest rates may be as low as 1 for every 100 domestic assaults." S.Rep. No. 101–545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5–30 (1988)).
>
> "Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year." S.Rep. No. 101–545, at 33 (citing Schneider, *supra,* at 4).
>
> "[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S.Rep. No. 103–138, at 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

> "[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." S.Rep. No. 101–545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).
>
> "According to one study, close to half a million girls now in high school will be raped before they graduate." S.Rep. No. 101–545, at 31 (citing R. Warshaw, I Never Called it Rape 117 (1988)).
>
> "[One hundred twenty—five thousand] college women can expect to be raped during this—or any—year." S.Rep. No. 101–545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).
>
> "[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S.Rep. No. 102–197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).
>
> "[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S.Rep. No. 102–197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender & Justice in the Colorado Courts 91 (1990)).
>
> "Less than 1 percent of all [rape] victims have collected damages." S.Rep. No. 102–197, at 44 (citing report by Jury Verdict Research, Inc.).
>
> " '[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.' " S.Rep. No. 101–545, at 33, n. 30 quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology and Law 95 (1980)).
>
> "Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S.Rep. No. 103–138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).
>
> "[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S.Rep. No. 102–197, at 53 (citing Ellis, Atkeson, & Calhoun, An Assessment of Long–Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, p. 264 (1981)).

Based on the data thus partially summarized, Congress found that

> "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce ... [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products...." H.R. Conf. Rep. No. 103–711, p. 385 (1994), U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853.

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner*

Broadcasting System, Inc. v. FCC, 520 U.S. 180, 199 (1997) "The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See Civil Rights—Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383–1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H.R.Rep. No. 88–914, pt. 2, pp. 9–10, and Table II (1963) (Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, see S. Rep. 101–545, at 33, and $5 to $10 billion in 1993, see S.Rep. No. 103–138, at 41.[9] Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets—women—from full partic[ipation] in the national economy." *Id.,* at 54.

[9] In other cases, we have accepted dramatically smaller figures. See, *e.g., Hodel v. Indiana,* 452 U.S. 314, 325, n. 11 (1981) (stating that corn production with a value of $5.16 million "surely is not an insignificant amount of commerce").

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard,* we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U.S., at 127–129. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S.Rep. No. 101–545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.,* at 56; H.R.Rep. No. 103–395, at 25–26. Violence against women may be found to affect interstate commerce and affect it substantially.[10]

[10] It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13–14 (1995) (testimony of Justice KENNEDY); Hearings on H.R. 4603 before a Subcommittee of the Senate Committee on Appropriations,

103d Cong., 2d Sess., 100–107 (1994) (testimony of Justices KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 70–71 (1993).

II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I, § 8, cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258; *McClung, supra,* at 301–305, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta,* 379 U.S., at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 1752. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons v. Ogden,* 9 Wheat. 1, 195 (1824); *ante,* at 1749–1750; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison).[11] The majority stresses that Art. I, § 8, enumerates the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, see *Lopez,* 514 U.S., at 566. *Ante,* at 1753.

[11] The claim that powers not granted were withheld was the chief Federalist argument against the necessity

of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436–437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily adopted a Bill of Rights. See *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 569 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.[12] My disagreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

[12] To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, *e.g., Lake Shore & Michigan Southern R. Co. v. Ohio,* 173 U.S. 285, 297–298 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States v. California,* 297 U.S. 175, 185 (1936) ("[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Art. I, § 8, authorizing Congress to make "all Laws ... necessary and proper" to give effect to its enumerated powers such as commerce. See *United States v. Darby,* 312 U.S. 100, 118 (1941) ("The power of Congress ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition

summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

Chief Justice Marshall's seminal opinion in *Gibbons v. Ogden,* 9 Wheat., at 193–194, 22 U.S. 1, construed the commerce power from the start with "a breadth never yet exceeded," *Wickard v. Filburn,* 317 U.S., at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons,* 9 Wheat., at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence. See, *e.g., id.,* at 197; *Nashville, C. & St. L.R. Co. v. Alabama,* 128 U.S. 96, 99–100 (1888); *Lottery Case,* 188 U.S. 321, 353 (1903); *Minnesota Rate Cases,* 230 U.S. 352, 398 (1913); *United States v. California,* 297 U.S. 175, 185 (1936); *United States v. Darby, supra,* at 115; *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S., at 255; *Hodel v. Indiana,* 452 U.S., at 324. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez,* as summed up by Justice Harlan: " 'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators ... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.' " *Maryland v. Wirtz,* 392 U.S. 183, 190 (1968) (quoting *Katzenbach v. McClung,* 379 U.S., at 303–304).

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near tragedy that I outlined in *United States v. Lopez,* 514 U.S., at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, *e.g., United States v. E.C. Knight Co.,* 156 U.S. 1 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff,* 197 U.S. 488, 505–506 (1905) (stating that Congress could not regulate the intrastate sale of liquor); *The Employers' Liability Cases,* 207 U.S. 463, 495–496 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect);
Adair v. United States, 208 U.S. 161 (1908) (holding that labor union membership fell outside "commerce"); *Hammer v. Dagenhart,* 247 U.S. 251 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 545–548 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd. v. Alton R. Co.,* 295 U.S. 330, 368–369 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter v. Carter Coal Co.,* 298 U.S. 238, 303–304 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937),

which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard,* which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez, supra,* at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer, supra,* at 271–272, but rejected for Commerce Clause purposes in *Heart of Atlanta, supra,* at 257, and *Darby,* 312 U.S., at 115.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary,[13] but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before *Wickard,* however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co., supra,* had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez, supra,* at 605–606 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

[13] Contrary to the Court's suggestion, *ante,* at 1750, n. 4, *Wickard v. Filburn,* 317 U.S. 111 (1942), applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce...." *Id.,* at 125. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., *e.g., National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 258 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra,* at 1768–1769.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard,* the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of

the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante,* at 1749. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby,* 312 U.S., at 123–124, and held insufficient standing alone to limit the commerce power in *Hodel,* 452 U.S., at 276–277. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland v. Wirtz,* 392 U.S. 183 (1968), with the recognition that "[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.,* at 195 (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within a delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *National League of Cities v. Usery,* 426 U.S. 833 (1976), that case was itself repudiated in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 U.S., at 546–547. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons's* explanation of the national commerce power as being as "absolut[e] as it would be in a single government," 9 Wheat., at 197.[14]

[14] The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "[t]he internal police ... ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25–26 (M. Farrand ed.1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall ... be affected in its internal police." 5 Elliot's Debates 551–552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that

politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.[15] Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

[15] That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 U.S. 1, 9 (1877). See also, *e.g., Farmers' Loan & Trust Co. v. Minnesota,* 280 U.S. 204, 211–212 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties),[16] Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, P. 319 (J. Cooke ed. 1961). James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438–439.[17] The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[18] In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

[16] As mentioned in n. 11, *supra,* many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's Debates 322–323 (Massachusetts), 325 (South Carolina), 325–327 (New Hampshire), 327 (Virginia), 327–331 (New York), 331–332 (North Carolina), 334–337 (Rhode Island).

[17] Statements to similar effect pervade the ratification debates. See, *e.g.,* 2 *id.,* at 166–170 (Massachusetts, remarks of Samuel Stillman); 2 *id.,* at 251–253 (New York, remarks of Alexander Hamilton); 4 *id.,* at 95–98 (North Carolina, remarks of James Iredell).

[18] The majority's special solicitude for "areas of traditional state regulation," *ante,* at 1753, is thus founded not on the text of the Constitution but on what has been termed the "*spirit* of the Tenth Amendment," *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S., at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri v. Holland,* 252 U.S. 416, 434 (1920), has increased in recent years, in disregard of his admonition that "[w]e must consider what this country has become in deciding what that Amendment has reserved," *ibid.*

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons,* 9 Wheat., at 197.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard,* for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "[h]e made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard,* 317 U.S., at 120 (citation omitted). Hence, "conflicts of economic interest ... are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.,* at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia,* 469 U.S., at 550–552, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty," *id.,* at 548. It concluded that

> "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.,* at 552.

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary

and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid.* See generally Rossum, The Irony of Constitutional Democracy: Federalism, the Supreme Court, as the Seventeenth Amendment, 36 San Diego L.Rev. 671, 712–714 (1999) (noting federalism-base objections to the Seventeenth Amendment). These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed.[19]

[19] The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury v. Madison,* 1 Cranch 137 (1803)), *ante,* at 1753–1754. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones* & *Laughlin, Darby, Wickard,* or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante,* at 1753–1754, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, *e.g., Wickard,* 317 U.S., at 125; *United States v. Darby,* 312 U.S. 100, 118–119 (1941). The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.

Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery.* In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry v. United States,* 421 U.S. 542 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal system, "which only collective action by the National Government might forestall." *Usery,* 426 U.S., at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential.[20]

[20] See n. 7, *supra.* The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the

Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991), and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy, representing that "the current system for dealing with violence against women is inadequate," see Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum).[21] The Act accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S.Rep. No. 101–545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical...." S.Rep. No. 103–138, at 38.

[21] The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under § 5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal's* James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal, Schechter,* and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup v. New York,* 386 U.S. 767 (1967) *(per curiam),* and *Miller v. California,* 413 U.S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.,* at 22, n. 3,; *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 706–708 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This

one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed.1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

Justice BREYER, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice GINSBURG join as to Part I–A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue.

I

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effect[s]" of individual instances. *Ante,* at 1754. Justice SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez v. United States,* 402 U.S. 146 (1971) (aggregating local "loan sharking" instances); *United States v. Lopez,* 514 U.S. 549, 559 (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"); *ante,* at 1749–1750. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7–8 (Nov.1998); Brief for Equal Rights Advocates et al. as *Amicus Curiae* 10–12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, "noneconomic" activity taking place at economic establishments. See *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (same for restaurants); *Lopez, supra,* at 559 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations); *ante,* at 1749–1750 (same). And it would permit Congress to regulate where that regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez, supra,* at 561; cf. Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (regulating drugs produced for home

consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause?* If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce ... among the several States," and to make laws "necessary and proper" to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 38–39 (1937) (focusing upon interstate effects); *Wickard v. Filburn,* 317 U.S. 111, 125 (1942) (aggregating interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra,* at 258 (" '[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze' " (quoting *United States v. Women's Sportswear Mfrs. Assn.,* 336 U.S. 460, 464 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez,* explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).

Most importantly, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of "areas of traditional state regulation" from federal intrusion. *Ante,* at 1752–1753. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite—for example, that some item relevant to the federally regulated activity has at some time crossed a state line. *Ante,* at 1749–1750, 1751, 1752, and n. 5; *Lopez, supra,* at 558; *Heart of Atlanta Motel, supra,* at 256 (" '[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question' " (quoting *Caminetti v. United States,* 242 U.S. 470, 491 (1917))); see also *United States v. Bass,* 404 U.S. 336, 347–350 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough v. United States,* 431 U.S. 563, 575 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); cf., *e.g.,* 18 U.S.C. § 2261(a)(1) (making it a federal crime for a person to cross state lines to commit a crime of violence against a spouse or intimate partner); § 1951(a) (federal crime to commit robbery, extortion, physical violence or threat thereof, where "article or commodity in commerce" is affected, obstructed, or delayed); § 2315 (making unlawful the knowing receipt or possession of certain stolen items that have "crossed a State ... boundary"); § 922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms "in interstate ... commerce").

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, *e.g.,* Child Support Recovery Act of 1992, 18 U.S.C. § 228. Although this possibility does

not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of "An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard, supra,* at 120; *United States v. Darby,* 312 U.S. 100, 116–117 (1941); *Jones & Laughlin Steel Corp., supra,* at 37.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything. Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority." *Ante,* at 1752–1753; *Lopez,* 514 U.S., at 558; cf. *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 548 (1935) (need for distinction between "direct" and "indirect" effects lest there "be virtually no limit to the federal power"); *Hammer v. Dagenhart,* 247 U.S. 251, 276 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. *Heart of Atlanta Motel,* 379 U.S., at 251. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause "aggregation" rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552 (1985); *ante,* at 1768–1771 (SOUTER, J., dissenting); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 93–94 (2000) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, "the normal operation of the legislative process itself would adequately defend state interests from undue infringement"); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, *e.g.,* Unfunded Mandates Reform Act of 1995, Pub.L. 104–4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, *e.g.,* 42 U.S.C. § 7543(b) (Clean Air Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); see also *New York v. United States,* 505 U.S. 144, 167–168 (1992) (collecting other examples of "cooperative federalism"). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "are[a] of traditional state regulation." *Ante,* at 1753. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993); see also Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, *supra,* at 77–84 (Conference of Chief Justices opposing legislation).

Moreover, as Justice SOUTER has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante,* at 1760–1763, 1772–1773 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. 42 U.S.C. § 13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem. Cf. §§ 300w–10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante,* at 1752, it far surpasses that which led to the enactment of the statute we considered in *Lopez.* And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in keeping the power of Congress in check. See *Garcia, supra,* at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy' " (quoting *EEOC v. Wyoming,* 460 U.S. 226, 236 (1983))); see also *Gregory v. Ashcroft,* 501 U.S. 452, 460–461 (1991) (insisting upon a "plain statement" of congressional intent when Congress legislates "in areas traditionally regulated by the States"); cf. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103–105, 114–117 (1976); *Fullilove v. Klutznick,* 448 U.S. 448, 548–554 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures—*e.g.,* whether Congress took a "hard look"—might sometimes make a determinative difference in a Commerce Clause case, say, when Congress legislates in an area of traditional state regulation. See, *e.g.,* Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2231–2245 (1998); Gardbaum, Rethinking Constitutional Federalism, 74 Texas L. Rev. 795, 812–828, 830–832 (1996); Lessig, Translating Federalism: *United States v. Lopez,* 1995 S.Ct. Rev. 125, 194–214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L.Rev. 331, 378–403 (1994) (arguing for similar limitation in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra,* at 833–837 (applying subsidiarity principles to American federalism). Of course, any

judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. See *supra,* at 1774–1776.

I continue to agree with Justice SOUTER that the Court's traditional "rational basis" approach is sufficient. *Ante,* at 1759–1760 (dissenting opinion); see also *Lopez,* 514 U.S., at 603–615 (SOUTER, J., dissenting); *id.,* at 615–631 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach—in which case the law may evolve toward a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as well as those set forth by Justice SOUTER, this statute falls well within Congress' Commerce Clause authority, and I dissent from the Court's contrary conclusion.

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Supreme Court of the United States

Alberto R. GONZALES, Attorney General, et al., Petitioners,
v.
Angel McClary RAICH et al.

Decided June 6, 2005.

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes.[1] The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

[1] See Alaska Stat. §§ 11.71.090, 17.37.010–17.37.080 (Lexis 2004); Colo. Const., Art. XVIII, § 14, Colo.Rev.Stat. § 18–18–406.3 (Lexis 2004); Haw.Rev.Stat. §§ 329–121 to 329–128 (2004 Cum.Supp.); Me.Rev.Stat. Ann., Tit. 22, § 2383–B(5) (West 2004); Nev. Const., Art. 4, § 38, Nev.Rev.Stat. §§ 453A.010–453A.810 (2003); Ore.Rev.Stat. §§ 475.300–475.346 (2003); Vt. Stat. Ann., Tit. 18, §§ 4472–4474d (Supp.2004); Wash. Rev.Code §§ 69.51.010–69.51.080 (2004); see also Ariz.Rev.Stat. Ann. § 13–3412.01 (West Supp.2004) (voter initiative permitting physicians to prescribe Schedule I substances for medical purposes that was purportedly repealed in 1997, but the repeal was rejected by voters in 1998). In November 2004, Montana voters approved Initiative 148, adding to the number of States authorizing the use of marijuana for medical purposes.

I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana,[2] and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996.[3] The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need.[4] The Act creates an exemption from criminal prosecution for physicians,[5] as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.[6] A "primary caregiver" is a person who has consistentl y assumed responsibility for the housing, health, or safety of the patient.[7]

[2] 1913 Cal. Stats. ch. 342, § 8*a;* see also Gieringer, The Origins of Cannabis Prohibition in California, 21–23 (rev. Mar. 2005), available at http://www.canorml.org/background/caloriginsmjproh.pdf (all Internet materials as visited June 2, 2005, and available in Clerk of Court's case file)

[3] Cal. Health & Safety Code Ann. § 11362.5 (West Supp.2005). The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act. §§ 11362.7–11362.9

[4] "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

> "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
> "(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.
> "(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." § 11362.5(b)(1).

[5] "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." § 11362.5(c).

[6] "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." § 11362.5(d).

[7] § 11362.5(e).

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3–hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.,* to the extent it prevents them from

possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. *Raich v. Ashcroft,* 248 F.Supp.2d 918 (N.D.Cal.2003). Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims. *Id.,* at 931.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction.[8] *Raich v. Ashcroft,* 352 F.3d 1222 (9th Cir. 2003). The court found that respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." *Id.,* at 1227. The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of Commerce Clause challenges by focusing on what it deemed to be the "*separate and distinct class of activities*" at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.,* at 1228. The court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

[8] On remand, the District Court entered a preliminary injunction enjoining petitioners " 'from arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, non-commercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale, or exchange.' " Brief for Petitioners 9.

The majority placed heavy reliance on our decisions in *United States v. Lopez,* 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000), as interpreted by recent Circuit precedent, to hold that this separate class of purely local activities was beyond the reach of federal power. In contrast, the dissenting judge concluded that the CSA, as applied to respondents, was clearly valid under *Lopez* and *Morrison;* moreover, he thought it "simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn.*" 352 F.3d, at 1235 (opinion of Beam, J.).

The obvious importance of the case prompted our grant of certiorari. 542 U.S. 936 (2004). The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of

this case. We accordingly vacate the judgment of the Court of Appeals.

II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs."[9] As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.[10] That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

[9] See D. Musto & P. Korsmeyer, The Quest for Drug Control 60 (2002) (hereinafter Musto & Korsmeyer)

[10] H.R. Rep. No. 91–1444, pt. 2, p. 22 (1970) (hereinafter H.R. Rep.); 26 Congressional Quarterly Almanac 531 (1970) (hereinafter Almanac); Musto & Korsmeyer 56–57.

This was not, however, Congress' first attempt to regulate the national market in drugs. Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce.[11] Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer.[12] For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.[13]

[11] Pure Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.

[12] See *United States v. Doremus,* 249 U.S. 86 (1919); *Leary v. United States,* 395 U.S. 6, 14–16 (1969).

[13] See *Doremus,* 249 U.S., at 90–93.

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, 50 Stat. 551 (repealed 1970).[14] Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands.[15] Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements.[16] Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law.[17] Thus, while the Marihuana Tax Act did not declare the drug illegal *per se,* the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

[14] R. Bonnie & C. Whitebread, The Marijuana Conviction 154–174 (1999); L. Grinspoon & J. Bakalar, Marihuana, the Forbidden Medicine 7–8 (rev. ed.1997) (hereinafter Grinspoon & Bakalar). Although this was the Federal Government's first attempt to regulate the marijuana trade, by this time all States had in place some form of legislation regulating the sale, use, or possession of marijuana. R. Isralowitz, Drug Use,

Policy, and Management 134 (2d ed.2002).

15 *Leary,* 395 U.S., at 14–16.

16 Grinspoon & Bakalar 8.

17 *Leary,* 395 U.S., at 16–18.

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated this policy shift. First, in *Leary v. United States,* 395 U.S. 6 (1969), this Court held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional. Second, at the end of his term, President Johnson fundamentally reorganized the federal drug control agencies. The Bureau of Narcotics, then housed in the Department of the Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs, currently housed in the Department of Justice.[18] Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.[19]

18 Musto & Korsmeyer 32–35; 26 Almanac 533. In 1973, the Bureau of Narcotics and Dangerous Drugs became the DEA. See Reorg. Plan No. 2 of 1973, § 1, 28 CFR § 0.100 (1973).

19 The Comprehensive Drug Abuse Prevention and Control Act of 1970 consists of three titles. Title I relates to the prevention and treatment of narcotic addicts through HEW (now the Department of Health and Human Services). 84 Stat. 1238. Title II, as discussed in more detail above, addresses drug control and enforcement as administered by the Attorney General and the DEA. *Id.,* at 1242. Title III concerns the import and export of controlled substances. *Id.,* at 1285.

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.[20] Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.[21]

20 In particular, Congress made the following findings:

> "(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
> "(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
> "(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> > "(A) after manufacture, many controlled substances are transported in interstate commerce,
> > "(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
> > "(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

> "(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
> "(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
> "(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §§ 801(1)-(6).

[21] See *United States v. Moore,* 423 U.S. 122, 135 (1975); see also H.R. Rep., at 22, U.S. Code Cong. & Admin. News 1970, pp. 4566, 4596.

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. §§ 821–830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid.;* 21 CFR § 1301 *et seq.* (2004).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway."[22] Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. §§ 823(f), 841(a)(1), 844(a); see also *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 490 (2001).

[22] *Id.,* at 61, U.S. Code Cong. & Admin. News 1970, pp. 4566, 4629 (quoting letter from Roger O. Egeberg, M.D., to Hon. Harley O. Staggers (Aug. 14, 1970)).

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.[23]

[23] Starting in 1972, the National Organization for the Reform of Marijuana Laws began its campaign to reclassify marijuana. Grinspoon & Bakalar 13–17. After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III substance, *Grinspoon v. DEA,* 828 F.2d 881, 883–884 (1st Cir. 1987), the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, 54 Fed.

Reg. 53767 (1989), and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. 66 Fed. Reg. 20038 (2001). The Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See *Alliance for Cannabis Therapeutics v. DEA,* 15 F.3d 1131, 1133 (D.C. Cir. 1994).

III

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez,* our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time.[24] The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.[25] For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible.[26] Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, 15 U.S.C. § 2 *et seq.*[27]

[24] *United States v. Lopez,* 514 U.S. 549, 552–558 (1995); *id.,* at 568–574 (KENNEDY, J., concurring); *id.,* at 604–607 (SOUTER, J., dissenting).

[25] See *Gibbons v. Ogden,* 9 Wheat. 1, 224 (1824) (opinion of Johnson, J.); Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1337, 1340–1341 (1934); G. Gunther, Constitutional Law 127 (9th ed.1975).

[26] See *Lopez,* 514 U.S., at 553–554; *id.,* at 568–569 (KENNEDY, J., concurring); see also *Granholm v. Heald,* 544 U.S. 460, 472–473 (2005).

[27] *Lopez,* 514 U.S., at 554; see also *Wickard v. Filburn,* 317 U.S. 111, 121 (1942) ("It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti–Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder" (footnotes omitted)).

Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. *Perez v. United States,* 402 U.S. 146, 150 (1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate

commerce, and persons or things in interstate commerce. *Ibid.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Ibid.*; *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g., Perez,* 402 U.S., at 151; *Wickard v. Filburn,* 317 U.S. 111, 128–129 (1942). As we stated in *Wickard,* "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.,* at 125. We have never required Congress to legislate with scientific exactitude. When Congress decides that the " 'total incidence' " of a practice poses a threat to a national market, it may regulate the entire class. See *Perez,* 402 U.S., at 154–155 (" '[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so' "(quoting *Westfall v. United States,* 274 U.S. 256, 259, (1927))). In this vein, we have reiterated that when " 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' " *E.g., Lopez,* 514 U.S., at 558 (quoting *Maryland v. Wirtz,* 392 U.S. 183, 196, n. 27 (1968); emphasis deleted).

Our decision in *Wickard,* 317 U.S. 111, is of particular relevance. In *Wickard,* we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard,* 317 U.S., at 118. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.,* at 127–128.

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.[28] Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ..." and consequently control the market price, *id.,* at 115, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. See nn. 20–21, *supra.* In *Wickard,* we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market

conditions.

[28] Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. See also *Department of Revenue of Mont. v. Kurth Ranch,* 511 U.S. 767, 770, 774, n. 12, and 780, n. 17 (1994) (discussing the "market value" of marijuana); *id.,* at 790 (REHNQUIST, C. J., dissenting); *id.,* at 792 (O'CONNOR, J., dissenting); *Whalen v. Roe,* 429 U.S. 589, 591 (1977) (addressing prescription drugs "for which there is both a lawful and an unlawful market"); *Turner v. United States,* 396 U.S. 398, 417, n. 33 (1970) (referring to the purchase of drugs on the "retail market").

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. *Wickard,* 317 U.S., at 128. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[29]

[29] To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity. *Lopez,* 514 U.S., at 571 (KENNEDY, J., concurring) ("In the *Lottery Case,* 188 U.S. 321 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit"); see also *Wickard,* 317 U.S., at 128 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon").

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. 317 U.S., at 127. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation.[30] And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

[30] See *id.,* at 125 (recognizing that Filburn's activity "may not be regarded as commerce").

Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. See n. 20, *supra.* The submissions of the parties

and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute.[31] Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, see *Lopez,* 514 U.S., at 562; *Perez,* 402 U.S., at 156, absent a special concern such as the protection of free speech, see, *e.g., Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 664–668 (1994) (plurality opinion). While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.[32]

[31] The Executive Office of the President has estimated that in 2000 American users spent $10.5 *billion* on the purchase of marijuana. Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb.2004), http://www.whitehousedrugpolicy.gov/pub lications/factsht/marijuana/index.html.

[32] Moreover, as discussed in more detail above, Congress did make findings regarding the effects of intrastate drug activity on interstate commerce. See n. 20, *supra.* Indeed, even the Court of Appeals found that those findings "weigh[ed] in favor" of upholding the constitutionality of the CSA. 352 F.3d 1222, 1232 (9th Cir. 2003) (case below). The dissenters, however, would impose a new and heightened burden on Congress (unless the litigants can garner evidence sufficient to cure Congress' perceived "inadequa[cies]")—that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme. *Post,* at 2226–2228 (opinion of O'CONNOR, J.); *post,* at 2233 (opinion of THOMAS, J.). Such an exacting requirement is not only unprecedented, it is also impractical. Indeed, the principal dissent's critique of Congress for "not even" including "declarations" specific to marijuana is particularly unpersuasive given that the CSA initially identified 80 other substances subject to regulation as Schedule I drugs, not to mention those categorized in Schedules II–V. *Post,* at 2228 (opinion of O'CONNOR, J.). Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained therein in order to satisfy the dissenters' unfounded skepticism.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez,* 514 U.S., at 557; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276–280 (1981); *Perez,* 402 U.S., at 155–156; *Katzenbach v. McClung,* 379 U.S. 294, 299–301 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 252–253 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels,[33] we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard,* when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

[33] See n. 21, *supra* (citing sources that evince Congress' particular concern with the diversion of drugs from

legitimate to illicit channels).

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.

Those two cases, of course, are *Lopez,* 514 U.S. 549, and *Morrison,* 529 U.S. 598. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison,* the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez,* 402 U.S., at 154 (quoting *Wirtz,* 392 U.S., at 193 (emphasis deleted)); see also *Hodel,* 452 U.S., at 308.

At issue in *Lopez,* 514 U.S. 549, was the validity of the Gun–Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. 104 Stat. 4844–4845, 18 U.S.C. § 922(q)(1)(A). The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

> "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S., at 561.

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242–1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th item in the 3d subcategory. That classification,

unlike the discrete prohibition established by the Gun–Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez,* 514 U.S., at 561.[34] Our opinion in *Lopez* casts no doubt on the validity of such a program.

[34] The principal dissent asserts that by "[s]eizing upon our language in *Lopez,*" *post,* at 2223 (opinion of O'CONNOR, J.), *i.e.,* giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made. *Ibid.* (O'CONNOR, J., dissenting).

Nor does this Court's holding in *Morrison,* 529 U.S. 598. The Violence Against Women Act of 1994, 108 Stat.1902, created a federal civil remedy for the victims of gender-motivated crimes of violence. 42 U.S.C. § 13981. The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: " 'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' "[35] *Morrison,* 529 U.S., at 610.

[35] *Lopez,* 514 U.S., at 560; see also *id.,* at 573–574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

Unlike those at issue in *Lopez* and *Morrison,* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.[36] Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

[36] See 16 U.S.C. § 668(a) (bald and golden eagles); 18 U.S.C. § 175(a) (biological weapons); § 831(a) (nuclear material); § 842(n)(1) (certain plastic explosives); § 2342(a) (contraband cigarettes).

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." 352 F.3d, at 1229. The court characterized this class as "different in kind from drug trafficking." *Id.,* at 1228. The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.,* its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities

defined by the Court of Appeals was an essential part of the larger regulatory scheme.

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. *Id.,* at 1229. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose." 21 U.S.C. § 801(1). Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug,[37] the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. See §§ 821–830; 21 CFR § 1301 *et seq.* (2004). Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. *United States v. Rutherford,* 442 U.S. 544 (1979). Accordingly, the mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

[37] We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. See, *e.g.,* Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson, & J. Benson eds.1999) (recognizing that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant v. Walters,* 309 F.3d 629, 640–643 (9th Cir. 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

Nor can it serve as an "objective marke[r]" or "objective facto[r]" to arbitrarily narrow the relevant class as the dissenters suggest, *post,* at 2223 (opinion of O'CONNOR, J.); *post,* at 2235 (opinion of THOMAS, J.). More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the " 'outer limits' of Congress' Commerce Clause authority," *post,* at 2220 (opinion of O'CONNOR, J.), it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those " 'outer limits,' " whether or not a State elects to authorize or even regulate such use. Justice THOMAS' separate dissent suffers from the same sweeping implications. That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the " 'outer limits' " of Congress' Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," *Lopez,* 514 U.S., at 563, under any commonsense appraisal of the

probable consequences of such an open-ended exemption.

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be. *Wirtz,* 392 U.S., at 196 (quoting *Sanitary Dist. of Chicago v. United States,* 266 U.S. 405, 426 (1925)). See also 392 U.S., at 195–196; *Wickard,* 317 U.S., at 124 (" '[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress' "). Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, see, *e.g., Morrison,* 529 U.S., at 661–662 (BREYER, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See *United States v. Darby,* 312 U.S. 100, 114 (1941) ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power").[38]

[38] That is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are "effective," as the dissenters would have us blindly presume, *post,* at 2227 (opinion of O'CONNOR, J.); *post,* at 2232, 2235 (opinion of THOMAS, J.). California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," post, at 2232 (THOMAS, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. See *post*, at 2219 (SCALIA, J., concurring in judgment) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 424 (1819)) (" 'To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution' ").

Moreover, in addition to casting aside more than a century of this Court's Commerce Clause jurisprudence, it is noteworthy that Justice THOMAS' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens." *Post,* at 2234 (dissenting opinion).

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." Tr. of Oral Arg. 27. The dissenters fall prey to similar reasoning. See n. 38, *supra* this page. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, *post,* at 2229 (opinion of O'CONNOR, J.), it is readily apparent. The exemption for physicians provides them with an economic

incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp.2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic.[39] And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so.[40]

[39] California's Compassionate Use Act has since been amended, limiting the catchall category to "[a]ny other chronic or persistent medical symptom that either: ... [s]ubstantially limits the ability of the person to conduct one or more major life activities as defined" in the Americans with Disabilities Act of 1990, or "[i]f not alleviated, may cause serious harm to the patient's safety or physical or mental health." Cal. Health & Safety Code Ann. §§ 11362.7(h)(12)(A)–(B) (West Supp.2005).

[40] See, *e.g., United States v. Moore,* 423 U.S. 122 (1975); *United States v. Doremus,* 249 U.S. 86 (1919).

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.[41] The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.[42] Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so.[43] Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'CONNOR's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," *post,* at 2229, 2227–2228, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

[41] The state policy allows patients to possess up to eight ounces of dried marijuana, and to cultivate up to 6 mature or 12 immature plants. Cal. Health & Safety Code Ann. § 11362.77(a) (West Supp.2005). However, the quantity limitations serve only as a floor. Based on a doctor's recommendation, a patient can possess whatever quantity is necessary to satisfy his medical needs, and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Reply Brief for Petitioners 18–19 (citing Proposition 215 Enforcement Guidelines). Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes. Executive Office of the President, Office of National Drug Control Policy, What America's Users Spend on Illegal Drugs 24 (Dec.2001), http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf. And the street price for that amount can range anywhere from $900 to $24,000. DEA, Illegal Drug Price and Purity Report (Apr.2003) (DEA–02058).

[42] For example, respondent Raich attests that she uses 2.5 ounces of cannabis a week. App. 82. Yet as a resident of Oakland, she is entitled to possess up to 3 pounds of processed marijuana at any given time, nearly 20 times more than she uses on a weekly basis.

[43] See, *e.g., People ex rel. Lungren v. Peron,* 59 Cal.App.4th 1383, 1386–1387 (1997) (recounting how a Cannabis Buyers' Club engaged in an "indiscriminate and uncontrolled pattern of sale to thousands of

> persons among the general public, including persons who had not demonstrated any recommendation or approval of a physician and, in fact, some of whom were not under the care of a physician, such as undercover officers," and noting that "some persons who had purchased marijuana on respondents' premises were reselling it unlawfully on the street").

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." 352 F.3d, at 1229. Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

V

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States,* 402 U.S. 146 (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.,* at 150; see *United States v. Morrison,* 529 U.S. 598, 608–609 (2000); *United States v. Lopez,* 514 U.S. 549, 558–559 (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276–277 (1981). The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden,* 9 Wheat. 1, 189–190 (1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs,* 12 Pet. 72 (1838), Congress's regulatory

authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. *Id.,* at 78; *Katzenbach v. McClung,* 379 U.S. 294, 301–302 (1964); *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942); *Shreveport Rate Cases,* 234 U.S. 342, 353 (1914); *United States v. E.C. Knight Co.,* 156 U.S. 1, 39–40 (1895) (Harlan, J., dissenting).[1] And the category of "activities that substantially affect interstate commerce," *Lopez, supra,* at 559, is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

[1] See also *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 584–585 (1985) (O'CONNOR, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power").

I

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 36–37 (1937). That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. See, *e.g., Hodel, supra,* at 281 (surface coal mining); *Katzenbach, supra,* at 300 (discrimination by restaurants); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964) (discrimination by hotels); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 237 (1948) (intrastate price fixing); *Board of Trade of Chicago v. Olsen,* 262 U.S. 1, 40 (1923) (activities of a local grain exchange); *Stafford v. Wallace,* 258 U.S. 495, 517, 524–525 (1922) (intrastate transactions at stockyard). *Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: "[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez, supra,* at 560; *Morrison, supra,* at 610 (same).

This principle is not without limitation. In *Lopez* and *Morrison,* the Court—conscious of the potential of the "substantially affects" test to " 'obliterate the distinction between what is national and what is local,' " *Lopez, supra,* at 566–567, quoting *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 554 (1935)); see also *Morrison, supra,* at 615–616—rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. *Lopez, supra,* at 564–566; *Morrison, supra,* at 617–618. "[I]f we were to accept [such] arguments," the Court reasoned in *Lopez,* "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S., at 564; see also *Morrison, supra,* at 615–616. Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," *Lopez, supra,* at 567, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez,* however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of

economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S., at 561. This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." *Wrightwood Dairy Co., supra,* at 119; see also *United States v. Darby,* 312 U.S. 100, 118–119 (1941); *Shreveport Rate Cases, supra,* at 353. As the Court put it in *Wrightwood Dairy,* where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." 315 U.S., at 118–119.

Although this power "to make ... regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,[2] and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See *Lopez, supra,* at 561. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See *Darby, supra,* at 121.

[2] *Wickard v. Filburn,* 317 U.S. 111 (1942), presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. *Id.,* at 127–129. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct. *Id.,* at 128–129.

In *Darby,* for instance, the Court explained that "Congress, having ... adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards," 312 U.S., at 121, could not only require employers engaged in the production of goods for interstate commerce to conform to wage and hour standards, *id.,* at 119–121, but could also require those employers to keep employment records in order to demonstrate compliance with the regulatory scheme, *id.,* at 125. While the Court sustained the former regulation on the alternative ground that the activity it regulated could have a "great effect" on interstate commerce, *id.,* at 122–123, it affirmed the latter on the sole ground that "[t]he requirement for records even of the intrastate transaction is an appropriate means to the legitimate end," *id.,* at 125.

As the Court said in the *Shreveport R. Co.,* the Necessary and Proper Clause does not give "Congress ... the authority to regulate the internal commerce of a State, as such," but it does allow Congress "to take all measures necessary or appropriate to" the effective regulation of the interstate market, "although intrastate transactions ... may thereby be controlled." 234 U.S., at 353; see also *Jones & Laughlin Steel Corp.,* 301 U.S., at 38 (the logic of the *Shreveport Rate Cases* is not limited to instrumentalities of commerce).

II

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to little "more than a drafting guide." *Post,* at 2223 (opinion of O'CONNOR, J.). I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of

an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could ... undercut" its regulation of interstate commerce. See *Lopez, supra,* at 561; *ante,* at 2206, 2210. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local." *Lopez, supra,* at 567–568.

Lopez and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, 514 U.S., at 561, and *Morrison* did not even discuss the possibility that it was. (The Court of Appeals in *Morrison* made clear that it was not. See *Brzonkala v. Virginia Polytechnic Inst.,* 169 F.3d 820, 834–835 (4th Cir. 1999) (en banc).) To dismiss this distinction as "superficial and formalistic," see *post,* at 2223 (O'CONNOR, J., dissenting), is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland,* 4 Wheat. 316, 421–422, (1819).

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland,* even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. *Id.,* at 421. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." *Ibid.* These phrases are not merely hortatory. For example, cases such as *Printz v. United States,* 521 U.S. 898 (1997), and *New York v. United States,* 505 U.S. 144 (1992), affirm that a law is not " '*proper* for carrying into Execution the Commerce Clause' " "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra,* at 923–924; see also *New York, supra,* at 166.

III

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." *Darby,* 312 U.S., at 113. See also *Hipolite Egg Co. v. United States,* 220 U.S. 45, 58 (1911); *Lottery Case,* 188 U.S. 321, 354 (1903). To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). See 21 U.S.C. §§ 841(a), 844(a). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so

whether or not the possession is for medicinal use or lawful use under the laws of a particular State.[3] See *ante,* at 2211–2215. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. See *ante,* at 2213, and n. 38. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch,* 4 Wheat. at 424.

[3] The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *United States v. Lopez,* 514 U.S. 549 (1995). See *post,* at 2226 (arguing that "we could have surmised in *Lopez* that guns in school zones are 'never more than an instant from the interstate market' in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun–Free School Zones Act" (citation omitted)). This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was "*not* an essential part of a larger regulation of economic activity." *Lopez, supra,* at 561 (emphasis added). On the dissent's view of things, that statement is inexplicable. Of course it is in addition difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1,000 feet of schools (and nowhere else). The dissent points to a federal law, 18 U.S.C. § 922(b)(1), barring licensed dealers from selling guns to minors, see *post,* at 2226, but the relationship between the regulatory scheme of which § 922(b)(1) is a part (requiring all dealers in firearms that have traveled in interstate commerce to be licensed, see § 922(a)) and the statute at issue in *Lopez* approaches the nonexistent—which is doubtless why the Government did not attempt to justify the statute on the basis of that relationship.

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," *id.,* at 421—except to argue that the CSA regulates an area typically left to state regulation. See *post,* at 2224, 2226 (opinion of O'CONNOR, J.); *post,* at 2234 (opinion of THOMAS, J.); Brief for Respondents 39–42. That is not enough to render federal regulation an inappropriate means. The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." *National League of Cities v. Usery,* 426 U.S. 833, 840 (1976); see *Cleveland v. United States,* 329 U.S. 14, 19 (1946); *McCulloch, supra,* at 424. At bottom, respondents' state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

* * *

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. See *Lopez,* 514 U.S., at 561. That is sufficient to authorize the application of the CSA to respondents.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice THOMAS join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to

protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. *United States v. Lopez,* 514 U.S. 549, 557 (1995); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993); *Whalen v. Roe,* 429 U.S. 589, 603, n. 30 (1977). Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez, supra,* and *United States v. Morrison,* 529 U.S. 598 (2000). Accordingly I dissent.

I

In *Lopez,* we considered the constitutionality of the Gun–Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm ... at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(2)(A). We explained that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce." 514 U.S., at 558–559 (citation omitted). This power derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 585–586, (1985) (O'CONNOR, J., dissenting) (explaining that *United States v. Darby,* 312 U.S. 100 (1941), *United States v. Wrightwood Dairy Co.,* 315 U.S. 110 (1942), and *Wickard v. Filburn,* 317 U.S. 111 (1942), based their expansion of the commerce power on the Necessary and Proper Clause, and that "the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce"); *ante,* at 2215–2216 (SCALIA, J., concurring in judgment). We held in *Lopez* that the Gun–Free School Zones Act could not be sustained as an exercise of that power.

Our decision about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. *Lopez, supra,* at 559–567; see also *Morrison, supra,* at 609–613. First, we observed that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce, but that § 922(q) was a criminal statute having "nothing to do with 'commerce' or any sort of economic enterprise." *Lopez,* 514 U.S., at 561. In this regard, we also noted that "[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Ibid.* Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to

interstate commerce. *Ibid.*

Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. We explained that while express legislative findings are neither required nor, when provided, dispositive, findings "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.,* at 563. Finally, we rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy. *Id.,* at 563–567. The Constitution, we said, does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.,* at 567. Later in *Morrison, supra,* we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act of 1994, 108 Stat. 1941, 42 U.S.C. § 13981, exceeded Congress' authority under the Commerce Clause.

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

II

A

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general. The Court's decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. See 21 U.S.C. §§ 841(a)(1), 844(a). Today's decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.,* by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun–Free School Zones Act of 1990 was a "brief, single-subject statute," *ante,* at 2209, whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances,' " *ante,* at 2210. Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," 514 U.S., at 561, the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. *Ante,* at 2209–2210. If the Court

is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* interstate scheme exclusively for the sake of reaching intrastate activity, see *ante,* at 2209, n. 33; *ante,* at 2218–2219 (SCALIA, J., concurring in judgment).

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent. See *Morrison,* 529 U.S., at 657 (BREYER, J., dissenting) (given that Congress can regulate " 'an essential part of a larger regulation of economic activity,' " "can Congress save the present law by including it, or much of it, in a broader 'Safe Transport' or 'Worker Safety' act?"). *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, see *Lopez,* 514 U.S., at 557; *id.,* at 578 (KENNEDY, J., concurring), as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce. See *Maryland v. Wirtz,* 392 U.S. 183, 193 (1968); *Wickard,* 317 U.S., at 127–128. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated. See generally *Lopez,* 514 U.S., at 567; *id.,* at 579 (KENNEDY, J., concurring).

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation—including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation—recognize that medical and nonmedical (*i.e.,* recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. See 21 U.S.C. § 812; Cal. Health & Safety Code Ann. § 11362.5 (West Supp.2005); *ante,* at 2198–2199 (opinion of the Court). Respondents challenge only the application of the CSA to medicinal use of marijuana. Cf. *United States v. Raines,* 362 U.S. 17, 20–22 (1960) (describing our preference for as-applied rather than facial challenges). Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." *Lopez, supra,* at 583 (KENNEDY, J., concurring); see also *Morrison, supra,* at 617–619; *Lopez, supra,* at 580 (KENNEDY, J., concurring) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required"); cf. *Garcia,* 469 U.S., at 586 (O'CONNOR, J., dissenting) ("[S]tate autonomy is a relevant factor in assessing the means by which

Congress exercises its powers" under the Commerce Clause). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

B

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see *Lopez, supra,* at 565 ("depending on the level of generality, any activity can be looked upon as commercial")—the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local," *Jones & Laughlin Steel,* 301 U.S., at 37. It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. *Lopez, supra,* at 564.

In *Lopez* and *Morrison,* we suggested that economic activity usually relates directly to commercial activity. See *Morrison,* 529 U.S., at 611, n. 4 (intrastate activities that have been within Congress' power to regulate have been "of an apparent commercial character"); *Lopez,* 514 U.S., at 561 (distinguishing the Gun–Free School Zones Act of 1990 from "activities that arise out of or are connected with a commercial transaction"). The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. *Ibid.* And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. Cf. *id.,* at 583 (KENNEDY, J., concurring) ("The statute now before us forecloses the States from experimenting ... and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term").

The Court suggests that *Wickard,* which we have identified as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez, supra,* at 560, established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. 317 U.S., at 115–116. The AAA itself confirmed that Congress made an explicit choice not to reach—and thus the Court could not possibly have approved of federal control over—small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard,* the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Id.,* at 130, n. 30. *Wickard,* then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (*i.e.,* whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. *Garcia,* 469 U.S., at 585 (O'CONNOR, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution"). As Justice SCALIA recognizes, see *ante,* at 2218–2219 (opinion concurring in judgment), Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Cf. *Printz v. United States,* 521 U.S. 898, 923 (1997) (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action"). Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, *ante,* at 2219 (SCALIA, J., concurring in judgment), recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun–Free School Zones Act of 1990. (According to the Court's and the concurrence's logic, for example, the *Lopez* Court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on "sell[ing]" or "deliver[ing]" firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age." 18 U.S.C. § 922(b)(1) (1988 ed., Supp. II).)

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." See *Lopez,* 514 U.S., at 563. And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from *Wickard.* To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." 317 U.S., at 120. Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." *Id.,* at 125. After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. *Id.,* at 127. With real numbers at hand, the *Wickard* Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. *Id.,* at 128; see also *id.,* at 128–129 ("This record leaves us in no doubt" about substantial effects).

The Court recognizes that "the record in the *Wickard* case itself established the causal connection between the production for local use and the national market" and argues that "we have before us findings by Congress *to the same effect.*" *Ante,* at 2208 (emphasis added). The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes "swelling" in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents "is essential to the effective control" over interstate drug trafficking. 21 U.S.C. §§ 801(1)-(6). These bare declarations cannot be compared to the record before the Court in *Wickard.*

They amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence—descriptive, statistical, or otherwise. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 311 (1981) (REHNQUIST, J., concurring in judgment). Indeed, if declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. 529 U.S., at 614; *id.,* at 628–636 (SOUTER, J., dissenting) (chronicling findings). But, recognizing that " ' "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," ' " we found Congress' detailed findings inadequate. *Id.,* at 614 (quoting *Lopez, supra,* at 557, n. 2, in turn quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 273 (1964) (Black, J., concurring)). If, as the Court claims, today's decision does not break with precedent, how can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison,* while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do?

In particular, the CSA's introductory declarations are too vague and unspecific to demonstrate that the

federal statutory scheme will be undermined if Congress cannot exert power over individuals like respondents. The declarations are not even specific to marijuana. (Facts about substantial effects may be developed in litigation to compensate for the inadequacy of Congress' findings; in part because this case comes to us from the grant of a preliminary injunction, there has been no such development.) Because here California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring. The California Compassionate Use Act exempts from other state drug laws patients and their caregivers "who posses[s] or cultivat[e] marijuana for the *personal* medical purposes of the patient upon the written or oral recommendation or approval of a physician" to treat a list of serious medical conditions. Cal. Health & Safety Code Ann. §§ 11362.5(d), 11362.7(h) (West Supp.2005) (emphasis added). Compare *ibid.* with, *e.g.,* § 11357(b) (West 1991) (criminalizing marijuana possession in excess of 28.5 grams); § 11358 (criminalizing marijuana cultivation). The Act specifies that it should not be construed to supersede legislation prohibiting persons from engaging in acts dangerous to others, or to condone the diversion of marijuana for nonmedical purposes. § 11362.5(b)(2) (West Supp.2005). To promote the Act's operation and to facilitate law enforcement, California recently enacted an identification card system for qualified patients. §§ 11362.7–11362.83. We generally assume States enforce their laws, see *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 795 (1988), and have no reason to think otherwise here.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. The Government does cite one estimate that there were over 100,000 Compassionate Use Act users in California in 2004, Reply Brief for Petitioners 16, but does not explain, in terms of proportions, what their presence means for the national illicit drug market. See generally *Wirtz,* 392 U.S., at 196, n. 27 (Congress cannot use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"); cf. General Accounting Office, Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes 21–23 (Rep. No. 03–189, Nov. 2002), http://www.gao.gov/new.items/d03189.pdf (as visited June 3, 2005, and available in Clerk of Court's case file) (in four California counties before the identification card system was enacted, voluntarily registered medical marijuana patients were less than 0.5 percent of the population; in Alaska, Hawaii, and Oregon, statewide medical marijuana registrants represented less than 0.05 percent of the States' populations). It also provides anecdotal evidence about the CSA's enforcement. See Reply Brief for Petitioners 17–18. The Court also offers some arguments about the effect of the Compassionate Use Act on the national market. It says that the California statute might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade shows the difficulty of cordoning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without substantiation, they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison.*

III

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which,

in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292–293 (C. Rossiter ed.1961).

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal

I

Respondents' local cultivation and consumption of marijuana is not "Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Art. I, § 8, cl. 18. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

A

As I explained at length in *United States v. Lopez,* 514 U.S. 549 (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. *Id.,* at 586–589 (concurring opinion). The Clause's text, structure, and history all indicate that, at the time of the founding, the term " 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Id.,* at 585 (THOMAS, J., concurring). Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. *Id.,* at 586–587 (THOMAS, J., concurring). Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. *Ibid.* (THOMAS, J., concurring); Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 112–125 (2001). The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L. Rev. 847, 857–862 (2003).

Even the majority does not argue that respondents' conduct is itself "Commerce, among the several States," Art. I, § 8, cl. 3. *Ante,* at 2209. Monson and Raich neither buy nor sell the marijuana that they

consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.,* regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market—intrastate or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

B

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. Art. I, § 8, cl. 18. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power.[1] Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.[2]

[1] *McCulloch v. Maryland,* 4 Wheat. 316, 419–421 (1819); Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 3 The Founders' Constitution 244 (P. Kurland & R. Lerner eds.1987) (requiring "direct" rather than "remote" means-end fit); Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), in *id.,* at 248, 250 (requiring "obvious" means-end fit, where the end was "clearly comprehended within any of the specified powers" of Congress).

[2] *McCulloch, supra,* at 413–415; D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 162 (1985).

In *McCulloch v. Maryland,* 4 Wheat. 316 (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause:

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

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." *Ibid.;* D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, pp. 163–164 (1985). The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

1

Congress has exercised its power over interstate commerce to criminalize trafficking in marijuana across state lines. The Government contends that banning Monson and Raich's intrastate drug activity is "necessary and proper for carrying into Execution" its regulation of interstate drug trafficking. Art. I, § 8, cl. 18. See 21 U.S.C. § 801(6). However, in order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." Brief for Petitioners 14;

see *ante,* at 2208–2209 (majority opinion) (employing rational-basis review). It must be "plainly adapted" to regulating interstate marijuana trafficking—in other words, there must be an "obvious, simple, and direct relation" between the intrastate ban and the regulation of interstate commerce. *Sabri v. United States,* 541 U.S. 600, 613 (1870) (finding ban on intrastate sale of lighting oils not "appropriate and plainly adapted means for carrying into execution" Congress' taxing power).

On its face, a ban on the intrastate cultivation, possession, and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. *Ante,* at 2203, 2208–2209 (majority opinion). But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.[3]

[3] Because respondents do not challenge on its face the CSA's ban on marijuana, 21 U.S.C. §§ 841(a)(1), 844(a), our adjudication of their as-applied challenge casts no doubt on this Court's practice in *United States v. Lopez,* 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000). In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. *Ante,* at 2223–2224 (O'CONNOR, J., dissenting). The Court of Appeals found that respondents' "limited use is clearly distinct from the broader illicit drug market," because "th[eir] medicinal marijuana ... is not intended for, nor does it enter, the stream of commerce." *Raich v. Ashcroft,* 352 F.3d 1222, 1228 (9th Cir. 2003). If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp.2005), and prohibits "the diversion of marijuana for nonmedical purposes," § 11362.5(b)(2).[4] California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its program, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, § 11362.5(b)(1)(A), and that he obtain a physician's recommendation or approval, § 11362.5(d). Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. §§ 11362.715–11362.76. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines. See, *e.g., People v. Spark,* 121 Cal.App.4th 259, 263, 16 Cal.Rptr.3d 840, 843 (2004).

[4] Other States likewise prohibit diversion of marijuana for nonmedical purposes. See, *e.g.,* Colo. Const., Art. XVIII, § 14(2)(d); Nev.Rev.Stat. §§ 453A.300(1)(e)-(f) (2003); Ore.Rev.Stat. §§ 475.316(1)(c)-(d) (2003).

This class of intrastate users is therefore distinguishable from others. We normally presume that States enforce their own laws, *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 795 (1988), and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana. General Accounting Office, Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes 22–23 (Rep. No. 03–189, Nov. 2002),

http://www.gao.gov/new. items/d03189.pdf (all Internet materials as visited June 3, 2005, and available in Clerk of Court's case file). In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts. *Id.,* at 32.

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Brief for Petitioners 33. Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. *People v. Mower,* 28 Cal.4th 457, 469–470 (2002); *People v. Trippet,* 56 Cal.App.4th 1532, 1549 (1997). Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use—drugs like morphine and amphetamines—are available by prescription. 21 U.S.C. §§ 812(b)(2)(A)-(B); 21 CFR § 1308.12 (2004). No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. Executive Office of the President, Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb.2004), http:// www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.

To be sure, Congress declared that state policy would disrupt federal law enforcement. It believed the across-the-board ban essential to policing interstate drug trafficking. 21 U.S.C. § 801(6). But as Justice O'CONNOR points out, Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. *Ante,* at 2226–2228 (dissenting opinion). Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

2

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. *McCulloch,* 4 Wheat., at 421.

In *Lopez,* I argued that allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation. 514 U.S., at 584, 600 (concurring opinion). This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the Commerce Clause. When agents from the Drug Enforcement Administration raided

Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropriat[e] state police powers under the guise of regulating commerce." *United States v. Morrison,* 529 U.S. 598, 627 (2000) (THOMAS, J., concurring).

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, see *Dewitt,* 9 Wall., at 44; but see Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 186 (2003) (detailing statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress' enumerated powers), Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty. *Printz v. United States,* 521 U.S. 898, 923–924 (1997); *Alden v. Maine,* 527 U.S. 706, 732–733 (1999); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 585 (1985) (O'CONNOR, J., dissenting); The Federalist No. 33, pp. 204–205 (J. Cooke ed. 1961) (A. Hamilton) (hereinafter The Federalist).

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.[5] *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 719 (1985). Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. See Brief for Petitioners 21–22; cf. Ehrlich, The Increasing Federalization of Crime, 32 Ariz. St. L.J. 825, 826, 841 (2000) (describing both the relative recency of a large percentage of federal crimes and the lack of a relationship between some of these crimes and interstate commerce). This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext ... for the accomplishment of objects not intrusted to the government." *McCulloch, supra,* at 423.

[5] In fact, the Anti–Federalists objected that the Necessary and Proper Clause would allow Congress, *inter alia,* to "*constitute new Crimes,* ... and extend [its] Power as far as [it] shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights." Mason, Objections to the Constitution Formed by the Convention (1787), in 2 The Complete Anti–Federalist 11, 12–13 (H. Storing ed.1981) (emphasis added). Hamilton responded that these objections were gross "misrepresentation[s]." The Federalist No. 33, at 204. He termed the Clause "perfectly harmless," for it merely confirmed Congress' implied authority to enact laws in exercising its enumerated powers. *Id.,* at 205; see also *Lopez,* 514 U.S., at 597, n. 6 (THOMAS, J., concurring) (discussing Congress' limited ability to establish nationwide criminal prohibitions); *Cohens v. Virginia,* 6 Wheat. 264, 426–428 (1821) (finding it "clear, that Congress cannot punish felonies generally," except in areas over which it possesses plenary power). According to Hamilton, the Clause was needed only "to guard against cavliling refinements" by those seeking to cripple federal power. The Federalist No. 33, at 205; *id.,* No. 44, at 303–304 (J. Madison).

II

The majority advances three reasons why the CSA is a legitimate exercise of Congress' authority under the Commerce Clause: First, respondents' conduct, taken in the aggregate, may substantially affect interstate commerce, *ante,* at 2208–2209; second, regulation of respondents' conduct is essential to regulating the interstate marijuana market, *ante,* at 2210; and, third, regulation of respondents' conduct

is incidental to regulating the interstate marijuana market, *ante,* at 2208–2209. Justice O'CONNOR explains why the majority's reasons cannot be reconciled with our recent Commerce Clause jurisprudence. The majority's justifications, however, suffer from even more fundamental flaws.

A

The majority holds that Congress may regulate intrastate cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design. *Morrison, supra,* at 627 (THOMAS, J., concurring).

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce, any more than activities that do not fall within, but that affect, the subjects of its other Article I powers. *Lopez,* 514 U.S., at 589 (THOMAS, J., concurring). Whatever additional latitude the Necessary and Proper Clause affords, *supra,* at 2233–2234, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic activities that substantially affect interstate commerce. *Supra,* at 2231; *ante,* at 2217–2218 (SCALIA, J., concurring in judgment).

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. *Supra,* at 2233. The majority ignores that whether a particular activity substantially affects interstate commerce—and thus comes within Congress' reach on the majority's approach—can turn on a number of objective factors, like state action or features of the regulated activity itself. *Ante,* at 2223–2224 (O'CONNOR, J., dissenting). For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade.[6]

[6] Remarkably, the majority goes so far as to declare this question irrelevant. It asserts that the CSA is constitutional even if California's current controls are effective, because state action can neither expand nor contract Congress' powers. *Ante,* at 2213, n. 38. The majority's assertion is misleading. Regardless of state action, Congress has the power to regulate intrastate economic activities that substantially affect interstate commerce (on the majority's view) or activities that are necessary and proper to effectuating its commerce power (on my view). But on either approach, whether an intrastate activity falls within the scope of Congress' powers turns on factors that the majority is unwilling to confront. The majority apparently believes that even if States prevented any medical marijuana from entering the illicit drug market, and thus even if there were no need for the CSA to govern medical marijuana users, we should uphold the CSA under the *Commerce* Clause and the *Necessary* and Proper Clause. Finally, to invoke the Supremacy Clause, as the majority does, *ibid.,* is to beg the question. The CSA displaces California's Compassionate Use Act if the CSA is constitutional as applied to respondents' conduct, but that is the very question at issue.

The substantial effects test is easily manipulated for another reason. This Court has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce. *Morrison,* 529 U.S., at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature" (emphasis added)); *Lopez, supra,* at 560. To evade even that modest restriction on federal power, the majority defines economic activity in the

broadest possible terms as " 'the production, distribution, and consumption of commodities.' "[7] *Ante,* at 2211 (quoting Webster's Third New International Dictionary 720 (1966) (hereinafter Webster's 3d)). This carves out a vast swath of activities that are subject to federal regulation. See *ante,* at 2224–2225 (O'CONNOR, J., dissenting). If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." The Federalist No. 45, at 313.

[7] Other dictionaries do not define the term "economic" as broadly as the majority does. See, *e.g.,* The American Heritage Dictionary of the English Language 583 (3d ed.1992) (defining "economic" as "[o]f or relating to the production, development, and management of *material wealth,* as of a country, household, or business enterprise" (emphasis added)). The majority does not explain why it selects a remarkably expansive 40–year–old definition.

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term.[8] The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from " '[c]ommerce,' " *ante,* at 2199, to "commercial" and "economic" activity, *ante,* at 2209, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established … interstate market," *ante,* at 2211. Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

[8] See, *e.g., id.,* at 380 ("[t]he buying and selling of goods, especially on a large scale, as between cities or nations"); The Random House Dictionary of the English Language 411 (2d ed.1987) ("an interchange of goods or commodities, esp. on a large scale between different countries ... or between different parts of the same country"); Webster's 3d 456 ("the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place").

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. *Ante,* at 2206–2207; *Lopez,* 514 U.S., at 573–574 (KENNEDY, J., concurring). The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. *Id.,* at 590–593 (THOMAS, J., concurring); Letter from J. Madison to S. Roane (Sept. 2, 1819), in 3 The Founders' Constitution 259–260 (P. Kurland & R. Lerner eds. 1987). Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *inter*state commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that " '[t]he Constitution created a Federal Government of limited powers.' " *New York v. United States,* 505 U.S. 144, 155 (1992) (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991)). That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce ... among the several States." Congress may regulate

interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

B

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. *Ante,* at 2208–2209, 2209–2210. I have already explained why the CSA's ban on local activity is not essential. *Supra,* at 2233. However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely intrastate activity." *Ante,* at 2209. So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely intrastate, then it may not be regulated under the Commerce Clause. And if the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.

Nevertheless, the majority terms this the "pivotal" distinction between the present case and *Lopez* and *Morrison. Ante,* at 2209. In *Lopez* and *Morrison,* the parties asserted facial challenges, claiming "that a particular statute or provision fell outside Congress' commerce power in its entirety." *Ibid.* Here, by contrast, respondents claim only that the CSA falls outside Congress' commerce power as applied to their individual conduct. According to the majority, while courts may set aside whole statutes or provisions, they may not "excise individual applications of a concededly valid statutory scheme." *Ibid.*; see also *Perez v. United States,* 402 U.S. 146, 154 (1971); *Maryland v. Wirtz,* 392 U.S. 183, 192–193 (1968).

It is true that if respondents' conduct is part of a "class of activities ... and that class is within the reach of federal power," *Perez, supra,* at 154 (emphasis deleted), then respondents may not point to the *de minimis* effect of their own personal conduct on the interstate drug market, *Wirtz, supra,* at 196, n. 27. *Ante,* at 2223 (O'CONNOR, J., dissenting). But that begs the question at issue: whether respondents' "class of activities" is "within the reach of federal power," which depends in turn on whether the class is defined at a low or a high level of generality. *Supra,* at 2231–2232. If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage. Congress expressly provided that if "a provision [of the CSA] is held invalid in one or more of its *applications,* the provision shall remain in effect in all its valid applications that are severable." 21 U.S.C. § 901 (emphasis added); see also *United States v. Booker,* 543 U.S. 220, 320–321, and n. 9 (2005) (THOMAS, J., dissenting in part).

Even in the absence of an express severability provision, it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison,* but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, see *United States v. Raines,* 362 U.S. 17, 20–21 (1960), including the Commerce Clause, see *Katzenbach v. McClung,* 379 U.S. 294, 295 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 249 (1964); *Wickard v. Filburn,* 317 U.S. 111, 113–114 (1942). There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis. The CSA undoubtedly regulates a great deal of interstate commerce, but that is no license to regulate conduct that is neither interstate nor commercial, however minor or incidental.

If the majority is correct that *Lopez* and *Morrison* are distinct because they were facial challenges to "particular statute[s] or provision[s]," *ante,* at 2209, then congressional power turns on the manner in which Congress packages legislation. Under the majority's reasoning, Congress could not enact—either as

a single-subject statute or as a separate provision in the CSA—a prohibition on the intrastate possession or cultivation of marijuana. Nor could it enact an intrastate ban simply to supplement existing drug regulations. However, that same prohibition is perfectly constitutional when integrated into a piece of legislation that reaches other regulable conduct. *Lopez,* 514 U.S., at 600–601 (THOMAS, J., concurring).

Finally, the majority's view—that because *some* of the CSA's applications are constitutional, they must *all* be constitutional—undermines its reliance on the substantial effects test. The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.,* at 600 (THOMAS, J., concurring). The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme. Because medical marijuana users in California and elsewhere are not placing substantial amounts of cannabis into the stream of interstate commerce, Congress may not regulate them under the substantial effects test, no matter how broadly it drafts the CSA.

* * *

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern," *id.,* at 583 (KENNEDY, J., concurring). The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 502 (2001) (STEVENS, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Grayson Earl COMSTOCK, Jr., et al.

Decided May 17, 2010.

Justice BREYER delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U.S.C. § 4248. We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. See *Kansas v. Hendricks,* 521 U.S. 346, 356–358 (1997); *Kansas v. Crane,* 534 U.S. 407 (2002). But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." *McCulloch v. Maryland,* 4 Wheat. 316, 405 (1819). We conclude that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl. 18.

I

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

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described, *i.e.,* that he has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others. § 4248(a). When such a certification is filed, the statute automatically stays the individual's release from prison, *ibid.,* thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence, §§ 4247(b)-(c), 4248(b). The statute provides that the prisoner "shall be represented by counsel" and shall have "an opportunity" at the hearing "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine" the Government's witnesses. §§ 4247(d), 4248(c).

If the Government proves its claims by "clear and convincing evidence," the court will order the prisoner's continued commitment in "the custody of the Attorney General," who must "make all reasonable efforts to cause" the State where that person was tried, or the State where he is domiciled, to "assume responsibility for his custody, care, and treatment." § 4248(d); cf. *Sullivan v. Freeman,* 944 F.2d 334, 337 (7th Cir. 1991). If either State is willing to assume that responsibility, the Attorney General "shall release" the individual "to the appropriate official" of that State. § 4248(d). But if, "notwithstanding such efforts, neither such State will assume such responsibility," then "the Attorney General shall place the person for treatment in a suitable [federal] facility." *Ibid.;* cf. § 4247(i)(A).

Confinement in the federal facility will last until either (1) the person's mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. §§ 4248(d)(1)-(2). The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at 6-month intervals. §§ 4247(e)(1)(B), (h).

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case. Three of the five had previously pleaded guilty in federal court to possession of child pornography, see 507 F.Supp.2d 522, 526, and n. 2 (2007); § 2252A(a), and a fourth had pleaded guilty to sexual abuse of a minor, see *United States v. Vigil,* No. 1:99CR00509–001 (D NM, Jan. 26, 2000); §§ 1153, 2243(a). With respect to each of them, the Government claimed that the respondent was about to be released from federal prison, that he had engaged in sexually violent conduct or child molestation in the past, and that he suffered from a mental illness that made him sexually dangerous to others. App. 38–40, 44–52. During that same time period, the Government instituted similar proceedings against the fifth respondent, who had been charged in federal court with aggravated sexual abuse of a minor, but was found mentally incompetent to stand trial. See *id.,* at 41–43; *United States v. Catron,* No. 04–778 (D. Ariz., Mar. 27, 2006); § 4241(d).

Each of the five respondents moved to dismiss the civil-commitment proceeding on constitutional grounds. They claimed that the commitment proceeding is, in fact, criminal, not civil, in nature and consequently that it violates the Double Jeopardy Clause, the *Ex Post Facto* Clause, and the Sixth and Eighth Amendments. 507 F.Supp.2d, at 528. They claimed that the statute denies them substantive due process and equal protection of the laws. *Ibid.* They claimed that it violates their procedural due process rights by allowing a showing of sexual dangerousness to be made by clear and convincing evidence, instead of by proof beyond a reasonable doubt. *Ibid.* And, finally, they claimed that, in enacting the statute, Congress exceeded the powers granted to it by Article I, § 8, of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause. 507 F.Supp.2d, at 528–529.

The District Court, accepting two of the respondents' claims, granted their motion to dismiss. It agreed with respondents that the Constitution requires proof beyond a reasonable doubt, *id.,* at 551–559 (citing *In re Winship,* 397 U.S. 358 (1970)), and it agreed that, in enacting the statute, Congress exceeded its Article I legislative powers, 507 F.Supp.2d, at 530–551. On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on this latter, legislative-power ground. 551 F.3d 274, 278–284 (2009). It did not decide the standard-of-proof question, nor did it address any of respondents' other constitutional challenges. *Id.,* at 276, n. 1.

The Government sought certiorari, and we granted its request, limited to the question of Congress' authority under Article I, § 8, of the Constitution. Pet. for Cert. i. Since then, two other Courts of Appeals have considered that same question, each deciding it in the Government's favor, thereby creating a split of authority among the Circuits. See *United States v. Volungus,* 595 F.3d 1 (1st Cir. 2010); *United States v. Tom,* 565 F.3d 497 (8th Cir. 2009).

II

The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil

commitment in these circumstances. Cf. *Hendricks,* 521 U.S. 346; *Addington v. Texas,* 441 U.S. 418 (1979). In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," *McCulloch,* 4 Wheat., at 405, which means that "[e]very law enacted by Congress must be based on one or more of" those powers, *United States v. Morrison,* 529 U.S. 598, 607 (2000). But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch,* 4 Wheat., at 408. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." *Id.,* at 413, 418; see also *id.,* at 421 ("[Congress can] legislate on that vast mass of incidental powers which must be involved in the constitution ..."). Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary." *Id.,* at 413–415 (emphasis deleted); *Jinks v. Richland County,* 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be ' "*absolutely* necessary" ' to the exercise of an enumerated power"). In language that has come to define the scope of the Necessary and Proper Clause, he wrote:

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

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *Sabri v. United States,* 541 U.S. 600, 605 (2004) (using term "means-ends rationality" to describe the necessary relationship); *ibid.* (upholding Congress' "authority under the Necessary and Proper Clause" to enact a criminal statute in furtherance of the federal power granted by the Spending Clause); see *Gonzales v. Raich,* 545 U.S. 1, 22 (2005) (holding that because "Congress had a rational basis" for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States' " (ellipsis in original)); see also *United States v. Lopez,* 514 U.S. 549, 557 (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276 (1981).

Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also "not [be] prohibited" by the Constitution. *McCulloch, supra,* at 421. But as we have already stated, the present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. Under the question presented, the relevant inquiry is simply "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power" or under other powers that the Constitution grants Congress the authority to implement. *Gonzales, supra,* at 37 (SCALIA, J., concurring in judgment) (quoting *United States v. Darby,* 312 U.S. 100, 121 (1941)).

We have also recognized that the Constitution "addresse[s]" the "choice of means"

> "primarily ... to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs v. United States,* 290 U.S. 534, 547–548 (1934).

See also *Lottery Case,* 188 U.S. 321, 355 (1903) ("[T]he Constitution ... leaves to Congress a large discretion as to the means that may be employed in executing a given power"); *Morrison, supra,* at 607 (applying a "presumption of constitutionality" when examining the scope of congressional power); *McCulloch, supra,* at 410, 421.

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to "counterfeiting," "[t]reason," or "Piracies and Felonies committed on the high Seas" or "against the Law of Nations," Art. I, § 8, cls. 6, 10; Art. III, § 3, nonetheless grants Congress broad authority to create such crimes. See *McCulloch,* 4 Wheat, at 416 ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress"); see also *United States v. Fox,* 95 U.S. 670, 672 (1878). And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, § 8, cls. 1, 3, 4, 7, 9; Amdts. 13–15. See, *e.g., Lottery Case, supra* (upholding criminal statute enacted in furtherance of the Commerce Clause); *Ex parte Yarbrough,* 110 U.S. 651 (1884) (upholding Congress' authority to enact Rev. Stat. § 5508, currently 18 U.S.C. § 241 (criminalizing civil-rights violations) and Rev. Stat. § 5520, currently 42 U.S.C. § 1973j (criminalizing voting-rights violations) in furtherance of the Fourteenth and Fifteenth Amendments); *Sabri, supra* (upholding criminal statute enacted in furtherance of the Spending Clause); *Jinks, supra,* at 462, n. 2 (describing perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals (citing *McCulloch, supra,* at 417)); see also 18 U.S.C. § 1691 *et seq.* (postal crimes); § 151 *et seq.* (bankruptcy crimes); 8 U.S.C. §§ 1324–1328 (immigration crimes).

Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted in furtherance of its enumerated powers, "can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there." *Ex parte Karstendick,* 93 U.S. 396, 400 (1876). Moreover, Congress, having established a prison system, can enact laws that seek to ensure that system's safe and responsible administration by, for example, requiring prisoners to receive medical care and educational training, see, *e.g.,* 18 U.S.C. §§ 4005–4006; § 4042(a)(3), and can also ensure the safety of the prisoners, prison workers and visitors, and those in surrounding communities by, for example, creating further criminal laws governing entry, exit, and smuggling, and by employing prison guards to ensure discipline and security, see, *e.g.,* § 1791 (prohibiting smuggling contraband); § 751 *et seq.* (prohibiting escape and abetting thereof); 28 CFR § 541.10 *et seq.* (2009) (inmate discipline).

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

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. See, *e.g., Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use ... "); cf. *Morrison,* 529 U.S., at 612–614 (legislative history is neither necessary nor sufficient with respect to Art. I analysis). A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," *Gonzales,* 545 U.S., at 21; *Walz, supra,* at 678, and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental-health care to federal prisoners, and has long provided for their civil commitment. In 1855, it established Saint Elizabeth's Hospital in the District of Columbia to provide treatment to "the insane of the army and navy ... and of the District of Columbia." Act of Mar. 3, 1855, 10 Stat. 682; 39 Stat. 309. In 1857, it provided for confinement at Saint Elizabeth's of any person within the District of Columbia who had been "charged with [a] crime" and who was "insane" or later became "insane during the continuance of his or her sentence in the United States penitentiary." Act of Feb. 7, 1857, §§ 5–6, 11 Stat. 158; see 17 Op. Atty. Gen. 211, 212–213 (1881). In 1874, expanding the geographic scope of its statutes, Congress provided for civil commitment in federal facilities (or in state facilities if a State so agreed) of "*all* persons who have been or shall be convicted of any offense in *any* court of the United States" and who are or "shall become" insane "during the term of their imprisonment." Act of June 23, 1874, ch. 465, 18 Stat. 251 (emphasis added). And in 1882, Congress provided for similar commitment of those "*charged* " with federal offenses who become "insane" while in the "custody" of the United States. Act of Aug. 7, 1882, 22 Stat. 330 (emphasis added). Thus, over the span of three decades, Congress created a national, federal civil-commitment program under which any person who was either charged with or convicted of any federal offense in any federal court could be confined in a federal mental institution.

These statutes did not raise the question presented here, for they all provided that commitment in a federal hospital would end upon the completion of the relevant "terms" of federal "imprisonment" as set forth in the underlying criminal sentence or statute. §§ 2–3, 18 Stat. 252; see 35 Op. Atty. Gen. 366, 368 (1927); cf. 30 Op. Atty. Gen. 569, 571 (1916). But in the mid–1940's that proviso was eliminated.

In 1945, the Judicial Conference of the United States proposed legislative reforms of the federal civil-commitment system. The Judicial Conference based its proposals upon what this Court has described as a "long study by a conspicuously able committee" (chaired by Judge Calvert Magruder and whose members included Judge Learned Hand), involving consultation "with federal district and circuit judges" across the country as well as with the Department of Justice. *Greenwood v. United States,* 350 U.S. 366, 373 (1956); *Greenwood v. United States,* 219 F.2d 376, 380–384 (8th Cir. 1955) (describing the committee's work). The committee studied, among other things, the "serious problem faced by the Bureau of Prisons, namely, what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody." Judicial Conference, Report of Committee To Study Treatment Accorded by Federal Courts to Insane Persons Charged With Crime 11 (1945) (hereinafter Committee Report), App. 73. The committee provided examples of instances in which the Bureau of Prisons had struggled with the problem of " 'paranoid' " and " 'threatening' " individuals whom no State would accept. *Id.,* at 9, App. 71. And it noted that, in the Bureau's "[e]xperience," States would not accept an "appreciable number" of "mental[ly] incompetent" individuals "nearing expiration" of their prison terms, because of their "lack of legal residence in any State," even though those individuals "ought not ... be at large because they constitute

a menace to public safety." H.R.Rep. No. 1319, 81st Cong., 1st Sess., 2 (1949) (statement of James V. Bennett, Director); see also Letter from Bennett to Judge Magruder, attachment to Committee Report, App. 83–88. The committee, hence the Judicial Conference, therefore recommended that Congress enact "some provision of law authorizing the continued confinement of such persons after their sentences expired." Committee Report 11, App. 73; see also Report of the Judicial Conference of Senior Circuit Judges 13 (1945).

Between 1948 and 1949, following its receipt of the Judicial Conference report, Congress modified the law. See Act of June 25, 1948, 62 Stat. 855, 18 U.S.C. §§ 4241–4243 (1952 ed.); Act of Sept. 7, 1949, 63 Stat. 686, 18 U.S.C. §§ 4244–4248. It provided for the civil commitment of individuals who are, or who become, mentally incompetent at any time after their arrest and before the expiration of their federal sentence, §§ 4241, 4244, 4247–4248; and it set forth various procedural safeguards, §§ 4242, 4246, 4247. With respect to an individual whose prison term is about to expire, it specified the following:

> "Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined [and] ... in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and ... if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to ... the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined ... and shall ... hold a hearing .... If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General or his authorized representative." § 4247.

The precondition that the mentally ill individual's release would "probably endanger the safety of the officers, the property, or other interests of the United States" was uniformly interpreted by the Judiciary to mean that his "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States v. Curry,* 410 F.2d 1372, 1374 (4th Cir. 1969); see also *Royal v. United States,* 274 F.2d 846, 851–852 (10th Cir. 1960).

In 1984, Congress modified these basic statutes. See Insanity Defense Reform Act of 1984, 98 Stat.2057, 18 U.S.C. §§ 4241–4247 (2006 ed.). As relevant here, it altered the provision just discussed, regarding the prisoner's danger to the "interests of the United States," to conform more closely to the then-existing judicial interpretation of that language, *i.e.,* it altered the language so as to authorize (explicitly) civil commitment if, in addition to the other conditions, the prisoner's "release would create a substantial risk of bodily injury to another person or serious damage to the property of another." § 4246(d).

Congress also elaborated upon the required condition "that suitable arrangements ... are not otherwise available" by directing the Attorney General to seek alternative placement in state facilities, as we have set forth above. See *ibid.; supra,* at 1954 – 1955. With these modifications, the statutes continue to authorize the civil commitment of individuals who are both mentally ill and dangerous, once they have been charged with, or convicted of, a federal crime. §§ 4241(d), 4246; see also § 4243(d). They continue to provide for the *continued* civil commitment of those individuals when they are "due for release" from federal custody because their "sentence is about to expire." § 4246. And, as we have previously set forth, they establish various procedural and other requirements. *E.g.,* § 4247.

In 2006, Congress enacted the particular statute before us. § 302, 120 Stat. 619, 18 U.S.C. § 4248. It differs

from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Notably, many of these individuals were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the postsentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). But cf. H.R.Rep. No. 109–218, pt. 1, p. 29 (2005). Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949. Cf. § 4246. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. Cf. *Youngberg v. Romeo,* 457 U.S. 307, 320 (1982) ("In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them *as well as others* from violence" (emphasis added)). Indeed, at common law, one "who takes charge of a third person" is "under a duty to exercise reasonable care to control" that person to prevent him from causing reasonably foreseeable "bodily harm to others." 2 Restatement (Second) of Torts § 319, p. 129 (1963–1964); see *Volungus,* 595 F.3d, at 7–8 (citing cases); see also *United States v. S. A.,* 129 F.3d 995, 999 (8th Cir. 1997) ("[Congress enacted § 4246] to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees"). If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, § 8, cl. 3). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is "reasonably adapted," *Darby,* 312 U.S., at 121, to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority, see *supra,* at 1957 – 1958). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247(a)(6), would pose an especially high danger to the public if released. Cf. H.R.Rep. No. 109–218, at 22–23. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to "legal residence in any State" by incarcerating them in remote federal prisons. H.R.Rep. No. 1319, at 2; Committee Report 7–11, App. 69–75; cf. *post,* at 1968 (KENNEDY, J., concurring in judgment). Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," *i.e.,* that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority. *Sabri,* 541 U.S., at 605 (citing *McCulloch,* 4 Wheat. 316). See *Jinks,* 538 U.S., at 462–463 (opinion for the Court by SCALIA, J.) (holding that a statute is authorized by the Necessary and Proper Clause when it "provides an alternative to [otherwise] unsatisfactory options" that are "obviously inefficient").

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that § 4248

violates the Tenth Amendment because it "invades the province of state sovereignty" in an area typically left to state control. *New York v. United States,* 505 U.S. 144, 155 (1992); see Brief for Respondents 35–47; *post,* at 1974 – 1975, 1980 – 1983 (THOMAS, J., dissenting). See also *Jackson v. Indiana,* 406 U.S. 715, 736 (1972) ("The States have traditionally exercised broad power to commit persons found to be mentally ill"). But the Tenth Amendment's text is clear: "The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Emphasis added.) The powers "delegated to the United States by the Constitution" include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution "reserved to the States." See *New York, supra,* at 156, 159 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States ... ." "In the end ... it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment"); *Darby, supra,* at 123–124; see also *Hodel,* 452 U.S., at 276–277, 281; *Maryland v. Wirtz,* 392 U.S. 183, 195–196 (1968); *Lambert v. Yellowley,* 272 U.S. 581, 596 (1926).

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." *Post,* at 1974 (THOMAS, J., dissenting). To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. § 4248(d). He must also immediately "release" that person "to the appropriate official of" either State "if such State will assume [such] responsibility." *Ibid.* And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to state custody. § 4248(d)(1). Respondents contend that the States are nonetheless "powerless to *prevent* the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices." Brief for Respondents 11 (emphasis added). But that is not the most natural reading of the statute, see §§ 4248(d)(1)-(e), and the Solicitor General acknowledges that "the Federal Government would have no appropriate role" with respect to an individual covered by the statute once "the transfer to State responsibility and State control has occurred." Tr. of Oral Arg. 9.

In *Greenwood,* 350 U.S. 366, the Court rejected a challenge to the current statute's predecessor—*i.e.,* to the 1949 statute we described above, *supra,* at 1959 – 1960. The petitioners in that case claimed, like the respondents here, that the statute improperly interfered with state sovereignty. See Brief for Petitioner in *Greenwood v. United States,* O.T.1955, No. 460, pp. 2, 18–29. But the Court rejected that argument. See *Greenwood, supra,* at 375–376. And the version of the statute at issue in *Greenwood* was *less* protective of state interests than the current statute. That statute authorized federal custody so long as "*suitable* arrangements" were "not otherwise available" in a State or otherwise. 63 Stat. 687 (emphasis added). Cf. Brief for Petitioner in *Greenwood, supra,* at 25 ("What has really happened is that the Federal government has been dissatisfied with the care given by the states to those mentally incompetent who have been released by the Federal authorities"). Here, by contrast, as we have explained, § 4248 requires the Attorney General to encourage the relevant States to take custody of the individual without inquiring into the "suitability" of their intended care or treatment, and to relinquish federal authority whenever a State asserts its own. § 4248(d). Thus, if the statute at issue in *Greenwood* did not invade state interests, then, *a fortiori,* neither does § 4248.

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the

statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, *Lopez,* 514 U.S., at 567, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. See Brief for Respondents 21–22; Tr. of Oral Arg. 27–28. But this argument is irreconcilable with our precedents. Again, take *Greenwood* as an example. In that case we upheld the (likely indefinite) civil commitment of a mentally incompetent federal defendant who was accused of robbing a United States Post Office. 350 U.S., at 369. The underlying enumerated Article I power was the power to "Establish Post Offices and post Roads." Art. I, § 8, cl. 7. But, as Chief Justice Marshall recognized in *McCulloch,*

> "the power 'to establish post offices and post roads' ... is executed by the single act of *making* the establishment ... .[F]rom this has been inferred the power and duty of *carrying* the mail along the post road, from one post office to another. And, from this *implied* power, has *again* been inferred the right to *punish* those who steal letters from the post office, or rob the mail." 4 Wheat., at 417 (emphasis added).

And, as we have explained, from the implied power to punish we have *further* inferred both the power to imprison, see *supra,* at 1958, and, in *Greenwood,* the federal civil-commitment power.

Our necessary and proper jurisprudence contains multiple examples of similar reasoning. For example, in *Sabri* we observed that "Congress has authority under the Spending Clause to appropriate federal moneys" and that it therefore "has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars" are not "siphoned off" by "corrupt public officers." 541 U.S., at 605 (citation omitted). We then further held that, in aid of that implied power to criminalize graft of "taxpayer dollars," Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been "traceably skimmed from specific federal payments." *Id.*, at 605 – 606. Similarly, in *United States v. Hall,* 98 U.S. 343 (1879), we held that the Necessary and Proper Clause grants Congress the power, in furtherance of Art. I, § 8, cls. 11–13, to award "pensions to the wounded and disabled" soldiers of the armed forces and their dependents, 98 U.S., at 351; and from that implied power we further inferred the "[i]mplied power" "to pass laws to ... punish" anyone who fraudulently appropriated such pensions, *id.,* at 346. See also *Stewart v. Kahn,* 11 Wall. 493, 506–507 (1871).

Indeed, even the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. See *post,* at 1976 – 1977, 1978 – 1979, n. 12. Of course, each of those powers, like the powers addressed in *Sabri, Hall*, and *McCulloch,* is ultimately "derived from" an enumerated power, *Hall, supra,* at 346. And, as the dissent agrees, that enumerated power is "the enumerated power that justifies the defendant's statute of conviction," *post,* at 1978 – 1979, n. 12. Neither we nor the dissent can point to a single specific enumerated power "that justifies a criminal defendant's arrest or conviction," *post,* at 1976, in *all* cases because Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes, see *supra,* at 1957 – 1958. But every such statute must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well. See *supra,* at 1960 – 1961. Thus, we must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between

an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general "police power, which the Founders denied the National Government and reposed in the States." *Morrison,* 529 U.S., at 618. As the Solicitor General repeatedly confirmed at oral argument, § 4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. See Tr. of Oral Arg. 24–25 (105 individuals have been subject to § 4248 out of over 188,000 federal inmates); see also Dept. of Justice, Bureau of Justice Statistics, W. Sabol, H. West, & M. Cooper, Prisoners in 2008, p. 8 (NCJ 228417, Dec. 2009) (Table 8). And its reach is limited to individuals already "in the custody of the" Federal Government. § 4248(a); Tr. of Oral Arg. 7 ("[Federal authority for § 4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system ... "). Indeed, the Solicitor General argues that "the Federal Government would not have ... the power to commit a person who ... has been released from prison and whose period of supervised release is also completed." *Id.,* at 9. Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system.

To be sure, as we have previously acknowledged:

> "The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York,* 505 U.S., at 157.

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

* * *

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

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

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

It is so ordered.

Justice KENNEDY, concurring in the judgment.

The Court is correct, in my view, to hold that the challenged portions of 18 U.S.C. § 4248 are necessary and proper exercises of congressional authority.

Respondents argue that congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power. This is incorrect. When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.

Concluding that a relation can be put into a verbal formulation that fits somewhere along a causal chain of federal powers is merely the beginning, not the end, of the constitutional inquiry. See *United States v. Lopez,* 514 U.S. 549, 566–567 (1995). The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of " 'this is the house that Jack built.' " Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 The Papers of Thomas Jefferson 547 (B. Oberg ed.2004); see also *United States v. Patton,* 451 F.3d 615, 628 (10th Cir. 2006).

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

I

The Court concludes that, when determining whether Congress has the authority to enact a specific law under the Necessary and Proper Clause, we look "to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Ante,* at 1956 (suggesting that *Sabri v. United States,* 541 U.S. 600, 605 (2004), adopts a "means-ends rationality" test).

The terms "rationally related" and "rational basis" must be employed with care, particularly if either is to be used as a stand-alone test. The phrase "rational basis" most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court's precedents, the Court has said: "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 487–488 (1955). This formulation was in a case presenting a due process challenge and a challenge to a State's exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government. The phrase, then, should not be extended uncritically to the issue before us.

The operative constitutional provision in this case is the Necessary and Proper Clause. This Court has not held that the *Lee Optical* test, asking if "it might be thought that the particular legislative measure was a rational way to correct" an evil, is the proper test in this context. Rather, under the Necessary and Proper

Clause, application of a "rational basis" test should be at least as exacting as it has been in the Commerce Clause cases, if not more so. Indeed, the cases the Court cites in the portion of its opinion referring to "rational basis" are predominantly Commerce Clause cases, and none are due process cases. See *ante,* at 1956 – 1957 (citing *Gonzales v. Raich,* 545 U.S. 1 (2005); *Lopez, supra; Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276 (1981)).

There is an important difference between the two questions, but the Court does not make this distinction clear. *Raich, Lopez,* and *Hodel* were all Commerce Clause cases. Those precedents require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical*. " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " *Lopez, supra,* at 557, n. 2 (quoting *Hodel, supra,* at 311 (Rehnquist, J., concurring in judgment)). The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it.

The Court relies on *Sabri, supra,* for its conclusion that a "means-ends rationality" is all that is required for a power to come within the Necessary and Proper Clause's reach. See *ante,* at 1968. *Sabri* only refers to "means-ends rationality" in a parenthetical describing the holding in *McCulloch v. Maryland,* 4 Wheat. 316 (1819); it certainly did not import the *Lee Optical* rational-basis test into this arena through such a parenthetical. See *Sabri, supra,* at 612 (THOMAS, J., concurring in judgment) ("A statute can have a 'rational' connection to an enumerated power without being obviously or clearly tied to that enumerated power"). It should be remembered, moreover, that the spending power is not designated as such in the Constitution but rather is implied from the power to lay and collect taxes and other specified exactions in order, among other purposes, "to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1; see *South Dakota v. Dole,* 483 U.S. 203, 206 (1987). The limits upon the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the limits and the analytic approach in those precedents should be respected.

A separate concern stems from the Court's explanation of the Tenth Amendment. *Ante,* at 1962. I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government. The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around, as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.

It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. See *Lopez,* 514 U.S., at 580–581 (KENNEDY, J., concurring); see also *McCulloch, supra,* at 421 (powers "consist[ent] with the letter and spirit of the constitution, are constitutional"). It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion

of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely.

These remarks explain why the Court ignores important limitations stemming from federalism principles. Those principles are essential to an understanding of the function and province of the States in our constitutional structure.

II

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act. This obligation, parallel in some respects to duties defined in tort law, is not to put in motion a particular force (here an unstable and dangerous person) that endangers others. Having acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens.

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

This is not a case in which the National Government demands that a State use its own governmental system to implement federal commands. See *Printz v. United States,* 521 U.S. 898 (1997). It is not a case in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well-being of their citizens. See *United States v. Morrison,* 529 U.S. 598 (2000). Nor is it a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State. See *Lopez, supra,* at 580–581 (KENNEDY, J., concurring).

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

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

Justice ALITO, concurring in the judgment.

I am concerned about the breadth of the Court's language, see *ante,* at 1954 – 1956 (KENNEDY, J., concurring in judgment), and the ambiguity of the standard that the Court applies, see *post,* at 1975 (THOMAS, J., dissenting), but I am persuaded, on narrow grounds, that it was "necessary and proper" for Congress to enact the statute at issue in this case, 18 U.S.C. § 4248, in order to "carr[y] into Execution" powers specifically conferred on Congress by the Constitution, see Art. I, § 8, cl. 18.

Section 4248 was enacted to protect the public from federal prisoners who suffer from "a serious mental

illness, abnormality, or disorder" and who, if released, would have "serious difficulty in refraining from sexually violent conduct or child molestation." See §§ 4247(a)(5), (6), 4248(d). Under this law, if neither the State of a prisoner's domicile nor the State in which the prisoner was tried will assume the responsibility for the prisoner's "custody, care, and treatment," the Federal Government is authorized to undertake that responsibility. § 4248(d). The statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State.

I entirely agree with the dissent that "[t]he Necessary and Proper Clause empowers Congress to enact only those laws that 'carr[y] into Execution' one or more of the federal powers enumerated in the Constitution," *post,* at 1970, but § 4248 satisfies that requirement because it is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted. The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. In other words, most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system.

All of this has been recognized since the beginning of our country. The First Congress enacted federal criminal laws,[1] created federal law enforcement and prosecutorial positions,[2] established a federal court system,[3] provided for the imprisonment of persons convicted of federal crimes,[4] and gave United States marshals the responsibility of securing federal prisoners.[5]

[1] See, *e.g.,* ch. 9, 1 Stat. 112 ("An Act for the Punishment of certain Crimes against the United States").

[2] § 35, *id.,* at 92 ("[T]here shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, ... whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States").

[3] § 1, *id.,* at 73 ("An Act to establish the Judicial Courts of the United States").

[4] See, *e.g.,* § 9, *id.,* at 76–77 (providing that the federal district courts shall have exclusive jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, ... where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted"); see also J. Roberts, The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership With Probation and Pretrial Services, 61 Fed. Probation 53 (1997) (explaining that federal prisoners were originally housed in state and county facilities on a contract basis).

[5] See § 27, 1 Stat. 87 ("[A] marshal shall be appointed in and for each district for the term of four years, ... whose duty it shall be to attend the district and circuit courts when sitting therein, ... [a]nd to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States"); § 28, *id.,* at 88 ("[T]he marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs").

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

that question is "yes." Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.

Some years ago, a distinguished study group created by the Judicial Conference of the United States found that, in a disturbing number of cases, no State was willing to assume the financial burden of providing for the civil commitment of federal prisoners who, if left at large after the completion of their sentences, would present a danger to any communities in which they chose to live or visit. See *ante,* at 1959; *Greenwood v. United States,* 350 U.S. 366, 373–374 (1956). These federal prisoners, having been held for years in a federal prison, often had few ties to any State; it was a matter of speculation where they would choose to go upon release; and accordingly no State was enthusiastic about volunteering to shoulder the burden of civil commitment.

The Necessary and Proper Clause does not give Congress *carte blanche.* Although the term "necessary" does not mean "absolutely necessary" or indispensable, the term requires an "appropriate" link between a power conferred by the Constitution and the law enacted by Congress. See *McCulloch v. Maryland,* 4 Wheat. 316, 415 (1819). And it is an obligation of this Court to enforce compliance with that limitation. *Id*., at 423.

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

For this reason, I concur in the judgment that Congress had the constitutional authority to enact 18 U.S.C. § 4248.

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

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

I

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991). In our system, the Federal Government's powers are enumerated, and hence limited. See, *e.g., McCulloch v. Maryland,* 4 Wheat. 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"). Thus, Congress has no power to act unless the Constitution authorizes it to do so. *United States v. Morrison,* 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution"). The States, in turn, are free to exercise all powers that the Constitution does not withhold from them. Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").[1]

This constitutional structure establishes different default rules for Congress and the States: Congress' powers are "few and defined," while those that belong to the States "remain ... numerous and indefinite." The Federalist No. 45, p. 328 (B. Wright ed. 1961) (J. Madison).

[1] "With this careful last phrase, the [Tenth] Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which 'reserved' powers their state government may exercise." *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 848 (1995) (THOMAS, J., dissenting).

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

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

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

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

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

This limitation was of utmost importance to the Framers. During the state ratification debates, Anti–Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. See, *e.g.,* Essays of Brutus, in 2 The Complete Anti–Federalist 421 (H. Storing ed.1981). Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. Referring to the "powers declared in the Constitution," Alexander Hamilton

noted that "it is *expressly* to execute these powers that the sweeping clause ... authorizes the national legislature to pass all *necessary* and *proper* laws." The Federalist No. 33, at 245. James Madison echoed this view, stating that "the sweeping clause ... only extend[s] to the enumerated powers." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 455 (1836) (hereinafter Elliot). Statements by delegates to the state ratification conventions indicate that this understanding was widely held by the founding generation. *E.g., id.,* at 245–246 (statement of George Nicholas) ("Suppose [the Necessary and Proper Clause] had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would that have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all").[2]

[2] See also 4 Elliot 141 (statement of William Maclaine) ("This clause specifies that [Congress] shall make laws to carry into execution *all the powers vested* by this Constitution, consequently they can make no laws to execute any other power"); 2 *id.,* at 468 (statement of James Wilson) ("[W]hen it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, 'for carrying into execution the foregoing powers.' [The Clause] is saying no more than that the powers we have already particularly given, shall be effectually carried into execution"); Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 185–186 (2003); Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 274–275, and n. 24 (1993).

Roughly 30 years after the Constitution's ratification, *McCulloch* firmly established this understanding in our constitutional jurisprudence. 4 Wheat., at 421, 423. Since then, our precedents uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather "a *caveat* that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.' " *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 247 (1960); *Carter v. Carter Coal Co.,* 298 U.S. 238, 291 (1936); see *Alden v. Maine,* 527 U.S. 706, 739 (1999); *Martin v. Hunter's Lessee,* 1 Wheat. 304, 326 (1816); see also *Gonzales v. Raich,* 545 U.S. 1, 39 (2005) (SCALIA, J., concurring in judgment) (stating that, although the Clause "empowers Congress to enact laws ... that are not within its authority to enact in isolation," those laws must be "in effectuation of [Congress'] enumerated powers" (citing *McCulloch, supra,* at 421–422)).

II

Section 4248 establishes a federal civil-commitment regime for certain persons in the custody of the Federal Bureau of Prisons (BOP).[3] If the Attorney General demonstrates to a federal court by clear and convincing evidence that a person subject to the statute is "sexually dangerous,"[4] a court may order the person committed until he is no longer a risk "to others," even if that does not occur until after his federal criminal sentence has expired or the statute of limitations on the federal charge against him has run. §§ 4248(a), (d)-(e).

[3] The statute authorizes the Attorney General to petition a federal court to order the commitment of a person in BOP custody (1) who has been convicted of a federal crime and is serving a federal prison sentence therefor, (2) who has been found mentally incompetent to stand trial, or (3) "against whom all federal criminal charges have been dismissed solely for reasons relating to [his] mental condition." 18 U.S.C. § 4248(a).

[4] The Act defines a "sexually dangerous person" as one "who has engaged or attempted to engage in sexually violent conduct or child molestation," and "who is sexually dangerous to others." § 4247(a)(5). It further defines "sexually dangerous to others" to mean a person who "suffers from a serious mental illness" such

that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released." § 4247(a)(6).

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

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable. Indeed, not even the Commerce Clause—the enumerated power this Court has interpreted most expansively, see, *e.g., NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937)—can justify federal civil detention of sex offenders. Under the Court's precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce. *Morrison,* 529 U.S., at 617–618; *United States v. Lopez,* 514 U.S. 549, 563–567 (1995). That limitation forecloses any claim that § 4248 carries into execution Congress' Commerce Clause power, and the Government has never argued otherwise, see Tr. of Oral Arg. 21–22.[5]

[5] For the reasons explained in Part III–A–2, *infra,* the enumerated power that justifies a particular defendant's criminal arrest or conviction cannot justify his subsequent civil detention under § 4248.

This Court, moreover, consistently has recognized that the power to care for the mentally ill and, where necessary, the power "to protect the community from the dangerous tendencies of some" mentally ill persons, are among the numerous powers that remain with the States. *Addington v. Texas,* 441 U.S. 418, 426 (1979). As a consequence, we have held that States may "take measures to restrict the freedom of the dangerously mentally ill"—including those who are sexually dangerous—provided that such commitments satisfy due process and other constitutional requirements. *Kansas v. Hendricks,* 521 U.S. 346, 363 (1997).

Section 4248 closely resembles the involuntary civil-commitment laws that States have enacted under their *parens patriae* and general police powers. Indeed, it is clear, on the face of the Act and in the Government's arguments urging its constitutionality, that § 4248 is aimed at protecting society from acts of sexual violence, not toward "carrying into Execution" any enumerated power or powers of the Federal Government. See Adam Walsh Child Protection and Safety Act of 2006, 120 Stat. 587 (entitled "[a]n Act [t]o protect children from sexual exploitation and violent crime"), § 102, *id.,* at 590 (statement of purpose declaring that the Act was promulgated "to protect the public from sex offenders"); Brief for United States 38–39 (asserting the Federal Government's power to "*protect the public from harm* that might result upon these prisoners' release, even when that harm might arise from conduct that is *otherwise beyond the general regulatory powers of the federal government* " (emphasis added)).

To be sure, protecting society from violent sexual offenders is certainly an important end. Sexual abuse is a despicable act with untold consequences for the victim personally and society generally. See, *e.g., Kennedy v. Louisiana,* 554 U.S. 407, 455, n. 2, 468 – 469 (2008) (ALITO, J., dissenting). But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.[6] *New York v. United States,* 505 U.S. 144, 157 (1992) (" 'The question is not what power the Federal Government ought to have but what powers in fact have been given by the people' ") (quoting *United States v. Butler,* 297 U.S. 1, 63 (1936))).

[6] The absence of a constitutional delegation of general police power to Congress does not leave citizens

vulnerable to the harms Congress seeks to regulate in § 4248 because, as recent legislation indicates, the States have the capacity to address the threat that sexual offenders pose. See n. 15, *infra*.

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

III

The Court perfunctorily genuflects to *McCulloch* 's framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a " 'necessary and proper' " adjunct to a jumble of *unenumerated* "authorit [ies]." *Ante,* at 1965. The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.

A

I begin with the first and last "considerations" in the Court's inquiry. *Ante,* at 1956. The Court concludes that § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority because that authority is "broad," *ibid.,* and because "the links between § 4248 and an enumerated Article I power are not too attenuated," *ante,* at 1963. In so doing, the Court first inverts, then misapplies, *McCulloch* 's straightforward two-part test.

1

a

First, the Court describes Congress' lawmaking power under the Necessary and Proper Clause as "broad," relying on precedents that have upheld federal laws under the Clause after finding a " 'rationa[l]' " fit between the law and an enumerated power. *Ante,* at 1956 – 1957 (quoting *Sabri v. United States,* 541 U.S. 600, 605 (2004)). It is true that this Court's precedents allow Congress a certain degree of latitude in selecting the means for "carrying into Execution" an end that is "legitimate."[7] See, *e.g., Jinks v. Richland County,* 538 U.S. 456, 462–463 (2003) (citing *McCulloch,* 4 Wheat., at 417, 421). But in citing these cases, the Court puts the cart before the horse: The fit between means and ends matters only if the end is in fact legitimate—*i.e.,* only if it is one of the Federal Government's enumerated powers.

[7] Justice KENNEDY concludes that the Necessary and Proper Clause requires something beyond rational-basis scrutiny when assessing the fit between an enumerated power and the means Congress selects to execute it. *Ante,* at 1966 – 1967 (opinion concurring in judgment). Other arguments regarding the degree of fit between means and end have been lodged elsewhere. See, *e.g., Gonzales v. Raich,* 545 U.S. 1, 61 (2005) (THOMAS, J., dissenting) (arguing that, for a law to be within the Necessary and Proper Clause, it must bear an " 'obvious, simple, and direct relation' " to an exercise of Congress' enumerated powers and must not

subvert basic principles of federalism and dual sovereignty). But I find that debate beside the point here, because it concerns the analysis employed at *McCulloch* 's second step, see *McCulloch v. Maryland,* 4 Wheat. 316 (1819), while the Court's decision today errs by skipping the first.

By starting its inquiry with the degree of deference owed to Congress in selecting means to further a legitimate end, the Court bypasses *McCulloch* 's first step and fails carefully to examine whether the end served by § 4248 is actually one of those powers. See Part III–A–2, *infra*.

b

Second, instead of asking the simple question of what enumerated power § 4248 "carr[ies] into Execution" at *McCulloch* 's first step, the Court surveys other laws Congress has enacted and concludes that, because § 4248 is related to those laws, the "links" between § 4248 and an enumerated power are not "too attenuated"; hence, § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority. *Ante,* at 1963. This unnecessarily confuses the analysis and, if followed to its logical extreme, would result in an unwarranted expansion of federal power.

The Court observes that Congress has the undisputed authority to "criminalize conduct" that interferes with enumerated powers; to "imprison individuals who engage in that conduct"; to "enact laws governing [those] prisons"; and to serve as a "custodian of its prisoners." *Ante,* at 1958, 1961. From this, the Court assumes that § 4248 must also be a valid exercise of congressional power because it is " 'reasonably adapted' " to *those* exercises of Congress' incidental—and thus unenumerated—authorities. See *ante,* at 1961 (concluding that "§ 4248 is 'reasonably adapted' to Congress' power to act as a responsible federal custodian" (citation omitted)); *ante,* at 1965 (concluding that "the statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others"). But that is not the question. The Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority; the Clause plainly requires a showing that every federal statute "carr[ies] into Execution" one or more of the Federal Government's *enumerated* powers.[8]

[8] *McCulloch* makes this point clear. As the Court notes, *ante,* at 18–19, *McCulloch* states, in discussing a hypothetical, that from Congress' enumerated power to establish post offices and post roads "has been inferred the power and duty of carrying the mail," and, "from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail." 4 Wheat., at 417. Contrary to the Court's interpretation, this dictum does not suggest that the relationship between Congress' implied power to punish postal crimes and its implied power to carry the mail is alone sufficient to satisfy review under the Necessary and Proper Clause. Instead, *McCulloch* directly links the constitutionality of the former to Congress' enumerated power " 'to establish post offices and post roads.' " *Ibid.* (explaining that "the right to ... punish those who rob [the mail] is not indispensably necessary to the establishment of a post office and post road," but is "essential to the beneficial exercise of th[at] power"). More importantly, *McCulloch* 's holding, as well as the holdings of this Court's subsequent decisions, make plain that congressional action is valid under the Necessary and Proper Clause only if it carries into execution one or more enumerated powers. *Id.,* at 422 (upholding Congress' incorporation of a bank because it was a "means ... to be employed only for the purpose of carrying into execution *the given powers* " (emphasis added)); see *Sabri v. UnitedStates,* 541 U.S. 600, 605 (2004) ("Congress has authority *under the Spending Clause* to appropriate federal moneys to promote the general welfare, and it has *corresponding authority* under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact

spent for the general welfare" (emphasis added; citations omitted)); *Stewart v. Kahn,* 11 Wall. 493, 506–507 (1871) ("The power to pass [the Act in question] is necessarily implied from the *powers to make war and suppress insurrections* " (referring to Art. I, § 8, cls. 11 and 15; emphasis added)).

Federal laws that criminalize conduct that interferes with enumerated powers, establish prisons for those who engage in that conduct, and set rules for the care and treatment of prisoners awaiting trial or serving a criminal sentence satisfy this test because each helps to "carr[y] into Execution" the enumerated powers that justify a criminal defendant's arrest or conviction. For example, Congress' enumerated power "[t]o establish Post Offices and post Roads," Art. I, § 8, cl. 7, would lack force or practical effect if Congress lacked the authority to enact criminal laws "to punish those who steal letters from the post office, or rob the mail." *McCulloch, supra,* at 417. Similarly, that enumerated power would be compromised if there were no prisons to hold persons who violate those laws, or if those prisons were so poorly managed that prisoners could escape or demand their release on the grounds that the conditions of their confinement violate their constitutional rights, at least as we have defined them. See, *e.g., Estelle v. Gamble,* 429 U.S. 97 (1976). Civil detention under § 4248, on the other hand, lacks any such connection to an enumerated power.

2

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

First, the statute's definition of a "sexually dangerous person" contains no element relating to the subject's crime. See §§ 4247(a)(5)-(6). It thus does not require a federal court to find any connection between the reasons supporting civil commitment and the enumerated power with which that person's criminal conduct interfered. As a consequence, § 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence. §§ 4248(a), (d). That possibility is not merely hypothetical: The Government concedes that nearly 20% of individuals against whom § 4248 proceedings have been brought fit this description.[9] Tr. of Oral Arg. 23–25.

[9] The statute does require the court to find that the subject "has engaged or attempted to engage in sexually violent conduct or child molestation," § 4247(a)(5), but that factual predicate can be established by a *state* conviction, or by clear and convincing evidence that the person committed a sex crime for which he was never charged.

Second, § 4248 permits the term of federal civil commitment to continue beyond the date on which a convicted prisoner's sentence expires or the date on which the statute of limitations on an untried defendant's crime has run. The statute therefore authorizes federal custody over a person at a time when the Government would lack jurisdiction to detain him for violating a criminal law that executes an enumerated power.

The statute this Court upheld in *Greenwood v. United States,* 350 U.S. 366 (1956), provides a useful contrast. That statute authorized the Federal Government to exercise civil custody over a federal defendant declared mentally unfit to stand trial only " 'until the accused shall be mentally competent to

stand trial or until the pending charges against him are disposed of according to law.' " *Id.,* at 368, n. 2 (quoting 18 U.S.C. § 4246 (1952 ed.)). Thus, that statute's "end" reasonably could be interpreted as preserving the Government's power to enforce a criminal law against the accused. Section 4248 (2006 ed.), however, authorizes federal detention of a person even *after* the Government loses the authority to prosecute him for a federal crime.

Third, the definition of a "sexually dangerous person" relevant to § 4248 does not require the court to find that the person is likely to violate a law executing an enumerated power in the future. Although the Federal Government has no express power to regulate sexual violence generally, Congress has passed a number of laws proscribing such conduct in special circumstances. All of these statutes contain jurisdictional elements that require a connection to one of Congress' enumerated powers—such as interstate commerce, *e.g.,* § 2252(a)(2)—or that limit the statute's coverage to jurisdictions in which Congress has plenary authority, *e.g.,* § 2243(a). Section 4248, by contrast, authorizes civil commitment upon a showing that the person is "sexually dangerous," and presents a risk "to others," § 4247(a)(5). It requires no evidence that this sexually dangerous condition will manifest itself in a way that interferes with a federal law that executes an enumerated power or in a geographic location over which Congress has plenary authority.[10]

[10] The Constitution grants Congress plenary authority over certain jurisdictions where no other sovereign exists, including the District of Columbia, Art. I, § 8, cl. 17, and federal territories, Art. IV, § 3, cl. 2. In addition, Congress has "broad general powers to legislate in respect to Indian tribes," *United States v. Lara,* 541 U.S. 193, 200 (2004) (citing Art. I, § 8, cl. 3; Art. II, § 2, cl. 2), including certain special responsibilities over "Indian country," 18 U.S.C. § 1151. Although the Necessary and Proper Clause did not authorize Congress to enact § 4248, I do not rule out the possibility that Congress could provide for the civil commitment of individuals who enter federal custody as a result of acts committed in these jurisdictions. See, *e.g., UnitedStates v. Cohen,* 733 F.2d 128 (D.C. Cir. 1984) (en banc) (upholding civil commitment of a defendant under a District of Columbia statute authorizing the institutionalization of persons acquitted by reason of insanity). Although two of the respondents in this case were either charged with or convicted of criminal acts committed in such jurisdictions, see *ante,* at 1955; 507 F.Supp.2d 522, 527, and n. 2 (E.D.N.C.2007), that question is not presented here because § 4248 does not make that fact essential to an individual's placement in civil detention.

In sum, the enumerated powers that justify a criminal defendant's arrest or conviction cannot justify his subsequent civil detention under § 4248.

B

The remaining "considerations" in the Court's five-part inquiry do not alter this conclusion.

1

First, in a final attempt to analogize § 4248 to laws that authorize the Federal Government to provide care and treatment to prisoners while they await trial or serve a criminal sentence, the Court cites the Second Restatement of Torts for the proposition that the Federal Government has a "custodial interest" in its prisoners, *ante,* at 1965, and, thus, a broad "constitutional power to act in order to protect nearby and other) communities" from the dangers they may pose,[11] *ante,* at 1961. That citation is puzzling because federal authority derives from the Constitution, not the common law. In any event, nothing in the Restatement suggests that a common-law custodian has the powers that Congress seeks here. While the Restatement provides that a custodian has a duty to take reasonable steps to ensure that a person in his care does not cause "bodily harm to others," 2 Restatement (Second) of Torts § 319, p. 129 (1963–1964), that duty terminates once the legal basis for custody expires:

[11] The Court also cites *Youngberg v. Romeo,* 457 U.S. 307 (1982), but that case lends even less support than the Restatement. In *Youngberg,* an inmate at a state hospital argued that hospital workers violated his constitutional rights when they applied restraints to keep him in his bed at the hospital infirmary. *Id.,* at 310–311. In assessing that claim, this Court noted that the hospital had a responsibility to "protect *its residents* " from the danger of violence. *Id.,* at 320 (emphasis added). The Court never suggested that this responsibility extended to "nearby (and other) communities." *Ante,* at 1961. Moreover, the hospital was a *state* institution. Nothing in *Youngberg* suggests that the Federal Government can detain a person beyond the date on which its criminal jurisdiction expires for fear that he may later pose a threat to the surrounding community.

"There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

> "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> "(b) a special relation exists between the actor and the other which gives to the other a right to protection." *Id.,* § 315, at 122.

Once the Federal Government's criminal jurisdiction over a prisoner ends, so does any "special relation[ship]" between the Government and the former prisoner.[12]

[12] Federal law permits a sentencing court to order that a defendant be placed on a term of "supervised release" after his term of imprisonment is complete. 18 U.S.C. §§ 3583, 3624(e). Contrary to the Government's suggestion, federal authority to exercise control over individuals serving terms of "supervised release" does not derive from the Government's "relationship" with the prisoner, see Brief for United States 38, but from the original criminal sentence itself. Supervised release thus serves to execute the enumerated power that justifies the defendant's statute of conviction, just like any other form of punishment imposed at sentencing.

For this reason, I cannot agree with Justice ALITO that § 4248 is a necessary and proper incident of Congress' power "to protect the public from dangers created by the federal criminal justice and prison systems." *Ante,* at 1970 (opinion concurring in judgment). A federal criminal defendant's "sexually dangerous" propensities are not "created by" the fact of his incarceration or his relationship with the federal prison system. The fact that the Federal Government has the authority to imprison a person for the purpose of punishing him for a federal crime—sex-related or otherwise—does not provide the Government with the additional power to exercise indefinite civil control over that person.[13]

[13] The fact that Congress has the authority to "provide for the apprehension of escaped federal prisoners," see *ante,* at 1970 (ALITO, J., concurring in judgment), does not change this conclusion. That authority derives from Congress' power to vindicate the enumerated power with which the escaped defendant's crime of conviction interfered, not a freestanding police power.

2

Second, the Court describes § 4248 as a "modest" expansion on a statutory framework with a long historical pedigree. *Ante,* at 1958. Yet even if the antiquity of a practice could serve as a substitute for its constitutionality—and the Court admits that it cannot, *ibid.*—the Court overstates the relevant history.

Congress' first foray into this general area occurred in 1855, when it established St. Elizabeth's Hospital to provide treatment to "insane" persons in the military and the District of Columbia. Act of Mar. 3, 1855, 10 Stat. 682. But Congress was acting pursuant to *enumerated* powers when it took this step. See Art. I, § 8,

cl. 17 (granting Congress plenary authority over the District of Columbia); Art. I, § 8, cl. 14 (authorizing Congress to "make Rules for the Government and Regulation of the land and naval Forces"). This enactment therefore provides no support for Congress' claimed power to detain sexually dangerous persons without an otherwise valid basis for jurisdiction.

Later, Congress provided for the federal civil commitment of "insane" persons charged with or convicted of a federal crime. Act of Feb. 7, 1857, §§ 5–6, 11 Stat. 158; see 17 Op. Atty. Gen. 211, 212–213 (1881); Act of June 23, 1874, ch. 465, 18 Stat. 251; Act of Aug. 7, 1882, 22 Stat. 330. As the Court explains, however, these statutes did not authorize federal custody beyond the completion of the "term" of federal "imprisonment," §§ 2–3, 18 Stat. 252; see 35 Op. Atty. Gen. 366, 368 (1927); 30 Op. Atty. Gen. 569, 570–571 (1916); Act of May 13, 1930, ch. 254, § 6, 46 Stat. 271, and thus shed no light on the question presented here.

In 1949, Congress enacted a more comprehensive regime, authorizing the civil commitment of mentally ill persons in BOP custody. See 18 U.S.C. §§ 4246, 4247 (1952 ed.). This Court addressed that regime in *Greenwood,* but never endorsed the proposition that the Federal Government could rely on that statute to detain a person in the absence of a pending criminal charge or ongoing criminal sentence.[14]

[14] In addition, at least some courts questioned the Federal Government's power to detain a person in such circumstances. See *Dixon v. Steele,* 104 F. Supp. 904, 908 (W.D.Mo.1952) (holding that the Federal Government lacked authority to detain an individual declared mentally unfit to stand trial once it was determined that he was unlikely to recover in time to be prosecuted); *Higgins v. United States,* 205 F.2d 650, 653 (9th Cir. 1953) (avoiding this constitutional question by interpreting the statute to permit federal civil detention only for a period reasonably related to a criminal prosecution); *Wells v. Attorney General of United States,* 201 F.2d 556, 560 (10th Cir. 1953) (same).

As already noted, *Greenwood* upheld the commitment of a federal defendant declared unfit to stand trial on the narrow ground that the Government's criminal jurisdiction over the defendant—its "power to prosecute for federal offenses—[wa]s not exhausted," but rather "persist[ed]" in the form of a "pending indictment." 350 U.S., at 375; see *supra,* at 1962. The Court was careful to state that *"[t]his* commitment, and therefore the legislation authorizing commitment *in the context of this case,* involve[d] an assertion of authority" within "congressional power under the Necessary and Proper Clause." *Greenwood,* 350 U.S., at 375 (emphasis added). But it painstakingly limited its holding to "the narrow constitutional issue raised by th[at] order of commitment." *Ibid.*

The historical record thus supports the Federal Government's authority to detain a mentally ill person against whom it has the authority to enforce a criminal law. But it provides no justification whatsoever for reading the Necessary and Proper Clause to grant Congress the power to authorize the detention of persons without a basis for federal criminal jurisdiction.

3

Finally, the Court offers two arguments regarding § 4248's impact on the relationship between the Federal Government and the States. First, the Court and both concurrences suggest that Congress must have had the power to enact § 4248 because a long period of federal incarceration might "seve[r]" a sexually dangerous prisoner's "claim to 'legal residence' " in any particular State, *ante,* at 1961 – 1962 (opinion of the Court), thus leaving the prisoner without any "home State to take charge" of him upon release, *ante,* at 1968 (KENNEDY, J., concurring in judgment); see *ante,* at 1968 – 1969 (ALITO, J., concurring in judgment) (noting that many federal prisoners, "as a result of lengthy federal incarceration, no longer ha[ve] any substantial ties to any State"). I disagree with the premise of that argument. As an initial matter, States

plainly have the constitutional authority to "take charge" of a federal prisoner released within their jurisdiction. See Amdt. 10 (stating that powers not delegated to the Federal Government are "reserved" to the States, and to the people). In addition, the assumption that a State knowingly would fail to exercise that authority is, in my view, implausible. The Government stated at oral argument that its "default position" is to release a federal prisoner to the State in which he was convicted, Tr. of Oral Arg. 15; see also 28 CFR § 2.33(b) (2009), and neither the Court nor the concurrences argue that a State has the power to refuse such a person domicile within its borders. Thus, they appear to assume that, in the absence of 18 U.S.C. § 4248, a State would take no action when informed by the BOP that a sexually dangerous federal prisoner was about to be released within its jurisdiction. In light of the plethora of state laws enacted in recent decades to protect communities from sex offenders,[15] the likelihood of such an occurrence seems quite remote. But even in the event a State made such a decision, the Constitution assigns the responsibility for that decision, and its consequences, to the state government alone.

[15] As we have noted before, all 50 States have developed "some variation" of a system "for mandatory registration of sex offenders and corresponding community notification." *Smith v. Doe,* 538 U.S. 84, 89–90 (2003). In addition, several States have taken further steps; some impose residency restrictions on sex offenders, see, *e.g., Kennedy v. Louisiana,* 554 U.S. 407, 457 – 458, n. 5525 (2008) (ALITO, J., dissenting) (collecting statutes), and, most relevant here, 22 States have enacted involuntary civil-commitment laws substantially similar to § 4248, see Ariz.Rev.Stat. Ann. § 36–3701 *et seq.* (West 2009); Cal. Welf. & Inst.Code Ann. § 6600 *et seq.* (West 1998 and Supp.2010); Fla. Stat. § 394.910 *et seq.* (2007); Ill. Comp. Stat., ch. 725, § 205 *et seq.* (West 2008); Iowa Code § 229A.1 *et seq.* (2009); Kan. Stat. Ann. § 59–29a01 *et seq.* (2005 and 2008 Cum.Supp.); Mass. Gen. Laws, ch. 123A (West 2008); Minn.Stat. § 253B (2008 and 2009 Supp.); Mo.Rev.Stat. § 632.480 *et seq.* (2009 Cum.Supp.); Neb.Rev.Stat. § 29–2923 *et seq.* (2008); N.H.Rev.Stat. Ann. § 135–E:1 *et seq.* (West Cum.Supp.2009); N.J. Stat. Ann. § 30:4–82.4 *et seq.* (West 2008); N.M. Stat. Ann. § 43–1–1 *et seq.* (2000 and Cum.Supp.2009); N.Y. Mental Hyg. Law Ann. § 10.01 *et seq.* (West Supp.2010); N.D. Cent.Code Ann. § 25–03.3–01 *et seq.* (Lexis 2002 and Supp.2009); Ore.Rev.Stat. § 426.510 *et seq.* (2007); S.C.Code Ann. § 44–48–10 *et seq.* (Supp.2009); Tenn.Code Ann. § 33–6–801 *et seq.* (2007); Tex. Health & Safety Code Ann. § 841.001 *et seq.* (West Supp.2009); Va.Code Ann. § 37.2–900 *et seq.* (Lexis Cum.Supp.2009); Wash. Rev.Code § 71.09.010 *et seq.* (2008); Wis. Stat. Ann. § 980.01 *et seq.* (West 2007 and Supp.2009).

Next, the Court submits that § 4248 does not upset the balance of federalism or invade the States' reserved powers because it "requires accommodation of state interests" by instructing the Attorney General to release a committed person to the State in which he was domiciled or tried if that State wishes to " 'assume ... responsibility' " for him. *Ante,* at 1962 (emphasis deleted), 1962 – 1963 (quoting § 4248(d)). This right of first refusal is mere window dressing. Tr. of Oral Arg. 5 ("It is not the usual course that the State does take responsibility"). More importantly, it is an altogether hollow assurance that § 4248 preserves the principle of dual sovereignty—the "letter and spirit" of the Constitution—as the Necessary and Proper Clause requires.[16] *McCulloch,* 4 Wheat., at 421; *Printz v. United States,* 521 U.S. 898, 923–924 (1997). For once it is determined that Congress has the authority to provide for the civil detention of sexually dangerous persons, Congress "is acting within the powers granted it under the Constitution," and "may impose its will on the States." *Gregory,* 501 U.S., at 460; see Art. VI, cl. 2. Section 4248's right of first refusal is thus not a matter of constitutional necessity, but an act of legislative grace.

[16] The Court describes my argument as a claim that " § 4248 violates the Tenth Amendment." *Ante,* at 1962. Yet, I agree entirely with the Court that " 'it makes no difference whether one views the question at issue [here] as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.' " *Ibid.* (quoting *New York v. United States,* 505 U.S. 144, 159 (1992)). Section

> 4248 is unconstitutional because it does not "carr[y] into Execution" an enumerated power. Therefore, it necessarily intrudes upon the powers our Constitution reserves to the States and to the people.

Nevertheless, 29 States appear as *amici* and argue that § 4248 is constitutional. They tell us that they do not object to Congress retaining custody of "sexually dangerous persons" after their criminal sentences expire because the cost of detaining such persons is "expensive"—approximately $64,000 per year—and these States would rather the Federal Government bear this expense. Brief for Kansas et al. 2; *ibid.* ("[S]ex offender civil commitment programs are expensive to operate"); *id.,* at 4 ("[T]hese programs are expensive"); *id.,* at 8 ("[T]here are very practical reasons to prefer a system that includes a federal sex offender civil commitment program.... One such reason is the significant cost").

Congress' power, however, is fixed by the Constitution; it does not expand merely to suit the States' policy preferences, or to allow state officials to avoid difficult choices regarding the allocation of state funds. By assigning the Federal Government power over "certain enumerated objects only," the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects." The Federalist No. 39, at 285 (J. Madison). The purpose of this design is to preserve the "balance of power between the States and the Federal Government ... [that] protect[s] our fundamental liberties." *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572 (1985) (Powell, J., dissenting); *New York v. United States,* 505 U.S., at 181. It is the States' duty to act as the "immediate and visible guardian" of those liberties because federal powers extend no further than those enumerated in the Constitution. The Federalist No. 17, at 169 (A.Hamilton). The Constitution gives States no more power to decline this responsibility than it gives them to infringe upon those liberties in the first instance. *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it").

Absent congressional action that is in accordance with, or necessary and proper to, an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States. *Morrison,* 529 U.S., at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime"); see *Cohens v. Virginia,* 6 Wheat. 264, 426 (1821) (Marshall, C.J.) (stating that Congress has "no general right to punish murder committed within any of the States").

* * *

Not long ago, this Court described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action." *Printz, supra,* at 923. Regrettably, today's opinion breathes new life into that Clause, and—the Court's protestations to the contrary notwithstanding, see *ante,* at 1963—comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that "we *always* have rejected," *Lopez,* 514 U.S., at 584 (THOMAS, J., concurring) (citing *Gregory, supra,* at 457; *Wirtz,* 392 U.S., at 196; *Jones & Laughlin Steel Corp.,* 301 U.S., at 37). In so doing, the Court endorses the precise abuse of power Article I is designed to prevent—the use of a limited grant of authority as a "pretext ... for the accomplishment of objects not intrusted to the government." *McCulloch, supra,* at 423.

I respectfully dissent.

Supreme Court of the United States.

Donald J. TRUMP, et al., Petitioners
v.
MAZARS USA, LLP, et al.

Decided July 9, 2020

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade's worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

We have never addressed a congressional subpoena for the President's information. Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, Cir. J.), and earlier today we extended that ruling to state criminal proceedings, *Trump* v. *Vance, ante*, —— U.S. at ——. Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974), and more recently we ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton v. Jones*, 520 U.S. 681 (1997).

This case is different. Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). That distinctive aspect necessarily informs our analysis of the question before us.

I

A

Each of the three committees sought overlapping sets of financial documents, but each supplied different justifications for the requests.

The House Committee on Financial Services issued two subpoenas, both on April 11, 2019. App. 128, 154, 226. The first, issued to Deutsche Bank, seeks the financial information of the President, his children, their immediate family members, and several affiliated business entities. Specifically, the subpoena seeks any document related to account activity, due diligence, foreign transactions, business statements, debt

schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. The second, issued to Capital One, demands similar financial information with respect to more than a dozen business entities associated with the President. The Deutsche Bank subpoena requests materials from "2010 through the present," and the Capital One subpoena covers "2016 through the present," but both subpoenas impose no time limitations for certain documents, such as those connected to account openings and due diligence. *Id.,* at 128, 155.

According to the House, the Financial Services Committee issued these subpoenas pursuant to House Resolution 206, which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H. Res. 206, 116th Cong., 1st Sess., 5 (Mar. 13, 2019). Such loopholes, the resolution explained, had allowed "illicit money, including from Russian oligarchs," to flow into the United States through "anonymous shell companies" using investments such as "luxury high-end real estate." *Id.*, at 3. The House also invokes the oversight plan of the Financial Services Committee, which stated that the Committee intends to review banking regulation and "examine the implementation, effectiveness, and enforcement" of laws designed to prevent money laundering and the financing of terrorism. H. R. Rep. No. 116–40, p. 84 (2019). The plan further provided that the Committee would "consider proposals to prevent the abuse of the financial system" and "address any vulnerabilities identified" in the real estate market. *Id.*, at 85.

On the same day as the Financial Services Committee, the Permanent Select Committee on Intelligence issued an identical subpoena to Deutsche Bank—albeit for different reasons. According to the House, the Intelligence Committee subpoenaed Deutsche Bank as part of an investigation into foreign efforts to undermine the U. S. political process. Committee Chairman Adam Schiff had described that investigation in a previous statement, explaining that the Committee was examining alleged attempts by Russia to influence the 2016 election; potential links between Russia and the President's campaign; and whether the President and his associates had been compromised by foreign actors or interests. Press Release, House Permanent Select Committee on Intelligence, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019). Chairman Schiff added that the Committee planned "to develop legislation and policy reforms to ensure the U. S. government is better positioned to counter future efforts to undermine our political process and national security." *Ibid.*

Four days after the Financial Services and Intelligence Committees, the House Committee on Oversight and Reform issued another subpoena, this time to the President's personal accounting firm, Mazars USA, LLP. The subpoena demanded information related to the President and several affiliated business entities from 2011 through 2018, including statements of financial condition, independent auditors' reports, financial reports, underlying source documents, and communications between Mazars and the President or his businesses. The subpoena also requested all engagement agreements and contracts "[w]ithout regard to time." App. to Pet. for Cert. in 19–715, p. 230.

Chairman Elijah Cummings explained the basis for the subpoena in a memorandum to the Oversight Committee. According to the chairman, recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen, raised questions about whether the President had accurately represented his financial affairs. Chairman Cummings asserted that the Committee had "full authority to investigate" whether the President: (1) "may have engaged in illegal conduct before and during his tenure in office," (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," (3) "is complying with the Emoluments Clauses of the Constitution," and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities." App. in No. 19–5142 (CADC), p. 107. "The Committee's

interest in these matters," Chairman Cummings concluded, "informs its review of multiple laws and legislative proposals under our jurisdiction." *Ibid.*

B

Petitioners—the President in his personal capacity, along with his children and affiliated businesses—filed two suits challenging the subpoenas. They contested the subpoena issued by the Oversight Committee in the District Court for the District of Columbia (*Mazars*, No. 19–715), and the subpoenas issued by the Financial Services and Intelligence Committees in the Southern District of New York (*Deutsche Bank*, No. 19–760). In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege. For relief, petitioners asked for declaratory judgments and injunctions preventing Mazars and the banks from complying with the subpoenas. Although named as defendants, Mazars and the banks took no positions on the legal issues in these cases, and the House committees intervened to defend the subpoenas.

Petitioners' challenges failed. In *Mazars*, the District Court granted judgment for the House, 380 F.Supp.3d 76 (D.D.C. 2019), and the D. C. Circuit affirmed, 940 F.3d 710 (D.C. Cir. 2019). In upholding the subpoena issued by the Oversight Committee to Mazars, the Court of Appeals found that the subpoena served a "valid legislative purpose" because the requested information was relevant to reforming financial disclosure requirements for Presidents and presidential candidates. *Id.*, at 726–742 (internal quotation marks omitted). Judge Rao dissented. As she saw it, the "gravamen" of the subpoena was investigating alleged illegal conduct by the President, and the House must pursue such wrongdoing through its impeachment powers, not its legislative powers. *Id.*, at 773–774. Otherwise, the House could become a "roving inquisition over a co-equal branch of government." *Id.*, at 748. The D. C. Circuit denied rehearing en banc over several more dissents. 941 F.3d 1180, 1180–1182 (D.C. Cir. 2019).

In *Deutsche Bank*, the District Court denied a preliminary injunction, 2019 WL 2204898 (SDNY, May 22, 2019), and the Second Circuit affirmed "in substantial part," 943 F.3d 627, 676 (2d. Cir. 2019). While acknowledging that the subpoenas are "surely broad in scope," the Court of Appeals held that the Intelligence Committee properly issued its subpoena to Deutsche Bank as part of an investigation into alleged foreign influence over petitioners and Russian interference with the U. S. political process. *Id.*, at 650, 658–659. That investigation, the court concluded, could inform legislation to combat foreign meddling and strengthen national security. *Id.*, at 658–659, and n. 59.

As to the subpoenas issued by the Financial Services Committee to Deutsche Bank and Capital One, the Court of Appeals concluded that they were adequately related to potential legislation on money laundering, terrorist financing, and the global movement of illicit funds through the real estate market. *Id.*, at 656–659. Rejecting the contention that the subpoenas improperly targeted the President, the court explained in part that the President's financial dealings with Deutsche Bank made it "appropriate" for the House to use him as a "case study" to determine "whether new legislation is needed." *Id.*, at 662–663, n. 67.[1]

[1] The Court of Appeals directed a "limited" remand for the District Court to consider whether it was necessary to disclose certain "sensitive personal details" (such as documents reflecting medical services received by employees of the Trump business entities) and a "few" documents that might not relate to the committees' legislative purposes. 943 F.3d 627, 667–668, 675 (2019). The Court of Appeals ordered that all other documents be "promptly transmitted" to the committees. *Id.*, at 669.

Judge Livingston dissented, seeing no "clear reason why a congressional investigation aimed generally at

closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs." *Id.*, at 687.

We granted certiorari in both cases and stayed the judgments below pending our decision. 589 U. S. ——– (2019).

II

A

The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair's campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. See T. Taylor, Grand Inquest: The Story of Congressional Investigations 19–23 (1955). Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to "institute inquiries" and "call for papers" but the President could "exercise a discretion" over disclosures, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. *Id.*, at 189–190. President Washington then dispatched Jefferson to speak to individual congressmen and "bring them by persuasion into the right channel." *Id.*, at 190. The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts. See 3 Annals of Cong. 536 (1792); Taylor, *supra*, at 24.

Jefferson, once he became President, followed Washington's precedent. In early 1807, after Jefferson had disclosed that "sundry persons" were conspiring to invade Spanish territory in North America with a private army, 16 Annals of Cong. 686–687, the House requested that the President produce any information in his possession touching on the conspiracy (except for information that would harm the public interest), *id.*, at 336, 345, 359. Jefferson chose not to divulge the entire "voluminous" correspondence on the subject, explaining that much of it was "private" or mere "rumors" and "neither safety nor justice" permitted him to "expos[e] names" apart from identifying the conspiracy's "principal actor": Aaron Burr. *Id.*, at 39–40. Instead of the entire correspondence, Jefferson sent Congress particular documents and a special message summarizing the conspiracy. *Id.*, at 39–43; see generally *Vance, ante*, –– U.S. at ——– – ———. Neither Congress nor the President asked the Judiciary to intervene.[2]

[2] By contrast, later that summer, the Judiciary *was* called on to resolve whether President Jefferson could be issued a subpoena *duces tecum* arising from Burr's criminal trial. See *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (C.C. Va. 1807); see also *Trump* v. *Vance, ante*, —— U.S. ——— (2020).

Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court. The Reagan and Clinton presidencies provide two modern examples:

During the Reagan administration, a House subcommittee subpoenaed all documents related to the Department of the Interior's decision whether to designate Canada a reciprocal country for purposes of the Mineral Lands Leasing Act. President Reagan directed that certain documents be withheld because they implicated his confidential relationship with subordinates. While withholding those documents, the administration made "repeated efforts" at accommodation through limited disclosures and testimony over a period of several months. 6 Op. of Office of Legal Counsel 751, 780 (1982). Unsatisfied, the subcommittee and its parent committee eventually voted to hold the Secretary of the Interior in contempt, and an innovative compromise soon followed: All documents were made available, but only for one day with no photocopying, minimal notetaking, and no participation by non-Members of Congress. *Id.*, at 780–781; see H. R. Rep. No. 97–898, pp. 3–8 (1982).

In 1995, a Senate committee subpoenaed notes taken by a White House attorney at a meeting with President Clinton's personal lawyers concerning the Whitewater controversy. The President resisted the subpoena on the ground that the notes were protected by attorney-client privilege, leading to "long and protracted" negotiations and a Senate threat to seek judicial enforcement of the subpoena. S. Rep. No. 104–204, pp. 16–17 (1996). Eventually the parties reached an agreement, whereby President Clinton avoided the threatened suit, agreed to turn over the notes, and obtained the Senate's concession that he had not waived any privileges. *Ibid.*; see L. Fisher, Congressional Research Service, Congressional Investigations: Subpoenas and Contempt Power 16–18 (2003).

Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President's records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. See *infra*, at 2032 – 2033 (discussing *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc)). In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice " 'is a consideration of great weight' " in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches ... themselves have reached." *NLRB v. Noel Canning*, 573 U.S. 513, 524–526 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). With that in mind, we turn to the question presented.

B

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we

have held that each House has power "to secure needed information" in order to legislate. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*, at 174. Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." *Id.*, at 175. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.*, at 187.

Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187The subpoena must serve a "valid legislative purpose," *Quinn v. United States*, 349 U.S. 155, 161 (1955); it must "concern[ ] a subject on which legislation 'could be had,' " *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) (quoting *McGrain*, 273 U.S. at 177).

Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S. at 161. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*, 273 U.S. at 179. Congress has no " 'general' power to inquire into private affairs and compel disclosures," *id.*, at 173–174, and "there is no congressional power to expose for the sake of exposure," *Watkins*, 354 U.S. at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*, at 187.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.*, at 188, 198. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. See, *e.g.*, Congressional Research Service, *supra,* at 16–18 (attorney-client privilege); *Senate Select Committee*, 498 F.2d at 727, 730–731 (executive privilege).

C

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes—recordings of conversations between President Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas. See *Nixon*, 418 U.S. 683; *Senate Select Committee*, 498 F.2d 725.

Those cases, the President and the Solicitor General now contend, establish the standard that should govern the House subpoenas here. Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. 418 U.S. at 713. And drawing on *Senate Select Committee*—the D. C. Circuit case refusing to enforce the Senate subpoena for the tapes—the President and the Solicitor General argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose. 498 F.2d at 731.

We disagree that these demanding standards apply here. Unlike the cases before us, *Nixon* and *Senate Select Committee* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U.S. at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *United States v. Rumely*, 345 U.S. 41, 43 (1953) (internal quotation marks omitted).

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to "every affair of government." *Ibid.* (internal quotation marks omitted). Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

D

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they "relate[ ] to a valid legislative purpose" or "concern[ ] a subject on which legislation could be had." Brief for Respondent 46 (quoting *Barenblatt v. United States*, 360 U.S. 109, 127 (1959), and *Eastland*, 421 U.S. at 506). That approach is appropriate, the House argues, because the cases before us are not "momentous separation-of-powers disputes." Brief for Respondent 1.

Largely following the House's lead, the courts below treated these cases much like any other, applying precedents that do not involve the President's papers. See 943 F.3d at 656–670; 940 F.3d at 724–742. The Second Circuit concluded that "this case does not concern separation of powers" because the House seeks personal documents and the President sued in his personal capacity. 943 F.3d at 669. The D. C. Circuit, for its part, recognized that "separation-of-powers concerns still linger in the air," and therefore it did not afford deference to the House. 940 F.3d at 725–726. But, because the House sought only personal documents, the court concluded that the case "present[ed] no direct interbranch dispute." *Ibid.*

The House's approach fails to take adequate account of the significant separation of powers issues raised

by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, *e.g.*, *Barenblatt*, 360 U.S. at 127; *Eastland*, 421 U.S. at 506, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see *Vance, ante*, —— U.S. ——; *Nixon*, 418 U.S. 683. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another. Cf. *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997) ("The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings.").

Far from accounting for separation of powers concerns, the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records. Any personal paper possessed by a President could potentially "relate to" a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. Brief for Respondent 46. The President's financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify *any* type of information that lacks some relation to potential legislation. See Tr. of Oral Arg. 52–53, 62–65.

Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared. The Federalist No. 71, at 484 (A. Hamilton); see *id.*, No. 48, at 332–333 (J. Madison); *Bowsher v. Synar*, 478 U.S. 714, 721–722 (1986). And a limitless subpoena power would transform the "established practice" of the political branches. *Noel Canning*, 573 U.S. at 524 (internal quotation marks omitted). Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

The House and the courts below suggest that these separation of powers concerns are not fully implicated by the particular subpoenas here, but we disagree. We would have to be "blind" not to see what "[a]ll others can see and understand": that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. *Rumely*, 345 U.S. at 44 (quoting *Child Labor Tax Case*, 259 U.S. 20, 37 (1922) (Taft, C. J.)).

The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. "The interest of the man" is often "connected with the constitutional rights of the place." The Federalist No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisan[t] to the humors of the Legislature." *Id.*, No. 71, at 483. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency. Cf. *Carpenter* v. *United States*, 585 U. S. ——, ——, ——(2018). Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it "deals with substance, not shadows." *Cummings v. Missouri*, 4 Wall. 277, 325 (1867).

E

Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a "[d]eeply embedded traditional way[ ] of conducting government." *Youngstown Sheet & Tube Co.*, 343 U.S. at 610 (Frankfurter, J., concurring).

A balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); see *Noel Canning*, 573 U.S. at 524–526, and "resist[s]" the "pressure inherent within each of the separate Branches to exceed the outer limits of its power," *INS v. Chadha*, 462 U.S. 919, 951 (1983). We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U.S. at 187, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the "unique position" of the President, *Clinton*, 520 U.S. at 698 (internal quotation marks omitted). Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. " '[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 389–390 (2004) (quoting *Nixon*, 418 U.S. at 692). Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a "case study" for general legislation. Cf. 943 F.3d at 662–663, n. 67.

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U.S. at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] ... in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U.S. at 384; see *Senate Select Committee*, 498 F.2d at 732. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation

of the Office of the President." *Cheney*, 542 U.S. at 387.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. See *Watkins*, 354 U.S. at 201, 205 (preferring such evidence over "vague" and "loosely worded" evidence of Congress's purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation. *Id.*, at 205–206, 214–215.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance, ante*, ——— U.S. at ——— – ———; *Clinton*, 520 U.S. at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information "needed for intelligent legislative action," it "unquestionably" remains "the duty of *all* citizens to cooperate." *Watkins*, 354 U.S. at 187 (emphasis added). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

Three Committees of the U. S. House of Representatives issued subpoenas to several accounting and financial firms to obtain the personal financial records of the President, his family, and several of his business entities. The Committees do not argue that these subpoenas were issued pursuant to the House's impeachment power. Instead, they argue that the subpoenas are a valid exercise of their legislative powers.

Petitioners challenge the validity of these subpoenas. In doing so, they call into question our precedents to the extent that they allow Congress to issue legislative subpoenas for the President's private, nonofficial documents. I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power. Accordingly, I would reverse the judgments of the Courts of Appeals.

I

I begin with the Committees' claim that the House's legislative powers include the implied power to issue

legislative subpoenas. Although the Founders understood that the enumerated powers in the Constitution included implied powers, the Committees' test for the scope of those powers is too broad.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803). The structure of limited and enumerated powers in our Constitution denotes that "[o]ur system of government rests on one overriding principle: All power stems from the consent of the people." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (THOMAS, J., dissenting). As a result, Congress may exercise only those powers given by the people of the States through the Constitution.

The Founders nevertheless understood that an enumerated power could necessarily bring with it implied powers. The idea of implied powers usually arises in the context of the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. As I have previously explained, the Necessary and Proper Clause simply "made explicit what was already implicit in the grant of each enumerated power." *United States v. Comstock*, 560 U.S. 126, 161 (2010) (dissenting opinion). That is, "the grant of a general power includes the grant of incidental powers for carrying it out." Bray, "Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution, 102 Va. L. Rev. 687, 741 (2016).

The scope of these implied powers is very limited. The Constitution does not sweep in powers "of inferior importance, merely because they are inferior." *McCulloch v. Maryland*, 4 Wheat. 316, 408 (1819). Instead, Congress "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816). In sum, while the Committees' theory of an implied power is not categorically wrong, that power must be necessarily implied from an enumerated power.

II

At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers. This understanding persisted for decades and is consistent with the Court's first decision addressing legislative subpoenas, *Kilbourn v. Thompson*, 103 U.S. 168 (1881). The test that this Court created in *McGrain v. Daugherty*, 273 U.S. 135 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents.[1]

[1] I express no opinion about the constitutionality of legislative subpoenas for other kinds of evidence.

A

The Committees argue that Congress wields the same investigatory powers that the British Parliament did at the time of the founding. But this claim overlooks one of the fundamental differences between our Government and the British Government: Parliament was supreme. Congress is not.

I have previously explained that "the founding generation did not subscribe to Blackstone's view of parliamentary supremacy." *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 74 (2015) (opinion concurring in judgment). "Parliament's violations of the law of the land had been a significant complaint of the American Revolution." *Id.,* at 74–75. "And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the

law." *Id.*, at 75.

James Wilson, signer of the Constitution and future Justice, explained this difference to the Pennsylvania ratifying convention: "Blackstone will tell you, that in Britain [the supreme power] is lodged in the British Parliament; and I believe there is no writer on the other side of the Atlantic" who thought otherwise. 2 Documentary History of the Ratification of the Constitution 471 (M. Jensen ed. 1976) (Documentary History). In the United States, however, "the supreme, absolute, and uncontrollable authority, *remains* with the people." *Id.*, at 472. And "[t]he Constitution plainly sets forth the 'few and defined' powers that Congress may exercise." *Comstock*, 560 U.S. at 159 (THOMAS, J., dissenting); see also *McCulloch*, 4 Wheat. at 405; *Marbury*, 1 Cranch at 176. This significant difference means that Parliament's powers and Congress' powers are not necessarily the same.

In fact, the plain text of the Constitution makes clear that they are not. The Constitution expressly denies to Congress some of the powers that Parliament exercised. Article I, for example, prohibits bills of attainder, § 9, cl. 3, which Parliament used to "sentenc[e] to death one or more specific persons." *United States v. Brown*, 381 U.S. 437, 441 (1965). A legislature can hardly be considered supreme if it lacks the power to pass bills of attainder, which Justice Story called the "highest power of sovereignty." 3 Commentaries on the Constitution of the United States § 1338, p. 210 (1833). Relatedly, the Constitution prohibits *ex post facto* laws, § 9, cl. 3, reinforcing the fact that Congress' power to punish is limited.[2] And in a system in which Congress is not supreme, the individual protections in the Bill of Rights, such as the prohibition on unreasonable searches and seizures, meaningfully constrain Congress' power to compel documents from private citizens. Cf. 1 St. George Tucker, Blackstone's Commentaries 203–205, n. § (1803); see also D. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, p. 268 (1997).

[2] The Constitution also enumerates a limited set of congressional privileges. Although I express no opinion on the question, at least one early commentator thought the canon of *expressio unius* meant that Congress had no unenumerated privileges, such as the power to hold nonmembers in contempt. 1 St. George Tucker, Blackstone's Commentaries 200, n. § (1803).

Furthermore, *Kilbourn*—this Court's first decision on the constitutionality of legislative subpoenas—emphasized that Parliament had more powers than Congress. There, the congressional respondents relied on Parliament's investigatory power to support a legislative subpoena for testimony and documents. The Court rejected the analogy because the judicial powers of the House of Commons—the lower house of Parliament—exceeded the judicial functions of the House of Representatives. *Kilbourn*, *supra,* at 189. At bottom, *Kilbourn* recognized that legislative supremacy was decisively rejected in the framing and ratification of our Constitution, which casts doubt on the Committees' claim that they have power to issue legislative subpoenas to private parties.

B

The subpoenas in these cases also cannot be justified based on the practices of 18th-century American legislatures. *Amici* supporting the Committees resist this conclusion, but the examples they cite materially differ from the legislative subpoenas at issue here.

First, *amici* cite investigations in which legislatures sought to compel testimony from government officials on government matters. The subjects included military affairs, taxes, government finances, and the judiciary. Potts, Power of Legislative Bodies To Punish for Contempt, 74 U. Pa. L. Rev. 691, 708, 709, 710, 716–717 (1926) (Potts); see also E. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress To Investigate and Punish for Contempt 18 (1928) (Eberling). But the information sought in these examples was official, not private. Underscoring this distinction, at least

one revolutionary-era State Constitution permitted the legislature to "call for all *public or official* papers and records, and send for persons, whom they may judge necessary in the course of their inquiries, concerning affairs relating to the public interest." Md. Const., Art. X (1776) (emphasis added).

Second, 18th-century legislatures conducted nonlegislative investigations. For example, the New York colonial legislature tasked one committee with investigating a nuisance complaint and gave it the "power to send for persons, papers and records." Eberling 18; see also *id.*, at 19 (investigation of a government contract obtained by alleged wrongdoing); Potts 716 (investigation of armed resistance). But to describe this category is to distinguish it. Here, the Committees assert only a legislative purpose.

Third, colonial and state legislatures investigated and punished insults, libels, and bribery of members. For example, the Pennsylvania colonial assembly investigated "injurious charges, and slanderous Aspersions against the Conduct of the late Assembly" made by two individuals. *Id.*, at 710 (internal quotation marks omitted); see also *id.*, at 717; Eberling 20–21. But once again, to describe this category is to distinguish it because the subpoenas here are justified only as incidental to the power to legislate, not the power to punish libels or bribery. In short, none of the examples from 18th-century colonial and state history support a power to issue a legislative subpoena for private, nonofficial documents.

C

Given that Congress has no exact precursor in England or colonial America, founding-era congressional practice is especially informative about the scope of implied legislative powers. Thus, it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents. Although respondents could not identify the first such legislative subpoena at oral argument, Tr. of Oral Arg. 56, Congress began issuing them by the end of the 1830s. However, the practice remained controversial in Congress and this Court throughout the first century of the Republic.

1

In an attempt to establish the power of Congress to issue legislative subpoenas, the Committees point to an investigation of Government affairs and an investigation under one of Congress' enumerated privileges. Both precedents are materially different from the subpoenas here.

In 1792, the House authorized a Committee to investigate a failed military expedition led by General Arthur St. Clair. 3 Hinds' Precedents of the House of Representatives of the United States § 1725, pp. 79–80 (1907) (Hinds). The Committee was "empowered to call for such persons, papers and records as may be necessary to assist their inquiries." *Ibid.* But the Committee never subpoenaed private, nonofficial documents, which is telling. Whereas a subpoena for Government documents does not implicate concerns about property rights or the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," a subpoena for private, nonofficial documents raises those questions. Thus, the power to subpoena private documents, which the Committee did not exercise, is a far greater power and much less likely to be implied in Congress' legislative powers.

In 1832, the House investigated Representative Samuel Houston for assaulting Representative William Stanberry. Stanberry had accused Houston of collusion with Secretary of War John Eaton in connection with a bid for a Government contract, and the House initiated an investigation into the truthfulness of Stanberry's accusation. 8 Cong. Deb. 2550, 3022–3023 (1832). The House subpoenaed witnesses to testify, and one of them brought official correspondence between the Secretary of War and the President. H. R. Rep. No. 502, 22d Cong., 1st Sess. 64, 66–67 (1832). But official documents are obviously different

from nonofficial documents. Moreover, the subpoenas were issued pursuant to the House's enumerated privilege of punishing its own Members, Art. I, § 5, not as part of its legislative powers. Because these subpoenas were not issued pursuant to a legislative power, they do not aid the Committees' case.

2

As late as 1827, a majority of the House declined to authorize the Committee on Manufactures to subpoena documents, amid concerns that it was unprecedented. During the debate over the resolution, one opponent remarked that "[t]here is no instance under this Government, within my recollection, where this power has been given for the mere purpose of enabling a committee of this House to adjust the details of an ordinary bill." 4 Cong. Deb. 865–866 (Rep. Strong); see also *id.*, at 862 (referring to "authority to bring any citizens of the United States ... whom they might choose to send for, and compel them to give answers to every inquiry which should be addressed to them" as "very extraordinary"). Another opponent stated that the Committee had requested a power that had "not heretofore been thought necessary to enable that Committee to acquire correct information." *Id.*, at 866 (Rep. Storrs). A third called it "not only novel and extraordinary, but wholly unnecessary." *Id.*, at 874 (Rep. Stewart); see also *id.*, at 884–885 (Rep. Wright). No supporter of the resolution offered a specific precedent for doing so, and the House ultimately authorized the Committee to send for persons only. *Id.*, at 889–890.

This debate is particularly significant because of the arguments made by both sides. Proponents made essentially the same arguments the Committees raise here—that the power to send for persons and papers was necessary to inform Congress as it legislated. *Id.*, at 871 (Rep. Livingston). Opponents argued that this power was not part of any legislative function. *Id.*, at 865–866 (Rep. Strong). They also argued that the House of Commons provided no precedent because Congress was a body of limited and enumerated powers. *Id.*, at 882 (Rep. Wood). And in the end, the opponents prevailed. Thus, through 1827, the idea that Congress had the implied power to issue subpoenas for private documents was considered "novel," "extraordinary," and "unnecessary." *Id.*, at 874.

3

By the end of the 1830s, Congress began issuing legislative subpoenas for private, nonofficial documents. See Eberling 123–126. Still, the power to demand information from private parties during legislative investigations remained controversial.

In 1832, the House authorized a Committee to "inspect the books, and to examine into the proceedings of the Bank of the United States, to report thereon, and to report whether the provisions of its charter have been violated or not." 8 Cong. Deb. 2160, 2164. The House gave the Committee "power to send for persons and papers." *Id.,* at 2160. The power to inspect the books of the Bank of the United States is not itself a clear example of a legislative subpoena for private, nonofficial documents, because the Bank was a federally chartered corporation and was required to allow Congress to inspect its books. App. to 8 Cong. Deb. 54 (1833). The investigation itself appears to have ranged more widely, however, leading Congressman John Quincy Adams to criticize

> "investigations which must necessarily implicate not only the president and directors of the bank, and their proceedings, but the rights, the interests, the fortunes, and the reputation of individuals not responsible for those proceedings, and whom neither the committee nor the House had the power to try, or even accuse before any other tribunal." *Ibid.*

Adams continued that such an investigation "bears all the exceptionable and odious properties of general warrants and domiciliary visits." *Ibid.* He also objected that the Committee's investigation of the Bank was

tantamount to punishment and thus was in tension with the constitutional prohibitions on "passing any bill of attainder [or] *ex post facto* law." *Id.,* at 60. Thus, even when Congress authorized a Committee to send for private papers, the constitutionality of doing so was questioned.

An 1859 Senate investigation, which the Court of Appeals cited as precedent, underscores that legislative subpoenas to private parties were a 19th-century innovation. Following abolitionist John Brown's raid at Harper's Ferry, Senate Democrats opened an investigation apparently designed to embarrass opponents of slavery. As part of the investigation, they called private individuals to testify. Senator Charles Sumner, a leading opponent of slavery, railed against the proceedings:

> "I know it is said that this power is necessary *in aid of legislation*. I deny the necessity. *Convenient*, at times, it may be; but *necessary*, *never*. We do not drag the members of the Cabinet or the President to testify before a committee *in aid of legislation*; but I say, without hesitation, they can claim no immunity which does not belong equally to the humblest citizen." Cong. Globe, 36th Cong., 1st Sess., 3007 (1860).

Sumner also addressed the matter of Parliament's powers, calling them "more or less inapplicable" because "[w]e live under a written Constitution, with certain specified powers; and all these are restrained by the tenth amendment." *Ibid.* For Sumner, as for Adams, the power to issue legislative subpoenas to private parties was a "dangerous absurdity" with no basis in the text or history of the Constitution. *Ibid.*[3]

[3] I note as well that Sumner expressly distinguished legislative subpoenas from subpoenas issued during "those inquiries which are in their nature preliminary to an impeachment." Cong. Globe, 36th Cong., 1st Sess., 3007 (1860).

4

When this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court in *Kilbourn v. Thompson*, 103 U.S. 168, held that the subpoena at issue was unlawful because it sought to investigate private conduct.

In 1876, the House created a special Committee to investigate the failure of a major bank, which caused the loss of federal funds and related to financial speculation in the District of Columbia. *Id.*, at 171. The Committee issued a subpoena to Kilbourn, an employee of the bank. *Id.,* at 172. When he refused to answer questions or produce documents, the House held him in contempt and arrested him. *Id.*, at 173. After his release, he sued the Speaker, several Committee members, and the Sergeant at Arms for damages.

The Court discussed the arguments for an "impli[ed]" power to issue legislative subpoenas. *Id.*, at 183. As the Court saw it, there were two arguments: "1, its exercise by the House of Commons of England ... and, 2d, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them." *Ibid.*

The Court rejected the first argument. It found "no difference of opinion as to [the] origin" of the House of Commons' subpoena power:

> "[T]he two Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests." *Id.,* at 184.

Even after the division of Parliament into two houses, "[t]o the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament." *Ibid.* By contrast, the House of Representatives "is in no sense a court, ... exercises no functions derived from its once having been a part of the highest court of the realm," and has no judicial functions beyond "punishing its own members and determining their election." *Id.*, at 189. The Court thus rejected the notion that Congress inherited from Parliament an implied power to issue legislative subpoenas.

The Court did not reach a conclusion on the second theory that a legislative subpoena power was necessary for Congress to carry out its legislative duties. But it observed that, based on British judicial opinions, not "much aid [is] given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation." *Ibid.* The Court referred to a collection of 18th- and 19th-century English decisions grounding the Parliamentary subpoena power in that body's judicial origins. *Id.,* at 184–189 (citing *Burdett* v. *Abbott*, 104 Eng. Rep. 501 (K. B. 1811); *Brass Crosby's Case*, 95 Eng. Rep. 1005 (C. P. 1771); *Stockdale* v. *Hansard*, 112 Eng. Rep. 1112 (K. B. 1839); and *Kielley* v. *Carson*, 13 Eng. Rep. 225 (P. C. 1841)). The Court placed particular emphasis on *Kielley*, in which the Privy Council held that the Legislative Assembly of Newfoundland lacked a power to punish for contempt. The Privy Council expressly stated that the House of Commons could punish for contempt

> " 'not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription ... which forms a part of the common law of the land, and according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many privileges, that of punishment for contempt being one.' " *Kilbourn*, 103 U.S. at 188–189.

This Court also noted that the Privy Council "discusse[d] at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decide[d] against the proposition." *Id.*, at 189. Although the Court did not have occasion to decide whether the legislative subpoena in that case was necessary to the exercise of Congress' legislative powers, its discussion strongly suggests the subpoena was unconstitutional.[4]

[4] According to Justice Miller's private letters, "a majority of the Court, including Miller himself, were of the opinion that neither House nor Senate had power to punish for contempt witnesses who refused to testify before investigating committees." T. Taylor, Grand Inquest: The Story of Congressional Investigations 49 (1955). Only Justice Miller's desire to " 'decid[e] no more than is necessary' " caused the Court to avoid the broader question. *Ibid.*

The Court instead based its decision on the fact that the subpoena at issue "ma[de] inquiry into the private affairs of the citizen." *Id.*, at 190. Such a power, the Court reasoned, "is judicial and not legislative," *id.*, at 193, and "no judicial power is vested in the Congress or either branch of it, save in the cases" of punishing Members, compelling Members' attendance, judging elections and qualifications, and impeachment and trial, *id.*, at 192–193. Notably, the Court found no indication that the House "avowed to impeach the secretary," or else "the whole aspect of the case would have been changed." *Id.*, at 193. Even though the Court decided *Kilbourn* narrowly, it clearly entertained substantial doubts about the constitutionality of legislative subpoenas for private documents.

D

Nearly half a century later, in *McGrain* v. *Daugherty*, the Court reached the question reserved in

Kilbourn—whether Congress has the power to issue legislative subpoenas. It rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. Although *McGrain* involved oral testimony, the Court has since extended this test to subpoenas for private documents. The Committees rely on *McGrain*, but this line of cases misunderstands both the original meaning of Article I and the historical practice underlying it.

1

Shortly before Attorney General Harry Daugherty resigned in 1924, the Senate opened an investigation into his " 'alleged failure' " to prosecute monopolists, the protagonists of the Teapot Dome scandal, and " 'many others.' " *McGrain*, 273 U.S. at 151. The investigating Committee issued subpoenas to Daugherty's brother, Mally, who refused to comply and was arrested in Ohio for failure to testify. *Id.*, at 152–154. Mally petitioned for a writ of habeas corpus, and the District Court discharged him, based largely on *Kilbourn*. *Ex parte Daugherty*, 299 F. 620 (S.D. Ohio 1924). The Deputy Sergeant at Arms who arrested Mally directly appealed to this Court, which reversed.

The Court concluded that, "[i]n actual legislative practice[,] power to secure needed information by [investigating and compelling testimony] has long been treated as an attribute of the power to legislate." *McGrain*, 273 U.S. at 161. The Court specifically found that "[i]t was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution" and that "a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures." *Ibid.* But the authority cited by the Court did not support that proposition. The Court cited the 1792 investigation of St. Clair's defeat, in which it appears no subpoena was issued, *supra,* at 2040 – 2041, and the 1859 Senate investigation of John Brown's raid on Harper's Ferry, which led to an impassioned debate. 273 U.S. at 162–164. Thus, for the reasons explained above, the examples relied on in *McGrain* are materially different from issuing a legislative subpoena for private, nonofficial documents. See *supra,* at 2040, 2041 – 2042.[5]

[5] The Court also cited decisions between 1858 and 1913 from state courts and a Canadian court, none of which are persuasive evidence about the original meaning of the U. S. Constitution. *McGrain*, 273 U.S. at 165–167.

The Court acknowledged *Kilbourn,* but erroneously distinguished its discussion regarding the constitutionality of legislative subpoenas as immaterial dicta. *McGrain*, *supra*, at 170–171 (quoting *Kilbourn*, *supra,* at 189). The Court concluded that "the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective." *McGrain*, *supra,* at 173.

Instead of relying on *Kilbourn*'s analysis, *McGrain* developed a test that rested heavily on functional considerations. The Court wrote that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." 273 U.S. at 175. Because "mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete," "some means of compulsion are essential to obtain what is needed." *Ibid.*

The Court thus concluded that Congress could issue legislative subpoenas, provided that "the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function." *Id.,* at 176. The Court has since applied this test to subpoenas for papers without any further analysis of the text or history of the Constitution. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504–505 (1975). The majority today modifies that test for cases involving the President, but it leaves the core of the power untouched. *Ante*, at 2035 – 2036.

2

The opinion in *McGrain* lacks any foundation in text or history with respect to subpoenas for private, nonofficial documents. It fails to recognize that Congress, unlike Parliament, is not supreme. It does not cite any specific precedent for issuing legislative subpoenas for private documents from 18th-century colonial or state practice. And it identifies no founding-era legislative subpoenas for private documents.[6]

[6] The Court further observed that Congress has long exercised the power to hold nonmembers in contempt for reasons other than failure to comply with a legislative subpoena. *McGrain*, *supra,* at 168–169. The earliest case it cited, *Anderson v. Dunn*, 6 Wheat. 204 (1821), relied on arguments about Congress' power of self-protection, *id.,* at 226–227. Members of Congress defending the use of contempt for these other purposes made similar arguments about self-protection. 5 Annals of Cong. 181–182 (1795) (Rep. W. Smith); *id.,* at 189 (Rep. I. Smith). But the failure to respond to a subpoena does not pose a fundamental threat to Congress' ability to exercise its powers.

Since *McGrain*, the Court has pared back Congress' authority to compel testimony and documents. It has held that certain convictions of witnesses for contempt of Congress violated the Fifth Amendment. See *Watkins v. United States*, 354 U.S. 178 (1957) (Due Process Clause); *Quinn v. United States*, 349 U.S. 155 (1955) (Self-Incrimination Clause); see also *Barenblatt v. United States*, 360 U.S. 109, 153–154 (1959) (Black, J., dissenting). It has also affirmed the reversal of a conviction on the ground that the Committee lacked authority to issue the subpoena. See *United States v. Rumely*, 345 U.S. 41 (1953). And today, it creates a new four-part, nonexhaustive test for cases involving the President. *Ante*, at 2035 – 2036. Rather than continue our trend of trying to compensate for *McGrain*, I would simply decline to apply it in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents.

III

If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment.[7]

[7] I express no view on whether there are any limitations on the impeachment power that would prevent the House from subpoenaing the documents at issue.

A

It is often acknowledged, "if only half-heartedly honored," that one of the motivating principles of our Constitution is the separation of powers. *Association of American Railroads*, 575 U.S. at 74 (THOMAS, J., concurring in judgment). The Framers recognized that there are three forms of governmental power: legislative, executive and judicial. The Framers also created three branches: Congress, the President, and the Judiciary. The three powers largely align with the three branches. To a limited extent, however, the Constitution contains "a partial intermixture of those departments for special purposes." The Federalist No. 66, p. 401 (C. Rossiter ed. 1961) (A. Hamilton). One of those special purposes is the system of checks and balances, and impeachment is one of those checks.

The Constitution grants the House "the sole Power of Impeachment," Art. I, § 2, cl. 5, and it specifies that the President may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4. The founding generation understood impeachment as a check on Presidential abuses. In response to charges that impeachment "confounds legislative and judiciary authorities in the same body," Alexander Hamilton called it "an essential check in the hands of [Congress] upon the encroachments of the executive." The Federalist No. 66, at 401–402. And, in the Virginia ratifying convention, James Madison

identified impeachment as a check on Presidential abuse of the treaty power. 10 Documentary History 1397.

B

The power to impeach includes a power to investigate and demand documents. Impeachments in the States often involved an investigation. In 1781, the Virginia Legislature began what Edmund Randolph called an "impeachment" of then-Governor Thomas Jefferson. P. Hoffer & N. Hull, Impeachment in America, 1635–1805, p. 85 (1984). This "most publicized and far-reaching impeachment inquiry for incompetence" included an " 'inquir[y] into the conduct of the executive of this state for the last two months.' " *Ibid.* The legislatures of New Jersey, *id.*, at 92, and Pennsylvania, *id.*, at 93–95, similarly investigated officials through impeachment proceedings.

Reinforcing this understanding, the founding generation repeatedly referred to impeachment as an "inquest." See 4 Debates on the Constitution 44 (J. Elliot ed. 1854) (speech of A. Maclaine) (referring to the House as "the grand inquest of the Union at large"); The Federalist No. 65, at 397 (Hamilton) (referring to the House as "a method of NATIONAL INQUEST"); 2 Records of the Federal Convention 154 (M. Farrand ed. 1911) (record from the Committee of Detail stating that "[t]he House of Representatives shall be the grand Inquest of this Nation; and all Impeachments shall be made by them"); see also Mass. Const., ch. 1, § 3, Art. VI (1780) (referring to the Massachusetts House of Representatives as "the Grand Inquest of this Commonwealth"). At the time, an "inquest" referred to an "[i]nquiry, especially that made by a Jury" or "the Jury itself." N. Bailey, Universal Etymological Dictionary (22d ed. 1770).

The Founders were also aware of the contemporaneous impeachment of Warren Hastings in England, in which the House of Commons heard witnesses before voting to impeach. P. Marshall, The Impeachment of Warren Hastings 40–41, 58 (1965). In the first impeachment under the new Constitution, Congressmen cited the Hastings impeachment as precedent for several points, including the power to take testimony before impeaching. 7 Annals of Cong. 456 (1797) (Rep. Rutledge); *id.*, at 459 (Rep. Sitgreaves); *id.,* at 460 (Rep. Gallatin).

Other evidence from the 1790s confirms that the power to investigate includes the power to demand documents. When the House of Representatives sought documents related to the Jay Treaty from President George Washington, he refused to provide them on the ground that the House had no legislative powers relating to the ratification of treaties. 5 Annals of Cong. 760–762 (1796). But he carefully noted that "[i]t does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed." *Id.,* at 760. In other words, he understood that the House can demand documents as part of its power to impeach.

This Court has also long recognized the power of the House to demand documents. Even as it questioned the power to issue legislative subpoenas, the Court in *Kilbourn* acknowledged the ability to "compel the attendance of witnesses, and their answer to proper questions" when "the question of ... impeachment is before either body acting in its appropriate sphere on that subject." 103 U.S. at 190.

I express no view today on the boundaries of the power to demand documents in connection with impeachment proceedings. But the power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands.

IV

For nearly two centuries, until the 1970s, Congress never attempted to subpoena documents to investigate wrongdoing by the President outside the context of impeachment. Congress investigated Presidents without opening impeachment proceedings. See, *e.g.,* 2 Hinds § 1596, at 1043–1045 (President James Buchanan). But it never issued a subpoena for private, nonofficial documents as part of those non-impeachment inquiries. Perhaps most strikingly, one proposed request for official documents from the President was amended after objection so that it " 'requested' " them rather than " 'direct[ing]' " the President to provide them. 3 *id.*, § 1895, at 193.

Insisting that the House proceed through its impeachment power is not a mere formality. Unlike contempt, which is governed by the rules of each chamber, impeachment and removal constitutionally requires a majority vote by the House and a two-thirds vote by the Senate. Art. I, § 2, cl. 5; § 3, cl. 6. In addition, Congress has long thought it necessary to provide certain procedural safeguards to officials facing impeachment and removal. See, *e.g.*, 3 Annals of Cong. 903 (1793) (Rep. W. Smith). Finally, initiating impeachment proceedings signals to the public the gravity of seeking the removal of a constitutional officer at the head of a coordinate branch. 940 F.3d 710, 776 (D.C. Cir. 2019) (Rao, J., dissenting).

* * *

Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it chooses to appropriate for itself. The majority's solution—a nonexhaustive four-factor test of uncertain origin—is better than nothing. But the power that Congress seeks to exercise here has even less basis in the Constitution than the majority supposes. I would reverse in full because the power to subpoena private, nonofficial documents is not a necessary implication of Congress' legislative powers. If Congress wishes to obtain these documents, it should proceed through the impeachment power. Accordingly, I respectfully dissent.

Justice ALITO, dissenting.

Justice THOMAS makes a valuable argument about the constitutionality of congressional subpoenas for a President's personal documents. In these cases, however, I would assume for the sake of argument that such subpoenas are not categorically barred. Nevertheless, legislative subpoenas for a President's personal documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas.

In many cases, disputes about subpoenas for Presidential documents are fought without judicial involvement. If Congress attempts to obtain such documents by subpoenaing a President directly, those two heavyweight institutions can use their considerable weapons to settle the matter. See *ante*, at 2030 – 2031 (opinion of the Court) ("Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute"). But when Congress issues such a subpoena to a third party, Congress must surely appreciate that the Judiciary may be pulled into the dispute, and Congress should not expect that the courts will allow the subpoena to be enforced without seriously examining its legitimacy.

Whenever such a subpoena comes before a court, Congress should be required to make more than a

perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing. See *ante*, at 2031 – 2032. The House can inquire about possible Presidential wrongdoing pursuant to its impeachment power, see *ante*, at 2045 – 2047 (THOMAS, J., dissenting), but the Committees do not defend these subpoenas as ancillary to that power.

Instead, they claim that the subpoenas were issued to gather information that is relevant to legislative issues, but there is disturbing evidence of an improper law enforcement purpose. See 940 F.3d 710, 767–771 (D.C. Cir. 2019) (Rao, J., dissenting). In addition, the sheer volume of documents sought calls out for explanation. See 943 F.3d 627, 676–681 (2d Cir. 2019) (Livingston, J., concurring in part and dissenting in part).

The Court recognizes that the decisions below did not give adequate consideration to separation of powers concerns. Therefore, after setting out a non-exhaustive list of considerations for the lower courts to take into account, *ante*, at 2035 – 2036, the Court vacates the judgments of the Courts of Appeals and sends the cases back for reconsideration. I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.

Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court's remand inadequate, I must respectfully dissent.

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, Petitioner

v.

Russell F. THOMAS, Executive Director of the Tennessee Alcoholic Beverage Commission, et al.

Decided June 26, 2019

Justice ALITO delivered the opinion of the Court.

The State of Tennessee imposes demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license to operate a liquor store. One provision precludes the renewal of a license unless the applicant has resided in the State for 10 consecutive years. Another provides that a corporation cannot obtain a license unless all of its stockholders are residents. The Court of Appeals for the Sixth Circuit struck down these provisions as blatant violations of the Commerce Clause, and neither petitioner—an association of Tennessee liquor retailers—nor the State itself defends them in this Court.

The Sixth Circuit also invalidated a provision requiring applicants for an initial license to have resided in the State for the prior two years, and petitioner does challenge that decision. But while this requirement is less extreme than the others that the Sixth Circuit found to be unconstitutional, we now hold that it also violates the Commerce Clause and is not shielded by § 2 of the Twenty-first Amendment. Section 2 was adopted as part of the scheme that ended prohibition on the national level. It gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable. But § 2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.

I

A

Tennessee, like many other States, requires alcoholic beverages distributed in the State to pass through a specified three-tiered system.[1] Acting through the Tennessee Alcoholic Beverage Commission (TABC), the State issues different types of licenses to producers, wholesalers, and retailers of alcoholic beverages. See Tenn. Code Ann. § 57–3–201 (2018). Producers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers. § 57–3–404. No person may lawfully participate in the sale of alcohol without the appropriate license. See, *e.g.*, § 57–3–406.

[1] For purposes of the provisions at issue here, Tennessee law defines "alcoholic beverage[s]" to include "spirits, liquor, wine, high alcohol content beer," and "any liquid product containing distilled alcohol capable of being consumed by a human being, manufactured or made with distilled alcohol, regardless of alcohol content," Tenn. Code Ann. § 57–3–101(a)(1)(A) (2018). This definition excludes "beer," which is defined and regulated by separate statutory provisions, see § 57–5–101(b).

Included in the Tennessee scheme are onerous durational-residency requirements for all persons and companies wishing to operate "retail package stores" that sell alcoholic beverages for off-premises consumption (hereinafter liquor stores). See § 57–3–204(a). To obtain an initial retail license, an individual must demonstrate that he or she has "been a bona fide resident" of the State for the previous two years. § 57–3–204(b)(2)(A). And to renew such a license—which Tennessee law requires after only one year of

operation—an individual must show continuous residency in the State for a period of 10 consecutive years. *Ibid.*

The rule for corporations is also extraordinarily restrictive. A corporation cannot get a retail license unless all of its officers, directors, and owners of capital stock satisfy the durational-residency requirements applicable to individuals. § 57–3–204(b)(3). In practice, this means that no corporation whose stock is publicly traded may operate a liquor store in the State.

In 2012, the Tennessee attorney general was asked whether the State's durational-residency requirements violate the Commerce Clause, and his answer was that the requirements constituted "trade restraints and barriers that impermissibly discriminate against interstate commerce." App. to Brief in Opposition 11a; see also *id.*, at 12a (citing *Jelovsek v. Bredesen*, 545 F.3d 431, 435 (6th Cir. 2008)). In light of that opinion, the TABC stopped enforcing the requirements against new applicants. See App. 51, ¶9; *id.*, at 76, ¶10.

The Tennessee General Assembly responded by amending the relevant laws to include a statement of legislative intent. Citing the alcohol content of the beverages sold in liquor stores, the Assembly found that protection of "the health, safety and welfare" of Tennesseans called for "a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control" of such outlets. § 57–3–204(b)(4).

After the amendments became law, the attorney general was again asked about the constitutionality of the durational-residency requirements, but his answer was the same as before. See App. to Brief in Opposition 13a. Consequently, the TABC continued its practice of nonenforcement.

B

In 2016, respondents Tennessee Fine Wines and Spirits, LLC dba Total Wine Spirits Beer & More (Total Wine) and Affluere Investments, Inc. dba Kimbrough Fine Wine & Spirits (Affluere) applied for licenses to own and operate liquor stores in Tennessee. At the time, neither Total Wine nor Affluere satisfied the durational-residency requirements. Total Wine was formed as a Tennessee limited liability company but is owned by residents of Maryland, Brief for Respondent Total Wine 10; App. 51, ¶4–5, and Affluere was owned and controlled by two individuals who, by the time their application was considered, had only recently moved to the State, see App. 11–12, 20, 22.

TABC staff recommended approval of the applications, but petitioner Tennessee Wine and Spirits Retailers Association (the Association)—a trade association of in-state liquor stores—threatened to sue the TABC if it granted them. *Id.*, at 15, ¶17. The TABC's executive director (a respondent here) filed a declaratory judgment action in state court to settle the question of the residency requirements' constitutionality. *Id.*, at 17.

The case was removed to the United States District Court for the Middle District of Tennessee, and that court, relying on our decision in *Granholm v. Heald*, 544 U.S. 460 (2005), concluded that the requirements are unconstitutional. *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 259 F.Supp.3d 785, 797 (M.D. Tenn. 2017). The State declined to appeal, and Total Wine and Affluere were issued licenses.

The Association, however, took the case to the Court of Appeals for the Sixth Circuit, where a divided panel affirmed. See *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608 (6th Cir. 2018). All three judges acknowledged that the Tennessee residency requirements facially discriminate against out-of-state economic interests. See *id.,* at 624; *id.,* at 634 (Sutton, J., concurring in part and dissenting in

part). And all three also agreed that neither the 10-year residency requirement for license renewals nor the 100-percent-resident shareholder requirement is constitutional under this Court's Twenty-first Amendment and dormant Commerce Clause precedents. See *id.,* at 625–626; *id.,* at 635 (opinion of Sutton, J.).

The panel divided, however, over the constitutionality of the 2-year residency requirement for individuals seeking initial retail licenses, as well as the provision applying those requirements to officers and directors of corporate applicants. Applying standard dormant Commerce Clause scrutiny, the majority struck down the challenged restrictions, reasoning that they facially discriminate against interstate commerce and that the interests they are claimed to further can be adequately served through reasonable, nondiscriminatory alternatives. *Id.*, at 623–626. The dissent disagreed, reading § 2 of the Twenty-first Amendment to grant States " 'virtually' limitless" authority to regulate the in-state distribution of alcohol, the only exception being for laws that "serve no purpose besides 'economic protectionism.' " *Id.*, at 633 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)). Applying that highly deferential standard, the dissent would have upheld the 2-year residency requirement, as well as the provision applying that requirement to all officers and directors of corporate applicants. The dissent argued that these provisions help to promote the State's interests in "responsible consumption" of alcohol and "orderly liquor markets." 883 F.3d at 633.

The Association filed a petition for a writ of certiorari challenging the decision on the 2-year residency requirement for initial licenses. Tennessee declined to seek certiorari but filed a letter with the Court expressing agreement with the Association's position.[2] We granted certiorari, 585 U. S. ——(2018), in light of the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents. See 883 F. 3d at 616 (collecting cases).

[2] See Letter from H. Slatery III, Tenn. Atty. Gen., to S. Harris, Clerk of Court (Nov. 13, 2018).

II

A

The Court of Appeals held that Tennessee's 2-year residency requirement violates the Commerce Clause, which provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. ——, —— (2015), we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. See, *e.g.*, *ibid.; Philadelphia v. New* Jersey, 437 U.S. 617, 623–624 (1978); *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. (12 How.) 299, 318–319 (1852); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

This interpretation, generally known as "the dormant Commerce Clause," has a long and complicated history. Its roots go back as far as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had "great force." *Id.*, at 209. His successor disagreed, see *License Cases*, 46 U.S. (5 How.) 504, 578–579 (1847) (Taney, C. J.), but by the latter half of the 19th century the dormant Commerce Clause was firmly established, see, *e.g.*, *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279–280 (1873), and it played an important role in the economic history of our Nation. See Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 U. Chi. L. Rev. 1089, 1107 (2000).

In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. See, *e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–620 (1997) (THOMAS, J., dissenting); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 259–265 (1987) (Scalia, J., concurring in part and dissenting in part); cf. *post*, at 2477 – 2478 (GORSUCH, J., dissenting) (deeming doctrine "peculiar"). But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.

That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very life-blood of the nation." M. Farrand, The Framing of the Constitution of the United States 7 (1913). The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787.[3] At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, see Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 470–471 (1941), and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In The Federalist No. 7, Hamilton argued that state protectionism could lead to conflict among the States, see The Federalist No. 7, pp. 62–63 (C. Rossiter ed. 1961), and in No. 11, he touted the benefits of a free national market, *id*., at 88–89. In The Federalist No. 42, Madison sounded a similar theme. *Id*., at 267–268.

[3] See, *e.g.*, R. Beeman, Plain, Honest Men: The Making of the American Constitution 18–20 (2009); D. Stewart, The Summer of 1787: The Men Who Invented the Constitution 9–10 (2007); M. Farrand, The Framing of the Constitution of the United States 7–10 (1913).

In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job. The only other provisions that the Framers might have thought would fill that role, at least in part, are the Import-Export Clause, Art. I, § 10, cl. 2, which generally prohibits a State from "lay[ing] any Imposts or Duties on Imports or Exports," and the Privileges and Immunities Clause, Art. IV, § 2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." But the Import-Export Clause was long ago held to refer only to international trade. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136–137 (1869). And the Privileges and Immunities Clause has been interpreted not to protect corporations, *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981) (citing *Hemphill v. Orloff*, 277 U.S. 537, 548–550 (1928)), and may not guard against certain discrimination scrutinized under the dormant Commerce Clause, see Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine, 88 Minn. L. Rev. 384, 393–397 (2003). So if we accept the Court's established interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism.[4]

[4] Before *Woodruff*, there was authority suggesting that the Import-Export Clause applied to trade between States. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827) (Marshall, C. J.); *Almy v. California*, 65 U.S. (24 How.) 169 (1861). And more recently *Woodruff* has been questioned. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 624–636 (1997) (THOMAS, J., dissenting). But one way or the other, it would grossly distort the Constitution to hold that it provides no protection against

> a broad swath of state protectionist measures. Even at the time of the adoption of the Constitution, it would have been asking a lot to require that Congress pass a law striking down every protectionist measure that a State or unit of local government chose to enact. Cf. Friedman & Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1898–1903 (2011); 3 The Records of the Federal Convention of 1787, p. 549 (M. Farrand ed. 1911) (the Virginia Plan's proposal of a congressional negative was "justly abandoned, as, apart from other objections, it was not practicable among so many States, increasing in number, and enacting, each of them, so many laws").

It is not surprising, then, that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence. In *Guy v. Baltimore*, 100 U.S. 434, 440 (1880), for example, the Court wrote that state protectionist measures, "if maintained by this court, would ultimately bring our commerce to that 'oppressed and degraded state,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and the national government instituted." More recently, we observed that our dormant Commerce Clause cases reflect a " 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " *Granholm*, 544 U.S. at 472 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979)).

In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.

B

Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to " 'advanc[e] a legitimate local purpose.' " *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). See also, *e.g.*, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of* Ore., 511 U.S. 93, 100–101 (1994); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a commodity other than alcohol. See 883 F.3d at 626. Instead, their arguments are based on § 2 of the Twenty-first Amendment, to which we will now turn.

III

A

Section 2 of the Twenty-first Amendment provides as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading § 2 to prohibit the transportation or importation of alcoholic beverages in violation of *any* state law[5] would lead to absurd results that the provision cannot

have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, see, *e.g.*, *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); A. Scalia & B. Garner, Reading Law 327–328 (2012); 1A N. Singer & J. Singer, Sutherland on Statutory Construction § 23:9 (7th ed. 2009), such a reading of § 2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause. Similarly, if a state law prohibited the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue, the First Amendment would provide no protection. If a State imposed a duty on the importation of foreign wine or spirits, the Import-Export Clause would have to give way. If a state law retroactively made it a crime to have bought or sold imported alcohol under specified conditions, the *Ex Post Facto* Clause would provide no barrier to conviction. The list goes on.

[5] As we will explain, § 2 followed the wording of the 1913 Webb-Kenyon Act, ch. 90, 37 Stat. 699, see *Craig v. Boren*, 429 U.S. 190, 205–206 (1976), and, given this Court's case law at the time, it went without saying that the only state laws that Congress could protect from constitutional challenge were those that represented the valid exercise of the police power, which was not understood to authorize purely protectionist measures with no bona fide relation to public health or safety. See *infra*, at 2463 – 2464, 2466 – 2467.

Despite the ostensibly broad text of § 2, no one now contends that the provision must be interpreted in this way. Instead, we have held that § 2 must be viewed as one part of a unified constitutional scheme. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–332 (1964); cf. Scalia & Garner, *supra*, at 167–169, 180–182. In attempting to understand how § 2 and other constitutional provisions work together, we have looked to history for guidance, and history has taught us that the thrust of § 2 is to "constitutionaliz[e]" the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 206 (1976). We therefore examine that history.

B

Throughout the 19th century, social problems attributed to alcohol use prompted waves of state regulation, and these measures were often challenged as violations of various provisions of the Federal Constitution.

One wave of state regulation occurred during the first half of the century. The country's early years were a time of notoriously hard drinking, see D. Okrent, Last Call: The Rise and Fall of Prohibition 7 (2010),[6] and the problems that this engendered prompted States to enact a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws. See Byse, Alcoholic Beverage Control Before Repeal, 7 Law & Contemp. Prob. 544, 546–551 (1940).

[6] Between 1780 and 1830, Americans consumed "more alcohol, on an individual basis, than at any other time in the history of the nation," with per capita consumption double that of the modern era. R. Mendelson, From Demon to Darling: A Legal History of Wine in America 11 (2009).

Three States' alcohol licensing laws came before this Court in 1847 in the *License Cases*, 46 U.S. (5 How.) 504. The principal claim in those cases was similar to the one now before us; licensing laws enacted in three States were challenged under the Commerce Clause. The Court unanimously rejected those claims, but six Justices authored opinions; no opinion commanded a majority; and the general status of dormant

Commerce Clause claims was left uncertain. See 5 C. Swisher, The Taney Period, 1836–64, History of the Supreme Court of the United States 373–374 (1974).

Following the Civil War, the Court considered a steady stream of alcohol-regulation cases. The postwar period saw a great proliferation of saloons,[7] and myriad social problems were attributed to this development. In response, many States passed laws restricting the sale of alcohol. By 1891, six States had banned alcohol production and sale completely. R. Hamm, Shaping the Eighteenth Amendment 25 (1995) (Hamm).

[7] By 1872, about 100,000 had sprung up across the country, and by the end of the century, that number had climbed to almost 300,000. *Id.*, at 31. This increase has been linked to the introduction of the English "tied-house" system. Under the tied-house system, an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that producer's products and to meet set sales requirements. *Ibid.*; T. Pegram, Battling Demon Rum: The Struggle for a Dry America, 1800–1933, p. 95 (1998). To meet those requirements, saloonkeepers often encouraged irresponsible drinking. *Id.*, at 97. The three-tiered distribution model was adopted by States at least in large part to preclude this system. See *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 187 (CA2 2009).

During this period, state laws regulating the alcohol trade were unsuccessfully challenged in this Court on a variety of constitutional grounds. See, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878) (Contracts Clause); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment). In those decisions, the Court staunchly affirmed the "right of the States," in exercising their "police power," to "protect the health, morals, and safety of their people," but the Court also cautioned that this objective could be pursued only "by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States." *Mugler*, 123 U.S. at 659. For that reason, the Court continued, "mere pretences" could not sustain a law regulating alcohol; rather, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.*, at 661.

Dormant Commerce Clause challenges also reached the Court. States that banned the production and sale of alcohol within their borders found that these laws did not stop residents from consuming alcohol shipped in from other States. To curb that traffic, States passed laws regulating or prohibiting the importation of alcohol, and these enactments were quickly challenged.

By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce. See *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). Dormant Commerce Clause cases from that era "advanced two distinct principles," an understanding of which is critical to gauging the States' pre-Prohibition power to regulate alcohol. *Granholm*, 544 U.S. at 476.

First, the Court held that the Commerce Clause prevented States from discriminating "against the citizens and products of other States," *Walling v. Michigan*, 116 U.S. 446, 460 (1886). See also *Scott v. Donald*, 165 U.S. 58 (1897); *Tiernan v. Rinker*, 102 U.S. 123 (1880). Applying that rule, the *Walling* Court struck down a discriminatory state fee that applied only to those in the business of selling imported alcohol. 116 U.S. at 454, 458. Similarly, in *Scott*, the Court invalidated a law that gave an "unjust preference [to] the products

of the enacting State as against similar products of the other States." 165 U.S. at 101. The Court did not question the States' use of the police power to regulate the alcohol trade but stressed that such regulation must have a "*bona fide*" relation to protecting " 'the public health, the public morals or the public safety,' " *id.,* at 91 (quoting *Mugler*, *supra,* at 661), and could not encroach upon Congress's "power to regulate commerce among the several States," *Walling*, *supra,* at 458.

Second, the Court "held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce." *Granholm*, 544 U.S. at 477. At the time of these decisions, the "original-package doctrine" defined the outer limits of Congress's authority to regulate interstate commerce. *Ibid.* See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Under that doctrine, "goods shipped in interstate commerce were immune from state regulation while in their original package," because at that point they had not yet been comingled with the mass of domestic property subject to state jurisdiction. *Granholm*, 544 U.S. at 477; see *id.,* at 477–478 (citing *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 444–445 (1898)). Applying this doctrine to state alcohol laws, the Court struck down an Iowa statute that required importers to obtain special certificates, *Bowman*, *supra*, as well as another Iowa law that, with limited exceptions, banned the importation of liquor, *Leisy*, *supra*.

These decisions left dry States "in a bind." *Granholm*, *supra*, at 478. See Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 174 (1916), 288 (1917) (noting "practical nullification of state laws" by original-package decisions). States could ban the production and sale of alcohol within their borders, but those bans "were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package." *Granholm, supra*, at 478. In effect, the Court's interpretation of the dormant Commerce Clause conferred favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws. Representatives of those States and temperance advocates thus turned to Congress, which passed two laws to solve the problem.

The first of these was the Wilson Act, enacted in 1890. Ch. 728, 26 Stat. 313, 27 U.S.C. § 121. Named for Senator James F. Wilson of Iowa, whose home State's laws had fallen in *Bowman* and *Leisy*, the Wilson Act aimed to obviate the problem presented by the "original-package" rule. Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue, cf. *Bowman*, *supra,* at 485; *Leisy*, *supra,* at 123–124, and the strategy of those who favored the Wilson Act was for Congress to eliminate the problem that had surfaced in *Bowman* and *Leisy* by regulating the interstate shipment of alcohol, see Hamm 77–80; Rogers, *supra*, at 194–195. During the late 19th century and early 20th century, Congress enacted laws that entirely prohibited the transportation of certain goods and persons across state lines, and some but not all of these measures were held to be valid exercises of the commerce power. See *Lottery Case*, 188 U.S. 321 (1903) (upholding law prohibiting interstate shipment of lottery tickets); *Hoke v. United States*, 227 U.S. 308 (1913) (sustaining Mann Act prohibition on bringing women across state lines for prostitution); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down provision banning interstate shipment of goods produced by child labor).

Unlike these laws, the Wilson Act did not attempt to ban all interstate shipment of alcohol. Its goal was more modest: to leave it up to each State to decide whether to admit alcohol. Its critical provision specified that all alcoholic beverages "transported into any State or Territory" were subject "upon arrival" to the same restrictions imposed by the State "in the exercise of its police powers" over alcohol produced in the State.[8] Thus, the Wilson Act mandated equal treatment for alcohol produced within and outside a State, not favorable treatment for local products. See *Granholm, supra*, at 479 (discussing *Scott*, 165 U.S.

at 100–101). And the only state laws that it attempted to shield were those enacted by a State "in the exercise of its police powers," which, as we have seen, applied only to bona fide health and safety measures. See, *e.g.*, *id.*, at 91 (citing *Mugler*, 123 U.S. at 661).

[8] The provision read as follows:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Ch. 728, 26 Stat. 313, 27 U.S.C. § 121.

Despite Congress's clear aim, the Wilson Act failed to relieve the dry States' predicament. In *Rhodes v. Iowa*, 170 U.S. 412 (1898), and *Vance* v. *W. A. Vandercook Co.*, *supra*, the Court read the Act's reference to the "arrival" of alcohol in a State to mean delivery to the consignee, not arrival within the State's borders. *Granholm*, 544 U.S. at 480. The upshot was that residents of dry States could continue to order and receive imported alcohol. *Ibid.* See also Hamm 178. In 1913, Congress tried to patch this hole by passing the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. § 122.

The aim of the Webb-Kenyon Act was to give each State a measure of regulatory authority over the importation of alcohol, but this created a drafting problem. There were those who thought that a federal law giving the States this authority would amount to an unconstitutional delegation of Congress's legislative power over interstate commerce.[9] So the Act was framed not as a measure conferring power on the States but as one prohibiting conduct that violated state law. The Act provided that the shipment of alcohol into a State for use in any manner, "either in the original package or otherwise," "in violation of any law of such State," was prohibited.[10] This formulation is significant for present purposes because it would provide a model for § 2 of the Twenty-first Amendment.

[9] That was the position expressed in an opinion issued by Attorney General Wickersham, 30 Op. Atty. Gen. 88 (1913), and President Taft's veto, which Congress overrode, was based on exactly this ground. 49 Cong. Rec. 4291 (1913) (Veto Message of the President).

[10] The Act provided:

> "That the shipment or transportation ... of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State ... into any other State ... which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State ... is hereby prohibited." 37 Stat. 699–700.

The Webb-Kenyon Act attempted to fix the hole in the Wilson Act and thus to "eliminate the regulatory advantage ... afforded imported liquor," *Granholm*, *supra*, at 482; see also *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 324 (1917), but its wording, unlike the Wilson Act's, did not explicitly mandate equal treatment for imported and domestically produced alcohol. And it referred to "*any* law of such State," 37 Stat. 700 (emphasis added), whereas the Wilson Act referred to "the laws of such State or Territory *enacted in the exercise of its police powers*." 26 Stat. 313 (emphasis added). But despite these differences, *Granholm* held, over a strenuous dissent, 544 U.S. at 505–514 (opinion of THOMAS, J.), that the Webb-Kenyon Act did not purport to authorize States to enact protectionist measures.

There is good reason for this holding. As we have noted, the Court's pre-Webb-Kenyon Act decisions upholding state liquor laws against challenges based on constitutional provisions other than the Commerce Clause had cautioned that protectionist laws disguised as exercises of the police power would not escape scrutiny. See *supra,* at 2463 – 2464.[11] The Webb-Kenyon Act, by regulating commerce, could obviate dormant Commerce Clause problems, but it could not override the limitations imposed by these other constitutional provisions and the traditional understanding regarding the bounds of the States' inherent police powers. Therefore the Wilson Act's reference to laws "enacted in the exercise of [a State's] police powers," 26 Stat. 313, merely restated what this Court had already found to be a constitutional necessity, and consequently, there was no need to include such language in the Webb-Kenyon Act. Even without limiting language like that in the Wilson Act, the shelter given by the Webb-Kenyon Act applied only where "the States treated in-state and out-of-state liquor on the same terms." *Granholm*, *supra*, at 481.[12]

[11] This principle was also invoked in dormant Commerce Clause cases involving other products. See, *e.g.*, *Minnesota v. Barber*, 136 U.S. 313, 319, 323 (1890); *Railroad Co.* v. *Husen*, 95 U.S. 465, 472 (1878).

[12] Lower court decisions issued between the enactment of the Webb-Kenyon Act and the ratification of the Eighteenth Amendment interpreted the Act this way. See *Evansville Brewing Assn. v. Excise Comm'n of Jefferson Cty.*, Ala., 225 F. 204 (N.D. Ala. 1915); *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652 (1915); *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402 (1916); *Charleston & W. C. R. Co. v. Gosnell*, 106 S.C. 84, 90 S.E. 264 (1916) (Hydrick, J., concurring); *Monumental Brewing Co. v. Whitlock*, 111 S.C. 198, 97 S.E. 56 (1918). See also *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34, 39–40 (WD Wash. 1936); Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-first Amendment, 21 Cornell L. Q. 504, 509 (1936).

Following passage of the Webb-Kenyon Act, temperance advocates began the final push for nationwide Prohibition, and with the ratification of the Eighteenth Amendment in 1919, their goal was achieved. The manufacture, sale, transportation, and importation of alcoholic beverages anywhere in the country were prohibited.

IV

A

By 1933, support for Prohibition had substantially diminished but not vanished completely. Thirty-eight state conventions eventually ratified the Twenty-first Amendment, but 10 States either rejected or took no action on the Amendment. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment and thus ended nationwide Prohibition, but § 2, the provision at issue here, gave each State the option of banning alcohol if its citizens so chose.

As we have previously noted, the text of § 2 "closely follow[ed]" the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning. *Craig*, 429 U.S. at 205–206. The decision to follow that unusual formulation is especially revealing since the drafters of § 2, unlike those who framed the Webb-Kenyon Act, had no need to worry that a more straightforward wording might trigger a constitutional challenge. Accordingly, we have inferred that § 2 was meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition. *Id.,* at 206. See also *Granholm*, *supra,* at 484. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as

police-power regulations. See *supra*, at 2463 – 2464. See also, *e.g.*, *Railroad Co.* v. *Husen*, 95 U.S. 465, 472 (1878) (a State "may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce").

This understanding is supported by the debates on the Amendment in Congress[13] and the state ratifying conventions. The records of the state conventions provide no evidence that § 2 was understood to give States the power to enact protectionist laws,[14] "a privilege [the States] had not enjoyed at any earlier time." *Granholm*, *supra*, at 485.

[13] See, *e.g.*, 76 Cong. Rec. 4172 (1933) (statement of Sen. Borah) (§ 2 of Twenty-first Amendment would "incorporat[e] [Webb-Kenyon] permanently in the Constitution of the United States"); *id.*, at 4168 (statement of Sen. Fess) ("[T]he second section of the joint resolution ... is designed to permit the Federal authority to assist the States that want to be dry to remain dry"); *id.*, at 4518 (statement of Rep. Robinson) ("Section 2 attempts to protect dry states").

[14] See Nielson, No More "Cherry-Picking": The Real History of the 21st Amendment's § 2, 28 Harv. J. L. & Pub. Pol'y 281, 286, n. 21 (2004). See generally E. Brown, Ratification of the Twenty-first Amendment to the Constitution of the United States; State Convention Records and Laws (1938).

B

Although our later cases have recognized that § 2 cannot be given an interpretation that overrides all previously adopted constitutional provisions, the Court's earliest cases interpreting § 2 seemed to feint in that direction. In 1936, the Court found that § 2's text was "clear" and saw no need to consider whether history supported a more modest interpretation, *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63–64 (1936)—an approach even the dissent rejects, see *infra*, at 2469, n. 16; *post*, at 2477.[15] The Court read § 2 as granting each State plenary "power to forbid all importations which do not comply with the conditions which it prescribes," *Young's Market*, *supra*, at 62; see also *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138–139 (1939), including laws that discriminated against out-of-state products. See, *e.g., Young's Market, supra*, at 62; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939). The Court went so far as to assume that the Fourteenth Amendment imposed no barrier to state legislation in the field of alcohol regulation. See *Young's Market*, *supra,* at 64 ("A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth").

[15] The dissent characterizes the Court as a "committee of nine" that has "stray[ed] from the text" of the Twenty-first Amendment and "impose[d] [its] own free-trade rules" on the States. *Post,* at 2480 – 2481, 2484 (opinion of J. GORSUCH). This is empty rhetoric. The dissent itself strays from a blinkered reading of the Amendment. The dissent interprets § 2 of the Amendment to mean more than it literally says, arguing that § 2 covers the residency requirements at issue even though they are not tied in any way to what the Amendment actually addresses, namely, "the transportation or importation" of alcohol across state lines. See *post,* at 2477, n. 1. And the dissent agrees that § 2 cannot be read as broadly as one might think if its language were read in isolation and not as part of an integrated constitutional scheme. See *post,* at 2477. The dissent asserts that § 2 does not abrogate all previously adopted constitutional provisions, just the dormant Commerce Clause. But the dissent does not say whether it thinks § 2 allows the States to adopt alcohol regulations that serve no conceivable purpose other than protectionism. Even the dissent below did not go that far. See n. 18, *infra*. If § 2 gives the States *carte blanche* to engage in protectionism, we suppose that Tennessee could restrict licenses to persons who can show that their lineal ancestors have lived in the State since 1796 when the State entered the Union. Does the dissent really think that this is what § 2 was meant to permit?

With subsequent cases, however, the Court saw that § 2 cannot be read that way, and it therefore

scrutinized state alcohol laws for compliance with many constitutional provisions. See, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig* v. *Boren*, *supra* (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

The Court also held that § 2 does not entirely supersede Congress's power to regulate commerce. Instead, after evaluating competing federal and state interests, the Court has ruled against state alcohol laws that conflicted with federal regulation of the export of alcohol, *Hostetter*, 377 U.S. at 333–334, federal antitrust law, *Midcal Aluminum,* 445 U.S. at 110–111, 113–114; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346–347, 350–351 (1987), and federal regulation of the airwaves, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713, 716 (1984).

As for the dormant Commerce Clause, the developments leading to the adoption of the Twenty-first Amendment have convinced us that the aim of § 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes. See *Granholm*, *supra,* at 486–487; *Bacchus*, 468 U.S. at 276.

C

Although some Justices have argued that § 2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine,[16] the Court's modern § 2 precedents have repeatedly rejected that view. We have examined whether state alcohol laws that burden interstate commerce serve a State's legitimate § 2 interests. And protectionism, we have stressed, is not such an interest. *Ibid.*

[16] See, *e.g., Granholm v. Heald*, 544 U.S. 460, 497–498 (2005) (THOMAS, J., dissenting); *Healy v. Beer Institute*, 491 U.S. 324, 349 (1989) (Rehnquist, C. J., dissenting); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352–353 (1987) (O'Connor, J., dissenting); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 281–282 (1984) (Stevens, J., dissenting).
The dissent rehashes this debate, see *post*, at 2478 – 2481, 2483 – 2484, asserting that the Webb-Kenyon Act, and thus § 2, were "understood" to repudiate not only the original-package cases, but also the antidiscrimination rule articulated in cases including *Scott v. Donald*, 165 U.S. 58 (1897). But this Court's modern § 2 decisions—not simply the lower court decisions at which the dissent takes aim, see *post*, at 2479, n. 3—establish that those enactments, though no doubt aimed at granting States additional "discretion to calibrate alcohol regulations to local preferences," *post*, at 2477, did not exempt States from "the nondiscrimination principle of the Commerce Clause." *Granholm*, *supra*, at 487.

Applying that principle, we have invalidated state alcohol laws aimed at giving a competitive advantage to in-state businesses. The Court's decision in *Bacchus* "provides a particularly telling example." *Granholm*, *supra*, at 487. There, the Court was confronted with a tax exemption that favored certain in-state alcohol producers. In defending the law, the State argued that even if the discriminatory exemption violated "ordinary Commerce Clause principles, it [was] saved by the Twenty-first Amendment." *Bacchus*, 468 U.S. at 274. We rejected that argument and held instead that the relevant question was "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [discriminatory] exemption ... to outweigh the Commerce Clause principles that would otherwise be offended." *Id.,* at 275. Ultimately, we held that § 2 did not save the disputed tax because it clearly aimed " 'to promote a local industry' " rather than "to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id.,* at 276.

The same went for the state law in *Healy v. Beer Institute*, 491 U.S. 324 (1989), which required out-of-state shippers of beer to affirm that their wholesale price for products sold in Connecticut was no higher than the prices they charged to wholesalers in bordering States. Connecticut argued that the "Twenty-first Amendment sanction[ed]" this law "regardless of its effect on interstate commerce," *id.*, at 341, but we held that the law violated the Commerce Clause, noting that it "discriminate[d] against brewers and shippers of beer engaged in interstate commerce" without justification "by a valid factor unrelated to economic protectionism," *id.*, at 340–341.[17]

[17] Justice Scalia, for his part, thought the "statute's invalidity [was] fully established by its facial discrimination against interstate commerce"—discrimination that in his view "eliminate[d] the immunity afforded by the Twenty-first Amendment." *Healy*, *supra*, at 344 (opinion concurring in part and concurring in judgment) (citing *Bacchus*, *supra*, at 275–276).

Most recently, in *Granholm*, we struck down a set of discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors. After surveying the history of § 2, we affirmed that "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." 544 U.S. at 488. We therefore examined whether the challenged laws were reasonably necessary to protect the States' asserted interests in policing underage drinking and facilitating tax collection. *Id.*, at 489–493. Concluding that the answer to that question was no, we invalidated the laws as inconsistent with the dormant Commerce Clause's nondiscrimination principle. *Id.,* at 492–493.

To summarize, the Court has acknowledged that § 2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize. *Id.*, at 487.

D

The Association resists this reading. Although it concedes (as it must under *Granholm*) that § 2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*, the Association presses the argument, echoed by the dissent, that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction.[18]

[18] The Association's argument is more extreme than that of the dissent below, which recognized that in-state distribution laws that "serve no purpose besides 'economic protectionism' " remain subject to dormant Commerce Clause scrutiny. *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608, 633 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part) (quoting *Bacchus*, *supra*, at 276).

1

The Association's argument encounters a problem at the outset. The argument concedes that § 2 does not shield state laws that discriminate against interstate commerce with respect to the very activity that the provision explicitly addresses—the importation of alcohol. But at the same time, the Association claims that § 2 protects something that § 2's text, if read literally, does not cover—laws restricting the licensing of domestic retail alcohol stores. That reading is implausible. Surely if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers.

The Association and the dissent point out that *Granholm* repeatedly spoke of discrimination against out-of-state products and producers, but there is an obvious explanation: The state laws at issue in *Granholm* discriminated against out-of-state producers. See 883 F.3d at 621. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or

producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all " 'out-of-state economic *interests*,' " *Granholm*, 544 U.S. at 472 (emphasis added), and noted that the direct-shipment laws in question "contradict[ed]" dormant Commerce Clause principles because they "deprive[d] *citizens* of their right to have access to the markets of other States on equal terms." *Id.,* at 473 (emphasis added). *Granholm* also described its analysis as consistent with the rule set forth in *Bacchus*, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* that " '[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic *interests* over out-of-state *interests*, we have generally struck down the statute without further inquiry.' " *Granholm*, *supra*, at 487 (quoting *Brown-Forman*, *supra*, at 579; emphasis added).

The Association counters that even if the *Granholm* Court did not explicitly limit its holding to products and producers, the Court implicitly did so when it rejected the argument that its analysis would call into question the constitutionality of state laws setting up three-tiered alcohol distribution systems. See *Granholm*, *supra,* at 488–489. This argument, which the dissent also advances, see *post*, at 2482 – 2483, reads far too much into *Granholm*'s discussion of the three-tiered model. Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme. At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners. See, *e.g.,* Brief for State of Illinois et al. as *Amici Curiae* 24–25, 27 (identifying States that have either "dispos[ed] with the durational aspect of the [residency] requirement" or "d[o] not regulate the residency of the applicant corporation or partnership"). Other three-tiered schemes differ in other ways. See, *e.g., id.,* at 24–28 (noting variations); FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 7–9 (July 2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (as last visited June 24, 2019) (same). Because we agree with the dissent that, under § 2, States "remai[n] free to pursue" their legitimate interests in regulating the health and safety risks posed by the alcohol trade, *post*, at 2482 – 2483, each variation must be judged based on its own features.

2

In support of the argument that the Tennessee scheme is constitutional, the Association and its *amici* claim that discriminatory distribution laws, including in-state presence and residency requirements, long predate Prohibition and were adopted by many States following ratification of the Twenty-first Amendment.[19] Indeed, the Association notes that the 2-year durational-residency requirement now before us dates back to 1939 and is consistent with durational-residency regimes adopted by several other States around the same time.[20] According to the Association, that history confirms that § 2 was intended to broadly exempt all in-state distribution laws from dormant Commerce Clause scrutiny. The dissent relies heavily on this same argument.

[19] See *Granholm*, 544 U.S. at 518, and n. 6 (THOMAS, J., dissenting) (licensing schemes adopted by three-tier States following ratification of Twenty-first Amendment discriminated "by requiring in-state residency or physical presence as a condition of obtaining licenses") (collecting statutes); Brief for Petitioner 33–34 (collecting residency-requirement statutes). See also Brief for State of Illinois et al. as *Amici Curiae* 7–8 (referencing 19th-century state statutes that required "retailers to reside in-state or to maintain an in-state presence").

[20] See 1939 Tenn. Pub. Acts, ch. 49, §§ 5–8; Brief for Petitioner 34 (collecting durational-residency requirement statutes); Brief for State of Illinois et al. as *Amici Curiae* 24 (same).

This argument fails for several reasons. Insofar as it relies on state laws enacted shortly after the ratification of the Twenty-first Amendment and this Court's early decisions interpreting it, the Association and the dissent's argument does not take into account the overly expansive interpretation of § 2 that took hold for a time in the immediate aftermath of its adoption. See *supra,* at 2468 – 2469. Thus, some state laws adopted soon after the ratification of the Twenty-first Amendment may have been based on an understanding of § 2 that can no longer be defended. It is telling that an argument similar to the one now made by the Association would have dictated a contrary result in *Granholm*, since state laws disfavoring imported products were passed during this same period. See, *e.g.*, *Young's Market Co.*, 299 U.S. at 62 (discriminatory license fee on imported beer); *Mahoney*, 304 U.S. at 403 (prohibition on import of certain liquors); *Indianapolis Brewing Co.*, 305 U.S. at 394 (same). But our later cases have rejected this interpretation of § 2. See *Granholm*, *supra*, at 487.

Insofar as the Association's argument is based on state laws adopted prior to Prohibition, it infers too much from the existence of laws that were never tested in this Court. Had they been tested here, there is no reason to conclude that they would have been sustained. During that time, the Court repeatedly invalidated, on dormant Commerce Clause grounds, a variety of state and local efforts to license those engaged in interstate business,[21] and as noted, pre-Prohibition decisions of this Court and the lower courts held that state alcohol laws that discriminated against interstate commerce were unconstitutional, see *supra*, at 2464.

[21] *Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 335–336 (1925) (license tax on solicitors of orders to be filled by an out-of-state manufacturer); *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 197–201 (1925) (license requirement for the purchase of grain shipped immediately out of the State); *Stewart v. Michigan*, 232 U.S. 665, 669–670 (1914) (state law requiring a license for catalog sales); *Crenshaw v. Arkansas*, 227 U.S. 389, 399–401 (1913) (state law requiring a foreign corporation actively soliciting sales in State to obtain a license); *Dozier v. Alabama*, 218 U.S. 124, 127–128 (1910) (licensing requirement on the solicitors of photography enlargement services and frames manufactured out of State); *International Textbook Co. v. Pigg*, 217 U.S. 91, 107–111 (1910) (state law requiring an out-of-state educational publishing company to pay a license fee for exchanging materials with customers); *Rearick v. Pennsylvania*, 203 U.S. 507, 510–511 (1906) (ordinance requiring license to solicit orders for out-of-state goods); *Norfolk & Western R. Co. v. Sims*, 191 U.S. 441, 449–451 (1903) (state licensing requirement on express company acting as agent for importer of a sewing machine); *Brennan v. Titusville*, 153 U.S. 289, 306–308 (1894) (licensing tax on persons engaged in trade on behalf of firms doing business outside the State); *Corson v. Maryland*, 120 U.S. 502, 505–506 (1887) (state licensing requirement as applied to agent of out-of-state firm soliciting sales); *Welton v. Missouri*, 91 U.S. 275, 278, 282–283 (1876) (state law requiring payment of license tax by sellers of out-of-state goods).

Contrary to the Association's contention, not all of these decisions involved discrimination against alcohol produced out of State or alcohol importers. The tax in *Walling*, for example, applied to those engaged in the business of selling imported alcohol within the State. 116 U.S. 446. And in concluding that the law violated the Commerce Clause, the Court affirmed that, without the dormant Commerce Clause, there would "be no security against conflicting regulations of different states, each discriminating in favor of its own products *and citizens*, and against the products *and citizens* of other states." *Id.,* at 456–457 (emphasis added). So too, the dispensary law in *Scott* was challenged on the ground that it discriminated "against products of other States *and against citizens* of other States." 165 U.S. at 62 (emphasis added); see also *id.,* at 94.

Nor have States historically enjoyed absolute authority to police alcohol within their borders. As discussed earlier, far from granting the States plenary authority to adopt domestic regulations, the Court's police-power precedents required an examination of the actual purpose and effect of a challenged law. See, *e.g.*, *Mugler*, 123 U.S. at 661 ("It does not at all follow that every statute enacted ostensibly for the promotion" of "the public health, the public morals, or the public safety" is "to be accepted as a legitimate exertion of the police powers of the State"); see also *Husen*, 95 U.S. at 472; *Welton v. Missouri*, 91 U.S. 275, 278 (1876). Cf. H. Black, Intoxicating Liquors § 30, p. 40 (1892) (stating that certain 19th-century licensing and residency requirements were valid because their "purpose and effect" was to prevent "the unlawful selling of liquors, *and not to discriminate against citizens of other states*" (emphasis added)).

For these reasons, we reject the Association's overly broad understanding of § 2. That provision allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

V

Having concluded that § 2 does not confer limitless authority to regulate the alcohol trade, we now apply the § 2 analysis dictated by the provision's history and our precedents.

If we viewed Tennessee's durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist. Indeed, two of those requirements—the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded corporations—are so plainly based on unalloyed protectionism that neither the Association nor the State is willing to come to their defense. The provision that the Association and the State seek to preserve—the 2-year residency requirement for initial license applicants—forms part of that scheme. But we assume that it can be severed from its companion provisions, see 883 F.3d at 626–628, and we therefore analyze that provision on its own.

Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State. Cf. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–392 (1994); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39 (1980). But because of § 2, we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U.S. at 490, 492. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. During the course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," 259 F.Supp.3d at 796, and the State itself mounted no independent defense. As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory

alternatives would be insufficient to further those interests. *Granholm*, *supra*, at 490; see 883 F.3d at 625–626.

In this Court, the Association has attempted to defend the 2-year residency requirement on public health and safety grounds, but this argument is implausible on its face. The Association claims that the requirement ensures that retailers are "amenable to the direct process of state courts," Brief for Petitioner 48 (internal quotation marks omitted), but the Association does not explain why this objective could not easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts. See *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994).

Similarly unpersuasive is the Association's claim that the 2-year requirement gives the State a better opportunity to determine an applicant's fitness to sell alcohol and guards against "undesirable nonresidents" moving into the State for the purpose of operating a liquor store. Brief for Petitioner 10 (internal quotation marks omitted). The State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. Tennessee law already calls for criminal background checks on all applicants, see Tenn. Code Ann. § 57–3–208, and more searching checks could be demanded if necessary. As the Fifth Circuit observed in a similar case, "[i]f [the State] desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the 'burden' of residing" in the State. *Cooper*, 11 F.3d at 554.

The 2-year residency requirement, in any event, poorly serves the goal of enabling the State to ensure that only law-abiding and responsible applicants receive licenses. As the Tennessee attorney general explained, if a nonresident moves to the State with the intention of applying for a license once the 2-year period ends, the TABC will not necessarily have any inkling of the future applicant's intentions until that individual applies for a license, and consequently, the TABC will have no reason to begin an investigation until the 2-year period has ended. App. to Brief in Opposition 17a. And all that the 2-year requirement demands is residency. A prospective applicant is not obligated during that time "to be educated about liquor sales, submit to inspections, or report to the State." *Ibid*.

The 2-year residency requirement is not needed to enable the State to maintain oversight over liquor store operators. In *Granholm*, it was argued that the prohibition on the shipment of wine from out-of-state sources was justified because the State could not adequately monitor the activities of nonresident entities. Citing "improvements in technology," we found that argument insufficient. 544 U.S. at 492. See also *Cooper*, *supra*, at 554 ("In this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options"). In this case, the argument is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. See § 57–3–104. Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license. *Granholm*, 544 U.S. at 490. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. *Ibid.*

In addition to citing the State's interest in regulatory control, the Association argues that the 2-year residency requirement would promote responsible alcohol consumption. According to the Association, the requirement makes it more likely that retailers will be familiar with the communities served by their stores, and this, it is suggested, will lead to responsible sales practices. Brief for Petitioner 48–49. The idea, it seems, is that a responsible neighborhood proprietor will counsel or cut off sales to patrons who are known to be abusing alcohol, who manifest the effects of alcohol abuse, or who perhaps appear to be

purchasing too much alcohol. No evidence has been offered that durational-residency requirements actually foster such sales practices, and in any event, the requirement now before us is very poorly designed to do so.

For one thing, it applies to those who hold a license, not to those who actually make sales. For another, it requires residence in the State, not in the community that a store serves. The Association cannot explain why a proprietor who lives in Bristol, Virginia, will be less knowledgeable about the needs of his neighbors right across the border in Bristol, Tennessee, than someone who lives 500 miles away in Memphis. And the rationale is further undermined by other features of Tennessee law, particularly the lack of durational-residency requirements for owners of bars and other establishments that sell alcohol for on-premises consumption. § 57–4–201.

Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices (an interest that we recognize as legitimate, contrary to the dissent's suggestion, *post*, at 2481, 2482 – 2483, 2483 – 2484), but there are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. Cf. § 57–3–208(c) (permitting local governments to "limit ... the number of licenses issued within their jurisdictions"); § 57–3–204(d)(7)(C) (imposing volume limits on certain sales of alcohol to patrons); Rules of TABC, ch. 0100–01, § 0100–01–.03(15) (2018) (same). The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community. Cf., *e.g.,* Tenn. Code Ann. § 57–3–221 (requiring managers of liquor stores to obtain permits, satisfy background checks, and undergo "alcohol awareness" training). And the State of course remains free to monitor the practices of retailers and to take action against those who violate the law.

Given all this, the Association has fallen far short of showing that the 2-year durational-residency requirement for license applicants is valid. Like the other discriminatory residency requirements that the Association is unwilling to defend, the predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition. We therefore hold that this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment.[22]

[22] Our analysis and conclusion apply as well to the provision requiring all officers and directors of corporate applicants to satisfy the 2-year residency requirement. See 883 F.3d at 623.

* * *

The judgment of the Court of Appeals for the Sixth Circuit is affirmed.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS joins, dissenting.

Alcohol occupies a complicated place in this country's history. Some of the founders were enthusiasts; Benjamin Franklin thought wine was "proof that God loves us." Letter from B. Franklin to A. Morellet (July 1779), in 7 Writings of Benjamin Franklin 437 (A. Smyth ed. 1907). Many in the Prohibition era were decidedly less enamored; they saw "liquor [a]s a lawlessness unto itself." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941) (Jackson, J., concurring in result). Over time, the people have adopted two separate

constitutional Amendments to adjust and then readjust alcohol's role in our society. But through it all, one thing has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms. In fact, States have enacted residency requirements for at least 150 years, and the Tennessee law at issue before us has stood since 1939. Today and for the first time, the Court claims to have discovered a duty and power to strike down laws like these as unconstitutional. Respectfully, I do not see it.

Start with the text of the Constitution. After the Nation's failed experiment with Prohibition, the people assembled in conventions in each State to adopt the Twenty-first Amendment. In § 1, they repealed the Eighteenth Amendment's nationwide prohibition on the sale of alcohol. But in § 2, they provided that "[t]he transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Amendment thus embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences. And under the terms of this compromise, Tennessee's law imposing a two-year residency requirement on those who seek to sell liquor within its jurisdiction would seem perfectly permissible.[1]

[1] The Court suggests that Tennessee's residency requirement may fall outside the terms of the Amendment because retailers may not be involved in the "transportation or importation" of liquor into the State. *Ante*, at 2470 – 2471. But the parties do not dispute that "transportation or importation" into the State is involved here. And understandably so: Unless the liquor stores intend to sell only Tennessee-made liquor (and no one so alleges), it is hard to see how transportation or importation would not be involved.

Of course, § 2 does not immunize state laws from *all* constitutional claims. Everyone agrees that state laws must still comply with, say, the First Amendment or the Equal Protection Clause. *Ante*, at 2462 – 2463. But the challenge before us isn't based on any constitutional provision like that. Instead, we are asked to decide whether Tennessee's residency requirement impermissibly discriminates against out-of-state residents and recent arrivals in violation of the "dormant Commerce Clause" doctrine. And that doctrine is a peculiar one. Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one. Under its banner, this Court has sometimes asserted the power to strike down state laws that discriminate against nonresidents on the ground that they usurp the authority to regulate interstate commerce that the Constitution assigns in Article I to Congress. But precisely because the Constitution assigns *Congress* the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434–436 (1946).

And that's exactly what happened here. In the Webb-Kenyon Act of 1913, Congress gave the States wide latitude to restrict the sale of alcohol within their borders. See 37 Stat. 699 (codified at 27 U.S.C. § 122). Not only is that law still on the books today, § 2 of the Twenty-first Amendment closely "followed the wording of the 1913 Webb-Kenyon Act." *Ante*, at 2462, n. 5. Accordingly, the people who adopted the Amendment naturally would have understood it to constitutionalize an "exception to the normal operation of the [dormant] Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 206 (1976). After all, what Congress can do by statute "surely the people may do ... through the process of amending our Constitution." *Granholm v. Heald*, 544 U.S. 460, 494 (2005) (Stevens, J., dissenting). So in this area, at least, we should not be in the business of imposing our own judge-made "dormant Commerce Clause" limitations on state powers.

What the relevant constitutional and statutory texts suggest, history confirms. Licensing requirements for the sale of liquor are older than the Nation itself. Byse, Alcoholic Beverage Control Before Repeal, 7 Law & Contemp. Prob. 544, 544–547 (1940). Colonial authorities generally allowed sales only by those who were deemed " 'fit and suitable' " and who agreed to post a bond conditioned upon compliance with local regulations. *Id.*, at 545. States started adopting residency requirements as early as 1834, when New Hampshire began requiring any person who sold liquor "in any quantity less than one gallon" to obtain a license "from the selectmen of the town or place where such person resides." *State v. Adams*, 6 N.H. 532, 533 (1834). In 1845, Missouri adopted a law nearly identical to the Tennessee statute now before us, requiring those seeking to sell liquor to have resided in the State for two years. Mo. Rev. Stat. app., p. 1099. In the decades that followed, several other States and Territories followed suit and enacted laws like Tennessee's.[2]

[2] See, *e.g.*, 1859 Neb. Terr. Laws p. 256; Iowa Code § 1575 (1860); 1875 Pa. Laws p. 42; N. Y. Rev. Stat. ch. 29, § 23 (1896); S. C. Code Ann. § 562 (1902); Minn. Stat. § 1529 (1905); R. I. Gen. Laws, ch. 123, § 2 (1909); 1911 Ala. Acts no. 259; Neb. Rev. Stat. § 3844 (1913); Ind. Code § 8323(e) (1914).

At the time these residency requirements were adopted they were widely understood to be constitutional, and courts generally upheld them against legal challenges. H. Black, Laws Regulating the Manufacture and Sale of Intoxicating Liquors § 30, pp. 39–40, and n. 33 (1892) (collecting cases). Indeed, in the mid-19th century this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause." *Craig*, 429 U.S. at 205 (citing the *License Cases*, 46 U.S. (5 How.) 504, 579 (1847)).

Things became more contentious only toward the end of the 19th century. By then, this Court had begun to take a more muscular approach to the dormant Commerce Clause and started using that implied doctrine to strike down state laws that restricted the sale of imported liquor. See *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). But this judicial activism did not go unnoticed, and in 1890 Congress responded by passing the Wilson Act. Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). That law sought to bolster the authority of States to regulate the distribution of liquor within their borders by providing that liquor shipped into a State would "upon arrival in such State... be subject to the operation and effect of the laws of such State ... to the same extent and in the same manner as though such [liquor] had been produced in such State."

Still, the Court did not seem to get the message. A second wave of dormant Commerce Clause attacks on state laws soon followed, and in the process they highlighted some of the Wilson Act's limitations. In *Scott v. Donald*, 165 U.S. 58 (1897), the Court addressed South Carolina's state monopoly system for the sale of liquor, which required state agents to favor domestic products and prohibited consumers from receiving out-of-state shipments for personal use. The Court held that this system unconstitutionally discriminated in favor of domestic products "as against similar products of the other States." *Id.*, at 101. Citing the text of the Wilson Act, including the phrase "to the same extent and in the same manner," the Court emphasized that the Act did not go so far as to authorize States to "discriminate injuriously against products of other States." *Id.*, at 100. Then, in *Rhodes v. Iowa*, 170 U.S. 412 (1898), the Court further curbed the States' authority to restrict liquor distribution by construing the Wilson Act's phrase "upon arrival in such State" to mean arrival at the purchaser's address, rather than arrival within the State's borders. *Id.*, at 421, 426; see also *Vance v. W. A. Vandercook Co.*, 170 U.S. 438 (1898).

Once more, however, Congress stepped in to repudiate this Court's decisions, this time in unmistakably sweeping language. In the Webb-Kenyon Act of 1913, Congress went so far as to "[take] the protection of interstate commerce *away*" from the distribution of liquor within a State's borders. *Clark Distilling Co. v.*

Western Maryland R. Co., 242 U.S. 311, 325 (1917) (emphasis added). The language Congress used could not have been plainer: The Act "prohibited" any "shipment or transportation" of alcoholic beverages "into any State" when they are "intended, by any person interested therein, to be received, possessed, sold, or in any manner used ... in violation of any law of such State." 27 U.S.C. § 122. Within a few years, the Court conceded the Webb-Kenyon Act's constitutionality, acknowledging along the way that the law was designed to—and did—"prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." *Clark Distilling*, 242 U.S. at 324.[3]

[3] The Court cites a few pre-Prohibition cases—from one federal district court and two state courts—that, it says, construed Webb-Kenyon to preserve a rule against discrimination. *Ante*, at 2467, n. 12. But these cases offer negligible support. True, two cases construed the Act's authorization of "any laws" as limited to "valid laws," a category from which these courts excluded laws discriminating against the products of other States. See *Evansville Brewing Assn. v. Excise Comm'n of Jefferson Cty.*, Ala., 225 F. 204, 208 (N.D. Ala. 1915); *Brennen v. Southern Express Co.*, 106 S.C. 102, 108–111, 90 S.E. 402, 404 (1916). But there is little reason to think courts would have considered residency requirements for liquor retailers "invalid," as those laws had generally been upheld prior to Webb-Kenyon. And at least one of the cited cases appears to support the opposite view: "[A]ll commands or prohibitions ancillary and reasonably related to the state's purpose to promote temperance ... cannot be thwarted or annulled on any idea that constitutional rights are thereby violated." *Southern Express Co. v. Whittle*, 194 Ala. 406, 436, 69 So. 652, 661 (1915). At any rate, a few scattered, thinly reasoned state and district court cases hardly settle anything.

This history bears special relevance because everyone agrees that, whatever other powers § 2 grants the States, at a minimum it " 'constitutionaliz[ed]' " the similarly worded Webb-Kenyon Act. *Ante*, at 2462, n. 5, 2467 – 2468. Nor can there be much doubt how most everyone understood the terms of the Act and the Amendment that embodied it. Because "centralized regulation did not work," the Twenty-first Amendment both ended nationwide prohibition in § 1 and authorized local control in § 2. Yablon, The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition, 13 Va. J. Soc. Pol'y & L. 552, 584 (2006). As a leading study noted at the time, "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced." R. Fosdick & A. Scott, Toward Liquor Control 10 (1933) (Fosdick & Scott). Ours is a vast and diverse Nation, and those who adopted the Amendment believed that what works for one State may not work for another. Consistent with this widespread public understanding of the Amendment's terms, at least 18 States adopted residency requirements for retailers within the first 15 years after its ratification.[4]

[4] *Granholm v. Heald*, 544 U.S. 460, 518, and n. 6 (2005) (THOMAS, J., dissenting) (collecting state statutes); Brief for Petitioner 33–34 (same). See also Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1148–1149, and n. 25 (1959). At least 10 States, including Tennessee, required a fixed period of residency of one year or more. Brief for Petitioner 34 (collecting statutes).

This Court's initial cases also reflected the same understanding of the Amendment's effect. Just a few years after ratification, a unanimous Court upheld discriminatory state liquor laws against a dormant Commerce Clause attack, explaining that "to construe the Amendment as saying, in effect: [the State] must let imported liquors compete with the domestic on equal terms ... would involve not a construction of the Amendment, but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). Other early cases reached similar conclusions. See, *e.g.*, *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) ("[D]iscrimination against imported liquor is permissible"); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) ("Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider," for "whatever its

character, the law is valid"). In short, this Court "recognized from the start" that the Twenty-first Amendment allowed the States to regulate alcohol " 'unfettered by the Commerce Clause.' " *Granholm*, 544 U.S. at 517 (THOMAS, J., dissenting).[5]

[5] The Court discounts the compelling evidence of postratification practice because, it suggests, States may have been relying on the Court's expansive interpretation of § 2 in *State Bd. of Education of Cal. v. Young's Market*, 299 U.S. 59 (1936), rather than their own independent understanding of the Amendment. *Ante*, at 2472. But most of the residency requirements were enacted *before* that November 1936 decision. Although many of the statutes were *codified* after *Young's Market*, a large majority were *enacted* earlier. Compare, *e.g.*, Wyo. Stat. Ann. § 53–204 (1945); Idaho Code Ann. § 18–130 (1940); R. I. Gen. Laws ch. 163 § 4 (1938); N. J. Rev. Stat. § 33:1–25 (1937); with 1935 Wy. Sess. Laws ch. 87; 1935 Idaho Sess. Laws ch. 103; 1934 R. I. Laws p. 52; 1933 N. J. Laws p. 1193.

Straying from the text, state practice, and early precedent, and leaning instead on the Amendment's famously sparse legislative history, the Court says it can find no evidence that § 2 was *intended* to authorize "protectionist" state laws. *Ante*, at 2467 – 2468, 2468 n. 15. But even there plenty of evidence can be found that those who ratified the Amendment wanted the States to be able to regulate the sale of liquor free of judicial meddling under the dormant Commerce Clause—and there is no evidence they wanted judges to have the power to decide that state laws restricted competition "too much."[6] After all, both before Prohibition and after repeal, robust competition in the liquor industry was far from universally considered an unalloyed good; lower prices enabled higher consumption and invited social problems along the way. T. Pegram, Battling Demon Rum 94–96 (1998); Fosdick & Scott 43–44, 81. The point of § 2 was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol. Reduced competition and increased prices were foreseeable consequences of allowing such unfettered state regulation, but they were consequences the people willingly accepted with the compromise of the Twenty-first Amendment.[7]

[6] See, *e.g.*, 76 Cong. Rec. 4143 (1933) (statement of Sen. Blaine) ("The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors"); *id*., at 4225 (statement of Sen. Swanson) ("[I]t is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported"); Ratification of the Twenty-first Amendment to the Constitution of the United States: State Convention Records and Laws 50 (E. Brown ed. 1938) (statement of President Robinson of the Connecticut convention) ("[F]undamentally our fight has been ... for the return to the peoples of the several states of their constitutional right to govern themselves in their internal affairs"); *id*., at 174 (statement of Del. Simmons to the Kentucky convention) ("The regulation of the sale of liquor is a state concern"); *id*., at 247 (statement of Mme. Chairman Gaylord of the Missouri convention) ("We have never been in favor of a National Regulation to take the place of the 18th Amendment .... We believe that each state should work out sane and sensible liquor control measures, responsive to the sentiment of the people of each state"); *id*., at 322 (statement of Gov. White of Ohio) ("[T]he control of intoxicating liquors presents a problem of first magnitude," and "[t]he solution of the problem will be returned to the several states").

[7] The majority worries that giving full effect to § 2 might allow a State to pass a statute restricting licenses to persons whose ancestors have resided in the State for 200 years. *Ante*, at 2468, n. 15. But under parts of the Constitution that § 2 left intact, such as the Equal Protection and Due Process clauses, any state law must bear a rational relationship to a legitimate state interest. Besides and understandably, the evidence before us suggests that the people who ratified § 2 weren't as concerned with States adopting fanciful laws like the majority's as they were with eliminating a very real threat—that judges would continue to use the dormant Commerce Clause to meddle with state regulatory authority.

That leaves only our modern precedent to consider—and even here the initial returns support Tennessee.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), for example, this Court addressed a New York law that interfered with the federally regulated sale of alcohol to passengers departing from an airport, which the passengers would not receive until they arrived at their "foreign destination." *Id.*, at 325. Emphasizing that "ultimate delivery and use" was "in a foreign country," this Court held that the Twenty-first Amendment did not permit New York to "prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.*, at 333–334. But at the same time, the Court took pains to reassure everyone that the States' core authority to "restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders" remained "unquestioned" and "unconfined" by the dormant Commerce Clause. *Id.*, at 330; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (describing "the core § 2 power" as a State's authority "directly to regulate the sale or use of liquor within its borders").

Consistent with that understanding, this Court in *Heublein*, *Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275 (1972), unanimously upheld a South Carolina law permitting producers to transfer liquor to in-state wholesalers only through "resident representative[s]." *Id.*, at 277. Because the requirement was an "appropriate element in the State's system" of regulating the sale of alcohol " 'within its borders,' " this Court held that the State could enforce it " 'unconfined by traditional Commerce Clause limitations.' " *Id.*, at 283 (quoting *Hostetter*, 377 U.S. at 330To be sure, in even later cases the Court declined to uphold state laws that, in substantial effect, regulated the sale of alcohol in *other* states. *E.g.*, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); *Healy v. Beer Institute*, 491 U.S. 324 (1989). But those decisions merely tracked the text of the Twenty-first Amendment, which grants States the power to regulate liquor only "for delivery or use *therein*."

The truth is, things have begun to shift only in very recent years. Bending to the same impulses that moved it at the beginning of the 20th century, this Court has lately begun flexing its dormant Commerce Clause muscles once more to strike down state laws even in core areas of state authority under § 2. So, for example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court considered Hawaii's tax exemption for certain liquor products manufactured in-state. As the Court described it, Hawaii's sole "purpose" in adopting its tax exemption was " 'to promote a local industry,' " not "to promote temperance." *Id.*, at 276. And a narrow majority considered this fact fatal because the law, in its judgment, did not implicate "any clear concern" of the Amendment—even though the Amendment was adopted to insulate state regulation from judicial charges of unduly interfering with interstate commerce. *Ibid.*

Yet, even under as bold a decision as *Bacchus*, Tennessee's residency requirement should survive—and easily. A residency requirement may not be the only way to ensure retailers will be amenable to state regulatory oversight, but it is surely one reasonable way of accomplishing that admittedly legitimate goal.[8] Residency also increases the odds that retailers will have a stake in the communities they serve.[9] As Judge Sutton observed in the proceedings below, this same commonsense rationale may explain why Congress requires federal court of appeals judges to live within their circuits, 28 U.S.C. § 44(c), and district court judges to live within their districts, § 134(b). *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608, 633 (6th Cir. 2018). Surely, Tennessee cannot be faulted for sharing a similar view. Of course, Tennessee's residency requirement reduces competition in the liquor market by excluding nonresidents or recent arrivals. But even that effect might serve a legitimate state purpose by increasing the price of alcohol and thus moderating its use, an objective States have always remained free to pursue under the bargain of the Twenty-first Amendment.[10]

[8] See *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799, 811 (CA8 2013) (Colloton, J.); *Hinebaugh v. James*, 119 W.Va. 162, 164 (1937); *Welsh v. State*, 126 Ind. 71, ——, 25

N.E. 883, 885 (1890); Note, 72 Harv. L. Rev., at 1148.

[9] See *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608, 633 (2018) (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part); *Southern Wine & Spirits*, 731 F.3d at 811.

[10] See Brief for U. S. Alcohol Policy Alliance et al. as *Amici Curiae* 5–24; Lawson, The Future of The Three-Tiered System as a Control of Marketing Alcoholic Beverages, in Social and Economic Control of Alcohol 32–34 (C. Jurkiewicz & M. Painter eds., 2008); 883 F.3d at 634 (opinion of Sutton, J.); cf. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (acknowledging a State's legitimate interest in "reducing alcohol consumption").

To defend its judgment today, the Court is thus left to try to wring support from our 2005 decision in *Granholm*. *Granholm* extended *Bacchus* and its reasoning to strike down on dormant Commerce Clause grounds a state law for disfavoring out-of-state wine producers, holding that "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*." 544 U.S. at 476 (emphasis added). But even this holding doesn't spell doom for Tennessee's retailer residency requirements. As even the Court today acknowledges, "*Granholm* repeatedly spoke of discrimination against out-of-state products and producers" and did not refer more generally to discrimination against nonresidents. *Ante*, at 2471.[11]

[11] See also *Granholm*, 544 U.S. at 486 ("States may not give a discriminatory preference to their own producers"); *id*., at 484–485 ("The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time").

To claim *Granholm*'s support, the majority is thus forced to characterize *Granholm*'s framing of the issue before it as purely incidental—the state laws at issue there happened to discriminate against out-of-state products, so the Court just happened to talk a lot about products. As the Court seems to read *Granholm*, then, it really meant to disapprove *any* discrimination against out-of-staters. But this badly misreads *Granholm*. The distinction between producers and other levels of the distribution system was integral to its reasoning and result—in fact, it was precisely how *Granholm* sought to reconcile its result with the longstanding tradition of state residency requirements. So yes, *Granholm* held that the Twenty-first Amendment does not protect laws that discriminate against out-of-state products, but it *also* expressly reaffirmed the " 'unquestionabl[e] legitima[cy]' " of state laws that require " 'all liquor sold for use in the State [to] be purchased from a licensed in-state wholesaler.' " 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *id.*, at 447 (Scalia, J., concurring in judgment)). And I would have thought that restatement of the law more than enough to resolve today's case.

Having now effectively abandoned *Granholm*'s distinction between products and their distribution and promising to subject both to dormant Commerce Clause scrutiny, it's hard not to wonder what's left of Webb-Kenyon and § 2. For its part, the Court assures us that it will still allow each State "leeway to enact the measures that *its citizens believe* are appropriate" to address public health and safety. *Ante*, at 2473 – 2474 (emphasis added). Yet the Court then proceeds to turn around and dismantle the longstanding judgment of the citizens of Tennessee on just these questions, dismissing them as "protectionist measures with no demonstrable connection" to public health and safety. *Ibid.* And it promises it will not sustain any state law whose protectionist "effect[s] ... predomina[te]." *Ante*, at 2474 – 2475.

What are lower courts supposed to make of this? How much public health and safety benefit must there be to overcome this Court's worries about protectionism "predominat[ing]"? Does reducing competition in the liquor market, raising prices, and thus reducing demand still count as a public health benefit, as many States have long supposed? And if residency requirements are problematic, what about simple

physical *presence* laws? After all, can't States "thoroughly investigate applicants" for liquor licenses without requiring them to have a brick-and-mortar store in the State? *Ante*, at 2475. The Court offers lower courts no more guidance than to proclaim delphically that "each variation must be judged based on its own features." *Ante*, at 2472.

As judges, we may be sorely tempted to "rationalize" the law and impose our own free-trade rules for all goods and services in interstate commerce. Certainly, that temptation seems to have proven nearly irresistible for this Court when it comes to alcohol. And as Justice Cardozo once observed, "an intellectual passion ... for symmetry of form and substance" is "an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class." B. Cardozo, The Nature of the Judicial Process 34 (1921). But real life is not always so tidy and satisfactory, and neither are the democratic compromises we are bound to respect as judges. Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for "cabbages and candlesticks" should not be applied to alcohol. *Carter v. Virginia*, 321 U.S. 131, 139 (1944) (Frankfurter, J., concurring). Under the terms of the compromise they hammered out, the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D. C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as "laborator[ies]" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), with "broad power to regulate liquor under § 2," *Granholm*, 544 U.S. at 493. If the people wish to alter this arrangement, that is their sovereign right. But until then, I would enforce the Twenty-first Amendment as they wrote and originally understood it.

Supreme Court of the United States

Loren J. PIKE, etc., Appellant,
v.
BRUCE CHURCH, INC.

Decided March 2, 1970.

Mr. Justice STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act.[1] A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must 'be packed in regular compact arrangement in closed standard containers approved by the supervisor * * *.'[2] Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional. A three-judge court was convened. 28 U.S.C. ss 2281, 2284. After first granting temporary relief, the court issued a permanent injunction upon the ground that the challenged order constituted an unlawful burden upon interstate commerce. This appeal followed. 28 U.S.C. s 1253. 396 U.S. 812.

[1] Ariz.Rev.Stat.Ann., Tit. 3, c. 3, Art. 4.

[2] Ariz.Rev.Stat.Ann. s 3—503, subsec. C. (Supp.1969).

The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company's newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use. The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality that those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoliage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes in the quantity involved can be so packed only in packing sheds, and because no such facilities were available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000. It was to prevent this unrecoverable loss that the District Court granted preliminary relief.[3]

[3] In view of the emergency situation presented, and the fact that only a narrow and specific application of the Act was challenged as unconstitutional, the court was fully justified in not abstaining from the exercise of its jurisdiction pending litigation in the state courts. Compare Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 with Reetz v. Bozanich, 397 U.S. 82.

After discovery proceedings, an agreed statement of facts was filed with the court. It contained a stipulation that the practical effect of the appellant's order would be to compel the company to build packing facilities in or near Parker, Arizona, that would take many months to construct and would cost approximately $200,000. After briefing and argument, the court issued a permanent injunction, finding that 'the order complained of constitutes an unlawful burden upon interstate commerce.'[4]

[4] The opinion of the District Court is unreported.

The appellant's threshold contention here is that even though the challenged order expressly forbids the interstate bulk shipment of the company's cantaloupes, it imposes no burden upon interstate commerce. If the Arizona Act is complied with, he argues, all that will be regulated will be the intrastate packing of goods destined for interstate commerce. Articles being made ready for interstate movement are not necessarily yet in interstate commerce, which, he says, begins only when the articles are delivered to the interstate shipper. In making this argument, the appellant relies on this Court's decisions in Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, and Chassaniol v. City of Greenwood, 291 U.S. 584. Both of those cases involved taxes imposed by Mississippi on a cotton warehouse and compress business located within that State. The taxes were non-discriminatory and were levied both on the warehoused cotton itself and on certain processes necessary to ready it for subsequent resale. The taxes were challenged as unlawful burdens on interstate commerce, since most of the taxed cotton was ultimately to be shipped to out-of-state buyers. The Court upheld the constitutionality of the Mississippi taxes. It is not entirely clear from the Court's opinions whether their rationale was that the taxes were imposed before interstate commerce had begun, or that the burden upon commerce was at the most indirect and remote.

But in any event, the decisions do not support the argument that the order in the present case does not affect interstate commerce. In the first place, those cases involved cotton that had come to rest in Mississippi and '(b)efore shipping orders (were) given, it (had) no ascertainable destination without the state.' 291 U.S., at 21. Here, by contrast, the perishable cantaloupes were destined to be shipped to an ascertainable location in California immediately upon harvest. Even more to the point, the taxes in Federal Compress and Chassaniol were imposed on goods and operations within the State, whereas the application of the statute at issue here would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there. If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such statutes have been consistently invalidated by this Court under the Commerce Clause. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1; Johnson v. Haydel, 278 U.S. 16; Toomer v. Witsell, 334 U.S. 385. See also Lemke v. Farmers Grain Co., 258 U.S. 50; Shafer v. Farmers Grain Co., 268 U.S. 189. Thus it is clear that the appellant's order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly

excessive in relation to the putative local benefits. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, e.g., Shafer v. Farmers Grain Co., supra.

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially misrepresent' the quality of the lot as a whole.[5] The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

[5] Ariz.Rev.Stat.Ann. s 3—481, subsecs. 7 and 8.

We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized,'[6] or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interest. Sligh v. Kirkwood, 237 U.S. 52, 61. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, Pacific States Box & Basket Co. v. White, 296 U.S. 176. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. Parker v. Brown, 317 U.S. 341. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.' Sligh v. Kirkwood, supra, 237 U.S., at 60; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511.

[6] Southern Pacific Co. v. Arizona, 325 U.S. 761, 796 (Douglas, J., dissenting).

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately $200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer.[7] The appellant's order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected good will of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged. As the appellant's brief puts the matter, 'It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona'.[8]

[7] California Agric. Code s 45691. The California Fruit, Nut and Vegetable Standardization Act, California Agric. Code, Division 17, is virtually identical to the Arizona Act. Each statute has the same primary purpose of preventing deceptive packs, and it is stipulated that the standard containers required for cantaloupes in the two States are exactly the same.

[8] Appellant's Brief, 43.

Although it is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1; Johnson v. Haydel, 278 U.S. 16; Toomer v. Witsell, 334 U.S. 385.

The appellant argues that the above cases are different because they involved statutes whose express or concealed purpose was to preserve or secure employment for the home State, while here the statute is a regulatory one and there is no hint of such a purpose. But in Toomer v. Witsell, supra, the Court indicated that such a burden upon interstate commerce is unconstitutional even in the absence of such a purpose. In Toomer the Court held invalid a South Carolina statute requiring that owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina must unload and pack their catch in that State before 'shipping or transporting it to another State.' What we said there applies to this case as well:

> 'There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.' 334 U.S., at 403—404.[9]

[9] Because of the State's recognized common-law property interest in its fish and wild game, Toomer presented an especially strong case for state control.

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The judgment is affirmed.

Supreme Court of the United States

ARIZONA, et al., Petitioners
v.
UNITED STATES.

Decided June 25, 2012.

Justice KENNEDY delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S.B. 1070, the version introduced in the State Senate. See also H.R. 2162, 49th Leg., 2d Reg. Sess. (2010) (amending S. 1070). Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Note following Ariz.Rev.Stat. Ann. § 11–1051 (West 2012). The law's provisions establish an official state policy of "attrition through enforcement." *Ibid.* The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law

I

The United States filed this suit against Arizona, seeking to enjoin S.B. 1070 as preempted. Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Ariz.Rev.Stat. Ann. § 13–1509 (West Supp.2011). Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as § 5(C). See § 13–2928(C). Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe ... has committed any public offense that makes the person removable from the United States." § 13–3883(A)(5). Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government. See § 11–1051(B) (West 2012).

The United States District Court for the District of Arizona issued a preliminary injunction preventing the four provisions at issue from taking effect. 703 F.Supp.2d 980, 1008 (D. Az. 2010). The Court of Appeals for the Ninth Circuit affirmed. 641 F.3d 339, 366 (3d Cir. 2011). It agreed that the United States had established a likelihood of success on its preemption claims. The Court of Appeals was unanimous in its conclusion that §§ 3 and 5(C) were likely preempted. Judge Bea dissented from the decision to uphold the preliminary injunction against §§ 2(B) and 6. This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status. 565 U.S. 1092 (2011).

II

A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll v. Moreno,* 458 U.S. 1, 10 (1982); see generally S. Legomsky & C. Rodríguez,

Immigration and Refugee Law and Policy 115–132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll, supra,* at 10 (citing *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 318 (1936)).

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. See, *e.g.,* Brief for United Mexican States as *Amici Curiae;* see also *Harisiades v. Shaughnessy,* 342 U.S. 580, 588–589 (1952). Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. See Brief for Madeleine K. Albright et al. as *Amici Curiae* 24–30.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung v. Freeman,* 92 U.S. 275, 279–280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States ... under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz,* 312 U.S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§ 1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* 8–13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See § 1229a(c)(4); see also, *e.g.,* §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state

may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Agencies in the Department of Homeland Security play a major role in enforcing the country's immigration laws. United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. See Dept. of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2010, p. 1 (2011). In 2010, CBP's Border Patrol apprehended almost half a million people. *Id.,* at 3. Immigration and Customs Enforcement (ICE), a second agency, "conducts criminal investigations involving the enforcement of immigration-related statutes." *Id.,* at 2. ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock. See App. 91. ICE officers are responsible "for the identification, apprehension, and removal of illegal aliens from the United States." Immigration Enforcement Actions, at 2. Hundreds of thousands of aliens are removed by the Federal Government every year. See *id.,* at 4 (reporting there were 387,242 removals, and 476,405 returns without a removal order, in 2010).

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Dept. of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 93 (2011) (Table 35). Unauthorized aliens who remain in the State constitute, by one estimate, almost 6% of the population. See J. Passel & D. Cohn, Pew Hispanic Center, U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid–Decade 3 (2010). And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime. See, *e.g.,* S. Camarota & J. Vaughan, Center for Immigration Studies, Immigration and Crime: Assessing a Conflicted Issue 16 (2009) (Table 3) (estimating that unauthorized aliens constitute 8.9% of the population and are responsible for 21.8% of the felonies in Maricopa County, which includes Phoenix).

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. Brief for Petitioners 6. Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." App. 170 (punctuation altered); see also Brief for Petitioners 5–6. The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.

III

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. See *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991); *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring).

From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. See *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372 (2000); *Gibbons v. Ogden,* 9 Wheat. 1, 210–211 (1824). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. See, *e.g., Chamber of Commerce of United States of America v. Whiting,* 563 U.S. 582, 592 (2011).

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. See *Gade v. National Solid Wastes Management Assn.,* 505 U.S. 88, 115 (1992) (Souter, J., dissenting). The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); see *English v. General Elec. Co.,* 496 U.S. 72, 79 (1990).

Second, state laws are preempted when they conflict with federal law. *Crosby, supra,* at 372. This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–143 (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines,* 312 U.S., at 67; see also *Crosby, supra,* at 373 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." *Rice, supra,* at 230; see *Wyeth v. Levine,* 555 U.S. 555, 565 (2009).

The four challenged provisions of the state law each must be examined under these preemption principles.

IV

A

Section 3

Section 3 of S.B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document ... in violation of 8 United States Code § 1304(e) or 1306(a)." Ariz.Rev.Stat. Ann. § 13–1509(A). In effect, § 3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. See Brief for United States 27, 31.

The Court discussed federal alien-registration requirements in *Hines, supra*. In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." *Id.,* at 70. The new federal law struck a careful balance. It punished an alien's willful failure to register but did not require aliens to carry identification cards. There were also limits on the sharing of registration records and fingerprints. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." *Id.,* at 74. Because this "complete scheme ... for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or

to "enforce additional or auxiliary regulations." *Id.,* at 66–67. As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program. See *id.,* at 59, 74.

The present regime of federal regulation is not identical to the statutory framework considered in *Hines,* but it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U.S.C. § 1304(e). Other aspects, however, have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Compare § 1302(a) with § 452(a) (1940 ed.). Detailed information is required, and any change of address has to be reported to the Federal Government. Compare §§ 1304(a), 1305(a) (2006 ed.) with §§ 455(a), 456 (1940 ed.). The statute continues to provide penalties for the willful failure to register. Compare § 1306(a) (2006 ed.) with § 457 (1940 ed.).

The framework enacted by Congress leads to the conclusion here, as it did in *Hines,* that the Federal Government has occupied the field of alien registration. See *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 419, n. 11 (2003) (characterizing *Hines* as a field preemption case); *Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956) (same); see also Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085, 2098–2099, 2107 (2000) (same). The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a " 'harmonious whole.' " *Hines, supra,* at 72. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. See *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 249 (1984).

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." *Wisconsin Dept. of Industry v. Gould Inc.,* 475 U.S. 282, 288–289 (1986). Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law. See *California v. Zook,* 336 U.S. 725, 730–731, 733 (1949); see also *In re Loney,* 134 U.S. 372, 375–376 (1890) (States may not impose their own punishment for perjury in federal courts).

Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Cf. *Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347–348 (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wisconsin Dept., supra,* at 288 (States may not impose their own punishment for repeat violations of the National Labor Relations Act). Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

There is a further intrusion upon the federal scheme. Even where federal authorities believe prosecution is appropriate, there is an inconsistency between § 3 and federal law with respect to penalties. Under federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine,

imprisonment, or a term of probation. See 8 U.S.C. § 1304(e) (2006 ed.); 18 U.S.C. § 3561. State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon). See Ariz.Rev.Stat. Ann. § 13–1509(D). This state framework of sanctions creates a conflict with the plan Congress put in place. See *Wisconsin Dept., supra,* at 286 ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity" (internal quotation marks omitted)).

These specific conflicts between state and federal law simply underscore the reason for field preemption. As it did in *Hines,* the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." 312 U.S., at 66–67. Section 3 is preempted by federal law.

B

Section 5(C)

Unlike § 3, which replicates federal statutory requirements, § 5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Ariz.Rev.Stat. Ann. § 13–2928(C). Violations can be punished by a $2,500 fine and incarceration for up to six months. See § 13–2928(F); see also §§ 13–707(A)(1) (West 2010); 13–802(A); 13–902(A)(5) (West Supp. 2011). The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 1971 Cal. Stats. ch. 1442, § 1(a). The law was upheld against a preemption challenge in *De Canas v. Bica,* 424 U.S. 351 (1976). *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.,* at 356. At that point, however, the Federal Government had expressed no more than "a peripheral concern with [the] employment of illegal entrants." *Id.,* at 360; see *Whiting,* 563 U.S., at 588.

Current federal law is substantially different from the regime that prevailed when *De Canas* was decided. Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. See §§ 1324a(a)(1)(B), (b); 8 CFR § 274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. See 8 U.S.C. §§ 1324a(e)(4), (f); 8 CFR § 274a.10.

This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.,* penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. See 8 U.S.C. §§ 1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See § 1227(a)(1)(C)(i); 8 CFR § 214.1(e). In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. See 18 U.S.C. § 1546(b).

Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct. See 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)–(G).

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by Commissioners 65–66 (1981); see § 4, 92 Stat. 907. Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. See Brief for Service Employees International Union et al. as *Amici Curiae* 9–12. But Congress rejected them. See, *e.g.,* 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. See, *e.g.,* Hearings before the Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3, pp. 919–920 (1972) (statement of Rep. Rodino, the eventual sponsor of IRCA in the House of Representatives).

IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. See 8 U.S.C. § 1324a(h)(2); *Whiting, supra,* at 587–588. But the existence of an "express preemption provisio[n] does *not* bar the ordinary working of conflict preemption principles" or impose a "special burden" that would make it more difficult to establish the preemption of laws falling outside the clause. *Geier v. American Honda Motor Co.,* 529 U.S. 861, 869–872 (2000); see *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002).

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines,* 312 U.S., at 67. Under § 5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. See *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action"). Section 5(C) is preempted by federal law.

C

Section 6

Section 6 of S.B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe ... [the person] has committed any public offense that makes [him] removable from the United States." Ariz.Rev.Stat. Ann. § 13–3883(A)(5). The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. See *INS v. Lopez–Mendoza,* 468 U.S. 1032, 1038 (1984). If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a "Notice to Appear." See 8 U.S.C. § 1229(a); 8 CFR § 239.1(a). The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. See 8 U.S.C. § 1229(a)(1). If an alien fails to appear, an *in absentia* order may direct removal. § 1229a(b)(5)(A).

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." § 1226(a); see Memorandum from John Morton, Director, ICE, to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (hereinafter 2011 ICE Memorandum) (describing factors informing this and related decisions). And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. See 8 CFR § 241.2(a)(1). In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law. See §§ 241.2(b), 287.5(e)(3). If no federal warrant has been issued, those officers have more limited authority. See 8 U.S.C. § 1357(a). They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." § 1357(a)(2).

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) who federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government. See § 1357(g)(1); see also § 1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens arriving off the coast of the United States"); § 1252c (authority to arrest in specific circumstance after consultation with the Federal Government); § 1324(c) (authority to arrest for bringing in and harboring certain aliens). Officers covered by these agreements are subject to the Attorney General's direction and supervision. § 1357(g)(3). There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. See *Padilla v. Kentucky,* 559 U.S. 356, 379–380 (2010) (ALITO, J., concurring in judgment). As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer. See § 1357(g)(2); cf. 8 CFR §§ 287.5(c) (arrest power contingent on training), 287.1(g) (defining the training).

By authorizing state officers to decide whether an alien should be detained for being removable, § 6

violates the principle that the removal process is entrusted to the discretion of the Federal Government. See, *e.g., Reno v. American–Arab Anti–Discrimination Comm.,* 525 U.S. 471, 483–484 (1999); see also Brief for Former INS Commissioners 8–13. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. See *Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances" (internal quotation marks omitted)); see also *Galvan v. Press,* 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress ..."); *Truax v. Raich,* 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government").

In defense of § 6, Arizona notes a federal statute permitting state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. The Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. See Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13–14 (2011), online at http://www.dhs.gov/files/resources/immigration.shtm (all Internet materials as visited June 21, 2012, and available in Clerk of Court's case file). State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody. See § 1357(d). But the unilateral state action to detain authorized by § 6 goes far beyond these measures, defeating any need for real cooperation.

Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress. See *Hines,* 312 U.S., at 67. Section 6 is preempted by federal law.

D

Section 2(B)

Section 2(B) of S.B. 1070 requires state officers to make a "reasonable attempt ... to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz.Rev.Stat. Ann. § 11–1051(B). The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Ibid.* The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin ... except to the extent permitted by the United States [and] Arizona Constitution[s]." *Ibid.* Third, the provision must be "implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and

respecting the privileges and immunities of United States citizens." § 11–1051(L).

The United States and its *amici* contend that, even with these limits, the State's verification requirements pose an obstacle to the framework Congress put in place. The first concern is the mandatory nature of the status checks. The second is the possibility of prolonged detention while the checks are being performed.

1

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See § 1373(c); see also § 1226(d)(1)(A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens). ICE's Law Enforcement Support Center operates "24 hours a day, seven days a week, 365 days a year" and provides, among other things, "immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies." ICE, Fact Sheet: Law Enforcement Support Center (May 29, 2012), online at http://www.ice.gov/news/library/factsheets/lesc.htm. LESC responded to more than 1 million requests for information in 2009 alone. App. 93.

The United States argues that making status verification mandatory interferes with the federal immigration scheme. It is true that § 2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. See Brief for United States 47–50. In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed. This might be the case, for example, when an alien is an elderly veteran with significant and longstanding ties to the community. See 2011 ICE Memorandum 4–5 (mentioning these factors as relevant).

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U.S.C. § 1357(g)(10)(A). A federal statute regulating the public benefits provided to qualified aliens in fact instructs that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." § 1644. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting,* 563 U.S., at 609–610 (rejecting argument that federal law preempted Arizona's requirement that employers determine whether employees were eligible to work through the federal E–Verify system where the Federal Government had encouraged its use).

2

Some who support the challenge to § 2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. See, *e.g.,* Brief for Former Arizona Attorney General Terry Goddard et al. as *Amici Curiae* 37, n. 49. Detaining individuals solely to verify their immigration status would raise constitutional concerns. See, *e.g., Arizona v. Johnson,* 555 U.S. 323, 333 (2009); *Illinois v. Caballes,* 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"). And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal

direction and supervision. Cf. Part IV–C, *supra* (concluding that Arizona may not authorize warrantless arrests on the basis of removability). The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

But § 2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of § 2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry. See Reply Brief 12, n. 4 ("[Section 2(B)] does not require the verification be completed during the stop or detention if that is not reasonable or practicable"); cf. *Muehler v. Mena,* 544 U.S. 93, 101 (2005) (finding no Fourth Amendment violation where questioning about immigration status did not prolong a stop).

To take another example, a person might be held pending release on a charge of driving under the influence of alcohol. As this goes beyond a mere stop, the arrestee (unlike the jaywalker) would appear to be subject to the categorical requirement in the second sentence of § 2(B) that "[a]ny person who is arrested shall have the person's immigration status determined before [he] is released." State courts may read this as an instruction to initiate a status check every time someone is arrested, or in some subset of those cases, rather than as a command to hold the person until the check is complete no matter the circumstances. Even if the law is read as an instruction to complete a check while the person is in custody, moreover, it is not clear at this stage and on this record that the verification process would result in prolonged detention.

However the law is interpreted, if § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law. See, *e.g., United States v. Di Re,* 332 U.S. 581, 589 (1948) (authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law); *Gonzales v. Peoria,* 722 F.2d 468, 475–476 (9th Cir. 1983) (concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law), overruled on other grounds in *Hodgers–Durgin v. de la Vina,* 199 F.3d 1037 (9th Cir. 1999).

The nature and timing of this case counsel caution in evaluating the validity of § 2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law. Cf. *Fox v. Washington,* 236 U.S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts" (citation omitted)). As a result, the United States cannot prevail in its current challenge. See *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 446 (1960) ("To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists"). This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

V

Immigration policy shapes the destiny of the Nation. On May 24, 2012, at one of this Nation's most distinguished museums of history, a dozen immigrants stood before the tattered flag that inspired Francis Scott Key to write the National Anthem. There they took the oath to become American citizens. The Smithsonian, News Release, Smithsonian Citizenship Ceremony Welcomes a Dozen New Americans (May 24, 2012), online at http://newsdesk.si.edu/releases. These naturalization ceremonies bring together men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. 8 CFR § 337.1(a). The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

* * *

The United States has established that §§ 3, 5(C), and 6 of S.B. 1070 are preempted. It was improper, however, to enjoin § 2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.

The judgment of the Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice SCALIA, concurring in part and dissenting in part.

[Omitted]

Justice THOMAS, concurring in part and dissenting in part.

[Omitted]

Supreme Court of the United States

Thomas CIPOLLONE, Individually and as Executor of the Estate of Rose D. Cipollone, Petitioner
v.
LIGGETT GROUP, INC., et al.

Decided June 24, 1992.

Justice STEVENS delivered the opinion of the Court, except as to Parts V and VI.

"WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH." A federal statute enacted in 1969 requires that warning (or a variation thereof) to appear in a conspicuous place on every package of cigarettes sold in the United States.[1] The questions presented to us by this case are whether that statute, or its 1965 predecessor which required a less alarming label, pre-empted petitioner's common-law claims against respondent cigarette manufacturers.

[1] Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331–1340. In 1984, Congress amended the statute to require four more explicit warnings, used on a rotating basis. See Comprehensive Smoking Education Act, Pub. L. 98–474, 98 Stat. 2201. Because petitioner's claims arose before 1984, neither party relies on this later Act.

Petitioner is the son of Rose Cipollone, who began smoking in 1942 and who died of lung cancer in 1984. He claims that respondents are responsible for Rose Cipollone's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Court of Appeals held that petitioner's state-law claims were pre-empted by federal statutes, 893 F.2d 541 (CA3 1990), and other courts have agreed with that analysis.[2] The highest court of the State of New Jersey, however, has held that the federal statutes did not pre-empt similar common-law claims.[3] Because of the manifest importance of the issue, we granted certiorari to resolve the conflict, 499 U.S. 935 (1991). We now reverse in part and affirm in part.

[2] The Court of Appeals' analysis was initially set forth in *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181 (3rd Cir. 1986). Other federal courts have adopted a similar analysis. See *Pennington v. Vistron Corp.,* 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.,* 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.,* 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987).

[3] *Dewey v. R.J. Reynolds Tobacco Co.,* 121 N.J. 69 (1990) (holding that the Cigarette Act does not pre-empt plaintiff's failure-to-warn and misrepresentation claims); see also *Forster v. R.J. Reynolds Tobacco Co.,* 437 N.W.2d 655 (Minn.1989) (holding that plaintiffs' claim in strict liability for unsafe design was not pre-empted; claims for misrepresentation and breach of express warranty would also not be pre-empted).

I

On August 1, 1983, Rose Cipollone and her husband filed a complaint invoking the diversity jurisdiction of the Federal District Court. Their complaint alleged that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by the three respondents. After her death in 1984, her husband filed an amended complaint. After trial, he also died; their son, executor of both estates, now maintains this action.

Petitioner's third amended complaint alleges several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort. These claims, all based on New Jersey law, divide into five categories. The "design defect claims" allege that respondents' cigarettes were defective because respondents failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created (Count 2, App. 83–84). The "failure to warn claims" allege both that the product was "defective as a result of [respondents'] failure to provide adequate warnings of the health consequences of cigarette smoking" (Count 3, App. 85) and that respondents "were negligent in the manner [that] they tested, researched, sold, promoted and advertised" their cigarettes (Count 4, App. 86). The "express warranty claims" allege that respondents had "expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences" (Count 7, App. 88). The "fraudulent misrepresentation claims" allege that respondents had willfully, "through their advertising, attempted to neutralize the [federally mandated] warnin[g]" labels (Count 6, App. 87–88), and that they had possessed, but had "ignored and failed to act upon" medical, and scientific data indicating that "cigarettes were hazardous to the health of consumers" (Count 8, App. 89). Finally, the "conspiracy to defraud claims" allege that respondents conspired to deprive the public of such medical and scientific data (*ibid.*).

As one of their defenses, respondents contended that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct after 1965. In a pretrial ruling, the District Court concluded that the federal statutes were intended to establish a uniform warning that would prevail throughout the country and that would protect cigarette manufacturers from being "subjected to varying requirements from state to state," *Cipollone v. Liggett Group, Inc.,* 593 F.Supp. 1146, 1148 (N.J.1984), but that the statutes did not pre-empt common-law actions. *Id.,* at 1153–1170.[4] Accordingly, the court granted a motion to strike the pre-emption defense entirely.

[4] The court explained:
"However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act." 593 F.Supp., at 1148.

The Court of Appeals accepted an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and reversed. *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181 (3rd Cir. 1986). The court rejected respondents' contention that the federal Acts expressly pre-empted common-law actions, but accepted their contention that such actions would conflict with federal law. Relying on the statement of purpose in the statutes,[5] the court concluded that Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy" would be upset by state-law damages actions based on noncompliance with "warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act." *Id.,* at 187. Accordingly, the court held:

[5] "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
"(2) commerce and the national economy may be (A) protected to the maximum extent

> consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331 (1982 ed.).

> "[T]he Act preempts those state law damage[s] actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. [W]here the success of a state law damage[s] claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act." *Ibid.* (footnote omitted).

The court did not, however, identify the specific claims asserted by petitioner that were pre-empted by the Act.

This Court denied a petition for certiorari, 479 U.S. 1043 (1987), and the case returned to the District Court for trial. Complying with the Court of Appeals' mandate, the District Court held that the failure-to-warn, express-warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims were barred to the extent that they relied on respondents' advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act). 649 F.Supp. 664, 669, 673–675 (N.J.1986). The court also ruled that while the design defect claims were not pre-empted by federal law, those claims were barred on other grounds.[6] *Id.,* at 669–672. Following extensive discovery and a 4–month trial, the jury answered a series of special interrogatories and awarded $400,000 in damages to Rose Cipollone's husband. In brief, it rejected all of the fraudulent-misrepresentation and conspiracy claims, but found that respondent Liggett had breached its duty to warn and its express warranties before 1966. It found, however, that Rose Cipollone had " 'voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes' " and that 80% of the responsibility for her injuries was attributable to her. See 893 F.2d, at 554 (summarizing jury findings). For that reason, no damages were awarded to her estate. However, the jury awarded damages to compensate her husband for losses caused by respondents' breach of express warranty.

[6] We are not presented with any question concerning these claims.

On cross-appeals from the final judgment, the Court of Appeals affirmed the District Court's pre-emption rulings but remanded for a new trial on several issues not relevant to our decision. We granted the petition for certiorari to consider the pre-emptive effect of the federal statutes.

II

Although physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. See U.S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress 5 (1989). The ensuing decades saw a wide range of epidemiologic and laboratory studies on the health hazards of smoking. Thus, by the time the Surgeon General convened an advisory committee to examine the issue in 1962, there were more than 7,000 publications examining the relationship between smoking and health. *Id.,* at 5–7.

In 1964, the advisory committee issued its report, which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964). Relying in part on that report, the Federal Trade Commission (FTC), which had long regulated unfair and deceptive advertising practices in the cigarette industry,[7] promulgated a new trade regulation rule. That rule, which was to take effect January 1, 1965, established that it would be a violation of the Federal Trade Commission Act "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed.Reg. 8325 (1964). Several States also moved to regulate the advertising and labeling of cigarettes. See, *e.g.,* 1965 N.Y.Laws, ch. 470; see also 111 Cong.Rec. 13900–13902 (1965) (statement of Sen. Moss). Upon a congressional request, the FTC postponed enforcement of its new regulation for six months. In July 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (1965 Act or Act).[8] The 1965 Act effectively adopted half of the FTC's regulation: the Act mandated warnings on cigarette packages (§ 5(a)), but barred the requirement of such warnings in cigarette advertising (§ 5(b)).[9]

[7] See, *e.g., Brown & Williamson Tobacco Corp.,* 56 F.T.C. 956 (1960); *Liggett & Myers Tobacco Co.,* 55 F.T.C. 354 (1958); *Philip Morris & Co., Ltd.,* 51 F.T.C. 857 (1955); *R.J. Reynolds Tobacco Co.,* 48 F.T.C. 682 (1952); *London Tobacco Co.,* 36 F.T.C. 282 (1943).

[8] Pub.L. 89–92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331–1340.

[9] However, § 5(c) of the Act expressly preserved "the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 79 Stat. 283.

Section 2 of the Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.[10] In furtherance of the first purpose, § 4 of the Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label stating: "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." In furtherance of the second purpose, § 5, captioned "Preemption," provided in part:

[10] See n. 5, *supra.*

> "(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> "(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act took effect January 1, 1966, § 10 of the Act provided that its provisions affecting the regulation of advertising would terminate on July 1, 1969.

As that termination date approached, federal authorities prepared to issue further regulations on cigarette advertising. The FTC announced the reinstitution of its 1964 proceedings concerning a warning requirement for cigarette advertisements. 34 Fed. Reg. 7917 (1969). The Federal Communications Commission (FCC) announced that it would consider "a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations." *Id.,* at 1959. State authorities also prepared to take actions regulating cigarette advertisements.[11]

[11] For example, the California State Senate passed a total ban on both print and electronic cigarette advertisements. "California Senate Votes Ban On Cigarette Advertising," Washington Post, June 26, 1969, p. A9.

It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969 (1969 Act or Act),[12] which amended the 1965 Act in several ways. First, the 1969 Act strengthened the warning label, in part by requiring a statement that cigarette smoking "is dangerous" rather than that it "may be hazardous." Second, the 1969 Act banned cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction." Third, and related, the 1969 Act modified the pre-emption provision by replacing the original § 5(b) with a provision that reads:

[12] Pub.L. 91–222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331–1340.

> "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act also directed the FTC not to "take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising," the narrowing of the pre-emption provision to prohibit only restrictions "imposed under State law" cleared the way for the FTC to extend the warning-label requirement to print advertisements for cigarettes. The FTC did so in 1972. See *In re Lorillard,* 80 F.T.C. 455 (1972).

III

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since our decision in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis. *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963)).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S., at 230).

The Court of Appeals was not persuaded that the pre-emption provision in the 1969 Act encompassed state common-law claims.[13] 789 F.2d, at 185–186. It was also not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. *Id.,* at 186. Nevertheless, reading the statute as a whole in the light of the statement of purpose in § 2, and considering the potential regulatory effect of state common-law actions on the federal interest in uniformity, the Court of Appeals concluded

that Congress had impliedly pre-empted petitioner's claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities. *Id.,* at 187.

[13] In its express pre-emption analysis, the court did not distinguish between the pre-emption provisions of the 1965 and 1969 Acts; it relied solely on the latter, apparently believing that the 1969 provision was at least as broad as the 1965 provision. The court's ultimate ruling that petitioner's claims were impliedly pre-empted effective January 1, 1966, reflects the fact that the 1969 Act did not alter the statement of purpose in § 2, which was critical to the court's implied pre-emption analysis.

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.,* 435 U.S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra,* 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn.

IV

In the 1965 pre-emption provision regarding advertising (§ 5(b)), Congress spoke precisely and narrowly: "No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." Section 5(a) used the same phrase ("No *statement* relating to smoking and health") with regard to cigarette labeling. As § 5(a) made clear, that phrase referred to the sort of warning provided for in § 4, which set forth verbatim the warning Congress determined to be appropriate. Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b)).

Beyond the precise words of these provisions, this reading is appropriate for several reasons. First, as discussed above, we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of § 5. Second, the warning required in § 4 does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically pre-empt a regulatory field. See *McDermott v. Wisconsin,* 228 U.S. 115, 131–132 (1913). Third, there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986,[14] Congress expressly pre-empted state or local imposition of a "statement relating to the use of smokeless tobacco products and health" but, at the same time, preserved state-law damages actions based on those products. See 15 U.S.C. § 4406. All of these considerations indicate that § 5 is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels.[15]

[14] Pub. L. 99–252, 100 Stat. 30, as codified, 15 U.S.C. §§ 4401–4408.

[15] Cf. *Banzhaf v. FCC,* 405 F.2d 1082 (1968) (holding that 1965 Act did not pre-empt FCC's fairness policy as applied to cigarette advertising), cert. denied, 396 U.S. 842 (1969).

This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health." Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General's report, the term "regulation" most naturally refers to positive enactments by those bodies, not to common-law damages actions.

The regulatory context of the 1965 Act also supports such a reading. As noted above, a warning requirement promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act. These regulatory actions animated the passage of § 5, which reflected Congress' efforts to prevent "a multiplicity of State and local regulations pertaining to labeling of cigarette packages," H.R.Rep. No. 449, 89th Cong., 1st Sess., 4 (1965), and to "preemp[t] all Federal, State, and local authorities from requiring *any statement* relating to smoking and health in the advertising of cigarettes." *Id.,* at 5 (emphasis supplied).[16]

[16] Justice SCALIA takes issue with our narrow reading of the phrase "No statement." His criticism, however, relies solely on an interpretation of those two words, artificially severed from both textual and legislative context. As demonstrated above, the phrase "No statement" in § 5(b) refers to the similar phrase in § 5(a), which refers in turn to § 4, which itself sets forth a *particular* statement. This context, combined with the regulatory setting in which Congress acted, establishes that a narrow reading of the phrase "No statement" is appropriate.

For these reasons, we conclude that § 5 of the 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state-law damages actions.[17]

[17] This interpretation of the 1965 Act appears to be consistent with respondents' contemporaneous understanding of the Act. Although respondents have participated in a great deal of litigation relating to cigarette use beginning in the 1950's, it appears that this case is the first in which they have raised § 5 as a pre-emption defense.

V

Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] ... imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Notwithstanding these substantial differences in language, both petitioner and respondents contend that the 1969 Act did not materially alter the pre-emptive scope of federal law.[18] Their primary support for this contention is a sentence in a Committee Report which states that the 1969 amendment "clarified" the 1965 version of § 5(b). S. Rep. No. 91–566, p. 12 (1969). We reject the parties' reading as incompatible with the language and origins of the amendments. As we noted in another context, "[i]nferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording, we cannot accept the parties' claim that the 1969 Act did not alter the reach of § 5(b).[19]

[18] See Brief for Petitioner 23–24; Brief for Respondents 21–23.

[19] As noted above, the 1965 Act's statement of purpose (§ 2) suggested that Congress was concerned primarily with "regulations"—positive enactments, rather than common-law damages actions. Although the 1969 Act did not amend § 2, we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to § 5(b).

Petitioner next contends that § 5(b), however broadened by the 1969 Act, does not pre-empt *common-law* actions. He offers two theories for limiting the reach of the amended § 5(b). First, he argues that common-law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement [s]."[20] We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959).

[20] Brief for Petitioner 20.

Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities, see S.Rep. No. 91–566, p. 12, the language of the Act plainly reaches beyond such enactments. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 (1983). In this case there is no "good reason to believe" that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is "good reason to believe" that Congress meant precisely what it said in amending that Act.

Moreover, common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose "requirements or prohibitions." See W. Prosser, Law of Torts 4 (4th ed. 1971); Black's Law Dictionary 1489 (6th ed. 1990) (defining "tort" as "always [involving] a violation of some duty owing to plaintiff"). It is in this way that the 1969 version of § 5(b) differs from its predecessor: Whereas the common law would not normally require a vendor to use any specific *statement* on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions.* We therefore reject petitioner's argument that the phrase "requirement or prohibition" limits the 1969 Act's pre-emptive scope to positive enactments by legislatures and agencies.

Petitioner's second argument for excluding common-law rules from the reach of § 5(b) hinges on the phrase "imposed under State law." This argument fails as well. At least since *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations. Indeed just last Term, the Court stated that the phrase " 'all other law, including State and municipal law' " "does not admit of [a] distinction ... between positive enactments and common-law rules of liability." *Norfolk & Western R. Co. v. Train Dispatchers,* 499 U.S. 117, 128 (1991). Although the presumption against pre-emption might give good reason to construe the phrase "state law" in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate. As explained above, the 1965 version of § 5 was precise and narrow on its face; the obviously broader language of the 1969 version extended that section's pre-emptive reach. Moreover, while the version of the 1969 Act passed by the Senate pre-empted "any State *statute or*

regulation with respect to ... advertising or promotion," S.Rep. No. 91–566, p. 16 (1969), the Conference Committee replaced this language with "State *law* with respect to advertising or promotion." In such a situation, § 5(b)'s pre-emption of "state law" cannot fairly be limited to positive enactments.

That the pre-emptive scope of § 5(b) cannot be limited to positive enactments does not mean that that section pre-empts all common-law claims. For example, as respondents concede, § 5(b) does not generally pre-empt "state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes."[21] For purposes of § 5(b), the common law is not of a piece.

[21] Brief for Respondents 14.

Nor does the statute indicate that any familiar subdivision of common-law claims is or is not pre-empted. We therefore cannot follow petitioner's passing suggestion that § 5(b) pre-empts liability for omissions but not for acts, or that § 5(b) pre-empts liability for unintentional torts but not for intentional torts. Instead we must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted.[22] The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion," giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims pre-empted by the statute.

[22] Petitioner makes much of the fact that Congress did not expressly include common law within § 5's pre-emptive reach, as it has in other statutes. See, *e.g.,* 29 U.S.C. § 1144(c)(1); 12 U.S.C. § 1715z–17(d). Respondents make much of the fact that Congress did not include a saving clause preserving common-law claims, again, as it has in other statutes. See, *e.g.,* 17 U.S.C. § 301. Under our analysis of § 5, these omissions make perfect sense: Congress was neither pre-empting nor saving common law as a whole—it was simply pre-empting particular common-law claims, while saving others.

We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, *arguendo*, that they are.

Failure to Warn

To establish liability for a failure to warn, petitioner must show that "a warning is necessary to make a product ... reasonably safe, suitable and fit for its intended use," that respondents failed to provide such a warning, and that that failure was a proximate cause of petitioner's injury. Tr. 12738. In this case, petitioner offered two closely related theories concerning the failure to warn: first, that respondents "were negligent in the manner [that] they tested, researched, sold, promoted, and advertised" their cigarettes; and second, that respondents failed to provide "adequate warnings of the health consequences of cigarette smoking." App. 85–86.

Petitioner's claims are pre-empted to the extent that they rely on a state-law "requirement or prohibition ... with respect to ... advertising or promotion." Thus, insofar as claims under either failure-to-warn theory require a showing that respondents' post–1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The Act does not, however, pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion.

Breach of Express Warranty

Petitioner's claim for breach of an express warranty arises under N.J.Stat.Ann. § 12A:2–313(1)(a) (West 1962), which provides:

> "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Petitioner's evidence of an express warranty consists largely of statements made in respondents' advertising. See 893 F.2d, at 574, 576; 683 F.Supp. 1487, 1497 (N.J.1988). Applying the Court of Appeals' ruling that Congress pre-empted "damage[s] actions ... that challenge ... the propriety of a party's actions with respect to the advertising and promotion of cigarettes," 789 F.2d, at 187, the District Court ruled that this claim "inevitably brings into question [respondents'] advertising and promotional activities, and is therefore pre-empted" after 1965. 649 F.Supp., at 675. As demonstrated above, however, the 1969 Act does not sweep so broadly: The appropriate inquiry is not whether a claim challenges the "propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed *by the warrantor.*[23] If, for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be "imposed under state law," but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement ... *imposed under State law"* within the meaning of § 5(b).[24]

[23] Thus it is that express warranty claims are said to sound in contract rather than in tort. Compare Black's Law Dictionary 1489 (6th ed. 1990) (defining "tort": "There must always be a violation of some duty ... and generally such duty must arise by operation of law and not by mere agreement of the parties") with *id.,* at 322 (defining "contract": "An agreement between two ... persons which creates an obligation").

[24] Justice SCALIA contends that because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requirement ... imposed under State law," and that, therefore, the Act pre-empts petitioner's express warranty claim. Justice SCALIA might be correct if the Act pre-empted "*liability*" imposed under state law (as he suggests, *post,* at 2635); but instead the Act expressly pre-empts only a "*requirement or prohibition"* imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character," *Norfolk & Western R. Co. v. Train Dispatchers,* 499 U.S. 117, 130 (1991), does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the State, but rather is "imposed" by the contracting party upon itself.

That the terms of the warranty may have been set forth in advertisements rather than in separate documents is irrelevant to the pre-emption issue (though possibly not to the state law issue of whether the alleged warranty is valid and enforceable) because, although the breach of warranty claim is made "with respect ... to advertising," it does not rest on a duty imposed under state law. Accordingly, to the

extent that petitioner has a viable claim for breach of express warranties made by respondents, that claim is not pre-empted by the 1969 Act.

Fraudulent Misrepresentation

Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition,* however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials. Section 5(b) of the 1969 Act pre-empts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent-misrepresentation theory.

Regulators have long recognized the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements. For example, the FTC, in promulgating its initial trade regulation rule in 1964, criticized advertising that "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness ... at the same time suggesting that smoking is an activity at least consistent with physical health and well-being." The Commission concluded:

> "To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves." 29 Fed.Reg. 8356 (1964).

Longstanding regulations of the Food and Drug Administration express a similar understanding of the relationship between required warnings and advertising that "negates or disclaims" those warnings: "A hazardous substance shall not be deemed to have met [federal labeling] requirements if there appears in or on the label ... statements, designs, or other graphic material that in any manner negates or disclaims [the required warning]." 21 CFR § 191.102 (1965). In this light it seems quite clear that petitioner's first theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory, a theory that we have already concluded is largely pre-empted by § 5(b).

Petitioner's second theory, as construed by the District Court, alleges intentional fraud and misrepresentation both by "false representation of a material fact [and by] conceal[ment of] a material fact." Tr. 12727.[25] The predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts. Our pre-emption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by § 5(b).

[25] The District Court stated that this claim "consists of the following elements: 1) a material misrepresentation of ... fact [by false statement or concealment]; 2) knowledge of the falsity ...; 3) intent that the misrepresentation be relied upon; 4) justifiable reliance ...; 5) resultant damage." 683 F.Supp. 1487, 1499 (N.J.1988).

Section 5(b) pre-empts only the imposition of state-law obligations "with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not pre-empted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, § 5(b) would not pre-empt a state-law claim based on a failure to fulfill that obligation.

Moreover, petitioner's fraudulent-misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b). Such claims are predicated not on a duty "based on smoking and health" but rather on a more general obligation the duty not to deceive. This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices—an authority that the FTC had long exercised and continues to exercise. See § 5(c) of the 1965 Act; § 7(b) of the 1969 Act; see also nn. 7, 9, *supra.* This indicates that Congress intended the phrase "relating to smoking and health" (which was essentially unchanged by the 1969 Act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising.[26]

[26] The Senate Report emphasized that the "preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health.* It would in no way affect the power of any State ... with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations.*" S.Rep. No. 91–566, p. 12 (1969) (emphasis supplied).

Moreover, this reading of "based on smoking and health" is wholly consistent with the purposes of the 1969 Act. State-law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state-law obligations concerning the warning necessary to render a product "reasonably safe," state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements is not pre-empted by § 5(b) of the 1969 Act.[27]

[27] Both Justice BLACKMUN and Justice SCALIA challenge the level of generality employed in our analysis. Justice BLACKMUN contends that, as a matter of consistency, we should construe failure-to-warn claims *not* as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." *Post,* at 2631. Justice SCALIA contends that, again as a matter of consistency, we should construe fraudulent-misrepresentation claims *not* as based on a general duty not to deceive but rather as "based on smoking and health." Admittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure-to-warn claims at the highest level of generality (as Justice BLACKMUN would have us do) would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as Justice SCALIA would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. See n. 25, *supra.*

Conspiracy to Misrepresent or Conceal Material Facts

Petitioner's final claim alleges a conspiracy among respondents to misrepresent or conceal material facts concerning the health hazards of smoking.[28] The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty is not pre-empted by § 5(b) for it is not a prohibition "based on smoking and health" as that

phrase is properly construed. Accordingly, we conclude that the 1969 Act does not pre-empt petitioner's conspiracy claim.

[28] The District Court described the evidence of conspiracy as follows:

> "Evidence presented by [petitioner], particularly that contained in the documents of [respondents] themselves, indicates ... that the industry of which these [respondents] were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community...." 683 F.Supp., at 1490.

VI

To summarize our holding: The 1965 Act did not pre-empt state law damages actions; the 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

The judgment of the Court of Appeals is accordingly reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, with whom Justice KENNEDY and Justice SOUTER join, concurring in part, concurring in the judgment in part, and dissenting in part.

I

The Court today would craft a compromise position concerning the extent to which federal law pre-empts persons injured by cigarette manufacturers' unlawful conduct from bringing state common-law damages claims against those manufacturers. I, however, find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language. In my view, *neither* version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims. I therefore join Parts I, II, III, and IV of the Court's opinion, but dissent from Parts V and VI.

A

I agree with the Court's exposition, in Part III of its opinion, of the underlying principles of pre-emption law, and in particular with its recognition that the pre-emptive scope of the Federal Cigarette Labeling and Advertising Act (1965 Act or Act) and the Public Health Cigarette Smoking Act of 1969 (1969 Act) is "governed entirely by the express language" of the statutes' pre-emption provisions. *Ante,* at 2618. Where, as here, Congress has included in legislation a specific provision addressing—and indeed, entitled—pre-emption, the Court's task is one of statutory interpretation—only to "identify the domain expressly pre-empted" by the provision. *Ibid.* An interpreting court must " 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *FMC Corp. v. Holliday,* 498 U.S. 52, 57 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985)). See *California Coastal Comm'n v. Granite Rock Co.,* 480

U.S. 572, 591–593 (1987); *California Federal Savings & Loan Assn. v. Guerra,* 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). We resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, see *English v. General Electric Co.,* 496 U.S. 72, 79 (1990)—only when Congress has been silent with respect to pre-emption.

I further agree with the Court that we cannot find the state common-law damages claims at issue in this case pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. See *ante,* at 2617. The Court describes this reluctance to infer pre-emption in ambiguous cases as a "presumption against the pre-emption of state police power regulations." *Ante,* at 2618. Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied pre-emption, see, *e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 146–152 (1963); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 236–237 (1947), this Court often speaks in general terms without reference to the nature of the pre-emption at issue in the given statutory scheme. See, *e.g., Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); *Avocado Growers,* 373 U.S., at 146–147 ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute ... in the absence of an unambiguous congressional mandate to that effect"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.).

The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent.* We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.[1] I therefore agree with the Court's unwillingness to conclude that the state common-law damages claims at issue in this case are pre-empted unless such result is " 'the clear and manifest purpose of Congress.' " *Ante,* at 2617 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S., at 230).

[1] The Court construes congressional inroads on state power narrowly in other contexts, as well. For example, the Court repeatedly has held that, in order to waive a State's sovereign immunity from suit in federal court, Congress must make its intention "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985); *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989).

B

I also agree with the Court's application of the foregoing principles in Part IV of its opinion, where it concludes that none of petitioner's common-law damages claims are pre-empted by the 1965 Act. In my view, the words of § 5(b) of that Act ("No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act") can bear only one meaning: that States are prohibited merely from "mandating particular cautionary statements ... in cigarette advertisements." *Ante,* at 2618. As the Court recognizes, this interpretation comports with Congress' stated purpose of avoiding " 'diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*' " relating to smoking and health. *Ante,* at 2619 (quoting 15 U.S.C. § 1331(2)). The narrow scope of federal pre-emption is thus apparent from the statutory text, and it is correspondingly impossible to divine any "clear and manifest purpose" on the part of Congress to pre-empt common-law damages actions.

II

My agreement with the Court ceases at this point. Given the Court's proper analytical focus on the scope of the express pre-emption provisions at issue here and its acknowledgment that the 1965 Act does not pre-empt state common-law damages claims, I find the plurality's conclusion that the 1969 Act pre-empts at least some common-law damages claims little short of baffling. In my view, the modified language of § 5(b), 15 U.S.C. § 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act"), no more "clearly" or "manifestly" exhibits an intent to pre-empt state common-law damages actions than did the language of its predecessor in the 1965 Act. Nonetheless, the plurality reaches a different conclusion, and its reasoning warrants scrutiny.

A

The plurality premises its pre-emption ruling on what it terms the "substantial changes" wrought by Congress in § 5(b), *ante,* at 2619, notably, the rewording of the provision to pre-empt any "requirement or prohibition" (as opposed merely to any "statement") "imposed under State law." As an initial matter, I do not disagree with the plurality that the phrase "State law," in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations. See *ante,* at 2620–2621. I do disagree, however, with the plurality's conclusion that "State law" as used in § 5(b) represents such an all-inclusive reference. Congress' intention in selecting that phrase cannot be understood without considering the narrow range of actions—any "requirement or prohibition"—that Congress specifically described in § 5(b) as "imposed under" state law. See *United States v. Morton,* 467 U.S. 822, 828 (1984) ("We do not ... construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase" (footnote omitted)); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"); see also *Norfolk & Western R. Co. v. Train Dispatchers,* 499 U.S. 117, 138–139 (1991) (STEVENS, J., dissenting) (declining to read the phrase "all other law, including State and municipal law," broadly).

Although the plurality flatly states that the phrase "no requirement or prohibition" "sweeps broadly" and "easily encompass[es] obligations that take the form of common-law rules," *ante,* at 2620, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if anything, specific actions mandated or disallowed by a formal governing authority. See, *e.g.,* Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "[a]ct or law prohibiting something"; an "interdiction").

More important, the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments—an assumption crucial to the plurality's conclusion that the phrase "requirement or prohibition" encompasses common-law actions—is significantly more complicated than the plurality's brief quotation from *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959), see *ante,* at 2620, would suggest.

The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages

by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action (*e.g.,* the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. See *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185–186 (1988) (corporation "may choose to disregard [state] safety regulations and simply pay an additional" damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations. See *Dewey v. R. J. Reynolds Tobacco Co.,* 121 N.J. 69, 90 (1990); Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S.Cal.L.Rev. 1423, 1454 (1980). Moreover, tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation. See *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529, 1540 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984).

Despite its earlier acknowledgment, consistent with the foregoing conception of damages actions, that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions," *ante,* at 2618,[2] the plurality apparently finds *Garmon's* statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," 359 U.S., at 247, sufficient authority to warrant extinguishing the common-law actions at issue in this case. See *ante,* at 2620. I am not persuaded. Not only has the Court previously distinguished *Garmon,*[3] but it has declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption.

[2] Congress, in fact, has expressly allowed common-law damages actions to survive while pre-empting other, more direct forms of state regulation. See, *e.g.,* Comprehensive Smokeless Tobacco Health Education Act of 1986, § 7, 100 Stat. 34, 15 U.S.C. § 4406; Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.,* as construed in *Gade v. National Solid Wastes Management Assn.,* 88 U.S. 88 (1992).

[3] The Court has explained that *Garmon,* in which a state common-law damages award was found to be pre-empted by the National Labor Relations Act, involved a special "presumption of federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. See *Brown v. Hotel Employees,* 468 U.S. 491, 502 (1984); *English v. General Electric Co.,* 496 U.S. 72, 86–87, n. 8 (1990).

In *Goodyear Atomic Corp. v. Miller,* for example, the Court distinguished, for purposes of pre-emption analysis, "direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. 486 U.S., at 185. Relying in part on its earlier decision in *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 256 (1984),[4] the Court stated that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." 486 U.S., at 186. Even more recently, the Court declined in *English v. General Electric Co.,* 496 U.S., at 86, to find state common-law damages claims for emotional distress pre-empted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct and could lead employers to alter the underlying conditions about which employees were complaining, *ibid.,* such an effect would be "neither direct nor substantial enough" to warrant pre-emption. *Id.,* at 85.

[4] The Court in *Silkwood* declined to find state punitive damages awards pre-empted by federal nuclear safety laws, explaining: "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform

to state standards, but that regulatory consequence was something that Congress was quite willing to accept." 464 U.S., at 256. Although the Court has noted that the decision in *Silkwood* was based in "substantial part" on affirmative evidence in the legislative history suggesting that Congress did not intend to include common-law damages remedies within the pre-empted field, see *English v. General Electric Co.,* 496 U.S. 72, 86 (1990), *Silkwood's* discussion of the regulatory effects of the common law is instructive and has been relied on in subsequent cases. See, *e.g., Goodyear,* 486 U.S., at 186.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law. The plain language of the 1969 Act's modified pre-emption provision simply cannot bear the broad interpretation the plurality would impart to it.

B

Not only does the text of the revised § 5(b) fail clearly or manifestly to require pre-emption of state common-law damages actions, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969. The plurality acknowledges the evidence that Congress itself perceived the changes in § 5(b) to be a mere " 'clarifi[cation]' " of the existing narrow pre-emption provision, *ante,* at 2619 (quoting S. Rep. No. 91–566, p. 12 (1969) (hereinafter S.Rep.)), but it dismisses these statements of legislative intent as the " 'views of a subsequent Congress.' " *Ante,* at 2619 (quoting *United States v. Price,* 361 U.S. 304, 313 (1960)). The plurality is wrong not only as a factual matter—for the statements of the Congress that amended § 5(b) are contemporaneous, not "subsequent," to enactment of the revised pre-emption provision—but as a legal matter, as well. This Court accords "great weight" to an amending Congress' interpretation of the underlying statute. See, *e.g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380–381, and n. 8 (1969).

Viewing the revisions to § 5(b) as generally nonsubstantive in nature makes sense. By replacing the word "statement" with the slightly broader term, "requirement," and adding the word "prohibition" to ensure that a State could not do through negative mandate (*e.g.,* banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e.g.,* mandating particular cautionary statements), Congress sought to "clarif[y]" the existing precautions against confusing and nonuniform state laws and regulations. S.Rep., at 12.[5]

[5] In the one reported case construing the scope of pre-emption under the 1965 Act, *Banzhaf v. FCC*—a case of which Congress was aware, see S. Rep., at 7—the Court of Appeals for the District of Columbia Circuit used the term "affirmative requirements" to describe § 5(b)'s ban on "statement[s]." 405 F.2d 1082, 1090 (D.C. Cir. 1968), cert. denied *sub nom. Tobacco Institute, Inc. v. FCC,* 396 U.S. 842 (1969). It is but a small step from "affirmative requirement" to the converse, "negative requirement" ("prohibition"), and, from there, to the single explanatory phrase, "requirement or prohibition."

Just as it acknowledges the evidence that Congress' changes in the pre-emption provision were nonsubstantive, the plurality admits that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities." *Ante,* at 2620. Indeed, the relevant Senate Report explains that the revised pre-emption provision is "intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State," a list remarkable for the absence of any reference to common-law damages actions. S.Rep., at 12. Cf., *e.g.,* 29 U.S.C. §§ 1144(a) and (c)(1) (ERISA statute defines "any and all State laws" as used in pre-emption provision to mean "all laws, *decisions,* rules, regulations, or *other State action* having the effect of law") (emphasis added). The plurality dismisses this statement with

the simple observation that "the language of the Act plainly reaches beyond such [positive] enactments." *Ante,* at 2620. Yet, as discussed above, the words of § 5(b) ("requirement or prohibition") do not so "plainly" extend to common-law damages actions, and the plurality errs in placing so much weight on this fragile textual hook.

The plurality further acknowledges that, at the same time that Congress amended the pre-emption provision of § 5(b), it made no effort to alter the statement of purpose contained in § 2 of the 1965 Act. *Ante,* at 2620, n. 19. Although the plurality relegates this fact to a footnote, the continued vitality of § 2 is significant, particularly in light of the Court's reliance on the same statement of purpose for its earlier conclusion that the 1965 Act does *not* pre-empt state common-law damages actions. See *ante,* at 2619 (concluding that Congress' expressed intent to avoid diverse, nonuniform, and confusing regulations "most naturally refers to positive enactments by [state legislatures and federal agencies], not to common-law damages actions").

Finally, there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common-law damages claims are pre-empted. The Court in the past has hesitated to find pre-emption where federal law provides no comparable remedy. See Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan.L.Rev. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in compensating injury victims"). Indeed, in *Silkwood,* the Court took note of "Congress' failure to provide any federal remedy" for injured persons, and stated that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S., at 251. See also *id.,* at 263 (BLACKMUN, J., dissenting) ("[I]t is inconceivable that Congress intended to leave victims with no remedy at all").

Unlike other federal statutes where Congress has eased the bite of pre-emption by establishing "comprehensive" civil enforcement schemes, see, *e.g., Ingersoll–Rand Co. v. McClendon,* 498 U.S. 133, 144–145 (1990) (discussing § 502(a) of ERISA), the Cigarette Labeling and Advertising Act is barren of alternative remedies. The Act merely empowers the Federal Trade Commission to regulate unfair or deceptive advertising practices (15 U.S.C. § 1336), establishes minimal criminal penalties (misdemeanor and fine not to exceed $10,000) for violations of the Act's provisions (§ 1338), and authorizes federal courts, upon the Government's application, to enjoin violations of the Act (§ 1339). Unlike the plurality, I am unwilling to believe that Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct.

Thus, not only does the plain language of the 1969 Act fail clearly to require pre-emption of petitioner's state common-law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision in the drastic manner that the plurality attributes to it. Our obligation to infer pre-emption only where Congress' intent is clear and manifest mandates the conclusion that state common-law damages actions are not pre-empted by the 1969 Act.[6]

[6] Every Court of Appeals to consider the question, including the Third Circuit in an earlier opinion in this case, similarly has concluded that state common-law damages claims are *not* expressly pre-empted under the 1969 Act. See, *e.g., Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 185–186 (3rd Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *Pennington v. Vistron Corp.,* 876 F.2d 414, 418 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.,* 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.,* 825 F.2d 620, 625 (1st Cir. 1987).

See also *Dewey v. R.J. Reynolds Tobacco Co.,* 121 N.J. 69, 85 (1990); *Forster v. R.J. Reynolds Tobacco Co.,* 437 N.W.2d 655, 658 (Minn.1989).

III

Stepping back from the specifics of the plurality's pre-emption analysis to view the result the Court ultimately reaches, I am further disturbed. Notwithstanding the plurality's ready acknowledgment that " ' "[t]he purpose of Congress is the ultimate touchstone" ' of pre-emption analysis," *ante,* at 2617 (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978)), the plurality proceeds to create a crazy quilt of pre-emption from among the common-law claims implicated in this case, and in so doing reaches a result that Congress surely could not have intended.

The most obvious problem with the plurality's analysis is its frequent shift in the level of generality at which it examines the individual claims. For example, the plurality states that fraudulent-misrepresentation claims (at least those involving false statements of material fact in advertisements) are "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive," and therefore are not pre-empted by § 5(b) of the 1969 Act. *Ante,* at 2623–2624. Yet failure-to-warn claims—which could just as easily be described as based on a "more general obligation" to inform consumers of known risks—implicitly are found to be "based on smoking and health" and are declared pre-empted. See *ante,* at 2621. The plurality goes on to hold that express warranty claims are not pre-empted because the duty at issue is undertaken by the manufacturer and is not "imposed under State law." *Ante,* at 2622. Yet, as the plurality itself must acknowledge, "the *general duty* not to breach warranties arises under state law," *ibid.* (emphasis added); absent the State's decision to penalize such behavior through the creation of a common-law damages action, no warranty claim would exist.

In short, I can perceive no principled basis for many of the plurality's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to create such a hodgepodge of allowed and disallowed claims when it amended the pre-emption provision in 1970. Although the plurality acknowledges that § 5(b) fails to "indicate that any familiar subdivision of common-law claims is or is not pre-empted," *ante,* at 2621, it ignores the simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the plurality does today. I can only speculate as to the difficulty lower courts will encounter in attempting to implement today's decision.

IV

By finding federal pre-emption of certain state common-law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result. Because I believe that neither version of the Federal Cigarette Labeling and Advertising Act evidences such a clear congressional intent to pre-empt state common-law damages actions, I respectfully dissent from Parts V and VI of Justice STEVENS' opinion.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment in part and dissenting in part.

Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express pre-emption provisions must be construed narrowly, "in light of the presumption against the pre-emption of state police power regulations." *Ante,* at 2618. The life-span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V, by adjudging at least some of the common-law tort claims at issue here pre-empted. In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did that job in the present case, we would find, under the 1965 Act, pre-emption of petitioner's failure-to-warn claims; and under the 1969 Act, we would find pre-emption of petitioner's claims complete.

I

The Court's threshold description of the law of pre-emption is accurate enough: Though we generally " 'assum[e] that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress,' " *ante,* at 2617 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)), we have traditionally not thought that to require express statutory text. Where state law is in actual conflict with federal law, see, *e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204 (1983), or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941), or even where the nature of Congress's regulation, or its scope, convinces us that "Congress left no room for the States to supplement it," *Rice, supra,* 331 U.S., at 230, we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved. See, *e.g., English v. General Electric Co.,* 496 U.S. 72, 78–79 (1990); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95 (1983).

The Court goes beyond these traditional principles, however, to announce two new ones. First, it says that express pre-emption provisions must be given the narrowest possible construction. This is in its view the consequence of our oft-repeated assumption that, absent convincing evidence of statutory intent to pre-empt, " 'the historic police powers of the States [are] not to be superseded,' " see *ante,* at 2617. But it seems to me that assumption dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.

That is precisely what our express pre-emption cases have done. Less than a month ago, in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), we held that the Airline Deregulation Act's provision pre-empting state laws "relating to [airline] rates, routes, or services," 49 U.S.C. § 1305(a)(1), was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any "plain-statement" rule, or rule of narrow construction, but applied the usual " ' "*assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.*" ' " *Morales, supra,* at 383 (quoting *FMC Corp. v. Holliday,* 498 U.S. 52, 57 (1990)) (emphasis added). And last Term, in *Norfolk & Western R. Co. v. Train Dispatchers,* 499 U.S. 117 (1991), we interpreted an express pre-emption provision broadly despite the fact that a well-respected canon of statutory construction supported a narrower reading. See *id.,* at 129; *id.,* at 136 (STEVENS, J., dissenting). We said not a word about a "presumption against ... pre-emption," *ante,* at 2618, that was to be applied to construction of the text.

In light of our willingness to find pre-emption in the absence of *any* explicit statement of pre-emptive intent, the notion that such explicit statements, where they exist, are subject to a "plain-statement" rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. See, *e.g., United States v. Mitchell,* 445 U.S. 535, 538 (1980) (waivers of federal sovereign immunity must be "unequivocally expressed"); *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65 (1989) (clear statement required to compel States to entertain damages suits against themselves in state courts); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). But *none* of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication,* with no express statement of intent at all. That is the novel regime the Court constructs today.

The results seem odder still when one takes into account the second new rule that the Court announces: "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, ... we need only identify the domain expressly pre-empted by [that provision]." *Ante,* at 2618. Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated. This proposition may be correct insofar as implied "field" pre-emption is concerned: The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines. However, with regard to implied "conflict" pre-emption—*i.e.,* where state regulation actually conflicts with federal law, or where state regulation "stands as an obstacle to the accomplishment and execution" of Congress's purposes, *Hines, supra,* 312 U.S., at 67—the Court's second new rule works mischief. If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (*e.g.,* consumer protection) could impose requirements entirely contrary to federal law—forbidding, for example, the use of certain safety equipment that federal law requires. To my knowledge, we have never expressed such a rule before, and our prior cases are inconsistent with it. See, *e.g., Jones v. Rath Packing Co.,* 430 U.S. 519, 540–543 (1977). When this second novelty is combined with the first, the result is extraordinary: The statute that says *anything* about pre-emption must say *everything;* and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption.

The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning. *FMC Corp. v. Holliday, supra,* 498 U.S., at 57; *Shaw v. Delta Air Lines,* 463 U.S., at 97. When this suggests that the pre-emption provision was intended to sweep broadly, our construction must sweep broadly as well. See, *e.g., id.,* at 96–97. And when it bespeaks a narrow scope of pre-emption, so must our judgment. See, *e.g., Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 7–8 (1987). Applying its niggardly rule of construction, the Court finds (not surprisingly) that none of petitioner's claims—common-law failure to warn, breach of express warranty, and intentional fraud and misrepresentation—is pre-empted under § 5(b) of the 1965 Act. And save for the failure-to-warn claims, the Court reaches the same result under § 5(b) of the 1969 Act. I think most of that is error. Applying ordinary principles of statutory construction, I believe petitioner's failure-to-warn claims are pre-empted by the 1965 Act, and all his common-law claims by the

1969 Act.

II

With much of what the plurality says in Part V of its opinion I agree—that "the language of the [1969] Act plainly reaches beyond [positive] enactments," *ante,* at 2620; that the general tort-law duties petitioner invokes against the cigarette companies can, as a general matter, impose "requirement[s] or prohibition[s]" within the meaning of § 5(b) of the 1969 Act, *ibid.;* and that the phrase "State law" as used in that provision embraces state common law, *ante,* at 2621. I take issue with the plurality, however, on its application of these general principles to the present case. Its finding that they produce only partial pre-emption of petitioner's common-law claims rests upon three misperceptions that I shall discuss in turn, under headings indicating the erroneously permitted claims to which they apply.

A

Pre–1969 Failure-to-Warn Claims

According to the Court,[1] § 5(b) of the 1965 Act "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate *particular* warning labels." *Ante,* at 2618–2619 (emphasis added). In essence, the Court reads § 5(b)'s critical language "No *statement* relating to smoking and health ... shall be required" to mean "No *particular statement* relating to smoking and health shall be required." The Court reasons that because common-law duties do not require cigarette manufacturers to include any *particular* statement in their advertising, but only *some* statement warning of health risks, those duties survive the 1965 Act. I see no basis for this element of "particularity." To require a warning about cigarette health risks is to require a "statement relating to smoking and health." If the "presumption against ... pre-emption," *ante,* at 2618, requires us to import limiting language into the 1965 Act, I do not see why it does not require us to import similarly limiting language into the 1969 Act—so that a "requirement ... based on smoking and health ... with respect to advertising" means only a *specific* requirement, and not just general, noncigarette-specific duties imposed by tort law. The divergent treatment of the 1965 Act cannot be justified by the Act's statement of purposes, which, as the Court notes, expresses concern with "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations.*" 15 U.S.C. § 1331(2) (emphasis added). That statement of purposes was left untouched by Congress in 1969, and thus should be as restrictive of the scope of the later § 5(b) as the Court believes it is of the scope of the earlier one.[2]

[1] The plurality is joined by Justices BLACKMUN, KENNEDY, and SOUTER in its analysis of the 1965 Act.

[2] The Court apparently thinks that because § 4 of the Act, imposing the federal package-labeling requirement, "itself sets forth a *particular* statement," *ante,* at 2619, n. 16, § 5(b), the advertising pre-emption provision must be read to proscribe only those state laws that compel the use of *particular* statements in advertising. Besides being a complete *non sequitur,* this reasoning proves too much: The similar prescription of a *particular* warning in the 1969 Act would likewise require us to confine the pre-emptive scope of that later statute to specific, prescriptive "requirement[s] or prohibition[s]" (which, I presume, would not include tort-law obligations to warn consumers about product dangers). And under both the 1965 and 1969 versions of the Act, the package-labeling pre-emption provision of § 5(a), no less than the advertising pre-emption provision of § 5(b), would have to be limited to the prescription of *particular* language, leaving the States free to impose general health-labeling requirements. These results are obviously contrary to the Act's stated purposes.

To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their *advertising* any statement relating to smoking and

health, I would find those claims, no less than the similar post–1969 claims, pre-empted. In addition, for reasons I shall later explain, see Part III, *infra,* I would find pre-emption even of those claims based on respondents' failure to make health-related statements to consumers *outside* their advertising. However, since § 5(b) of the 1965 Act enjoins only those laws that *require* "statement[s]" in cigarette advertising, those of petitioner's claims that, if accepted, would penalize statements *voluntarily* made by the cigarette companies must be deemed to survive. As these would appear to include petitioner's breach-of-express-warranty and intentional fraud and misrepresentation claims, I concur in the Court's judgment in this respect.

B

Post–1969 Breach–of–Express–Warranty Claims

In the context of this case, petitioner's breach-of-express-warranty claim necessarily embodies an assertion that respondents' advertising and promotional materials made statements to the effect that cigarette smoking is not unhealthy. Making such statements civilly actionable certainly constitutes an advertising "requirement or prohibition ... based on smoking and health." The plurality appears to accept this, but finds that liability for breach of express warranty is not "imposed under State law" within the meaning of § 5(b) of the 1969 Act. "[R]ather," it says, the duty "is best understood as undertaken by the manufacturer itself." *Ante,* at 2622. I cannot agree.

When liability attaches to a particular promise or representation, it attaches *by law.* For the making of a voluntary promise or representation, no less than for the commission of an intentional tort, it is the background law against which the act occurs, and not the act itself, that supplies the element of legal obligation. See *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 429 (1934); N.J.Stat.Ann. §§ 12A:2–313(1), 12A:2–714, and 12A:2–715 (West 1962) (providing for enforcement of express warranties). Of course, New Jersey's law of express warranty attaches legal consequences to the cigarette manufacturer's voluntary conduct in making the warranty, and in that narrow sense, I suppose, the warranty obligation can be said to be "undertaken by the manufacturer." But on that logic it could also be said that the duty to warn about the dangers of cigarettes is undertaken voluntarily by manufacturers when they choose to sell in New Jersey; or, more generally, that *any* legal duty imposed on volitional behavior is not one imposed by law.

The plurality cites no authority for its curious view, which is reason enough to doubt it. In addition, however, we rejected this very argument last Term in *Norfolk & Western R. Co. v. Train Dispatchers,* where we construed a federal exemption "from the antitrust laws and from all other law," 49 U.S.C. § 11341(a), to include an exemption from contract obligations. We observed, in a passage flatly inconsistent with the plurality's analysis today, that "[a] contract has no legal force *apart from the law that acknowledges its binding character.*" 499 U.S., at 130 (STEVENS, J., dissenting). I would find petitioner's claim for breach of express warranty pre-empted by § 5(b) of the 1969 Act.

C

Post–1969 Fraud and Misrepresentation Claims

According to the plurality, at least one of petitioner's intentional fraud and misrepresentation claims survives § 5(b) of the 1969 Act because the common-law duty underlying that claim is not "based on smoking and health" within the meaning of the Act. See *ante,* at 2623–2624. If I understand the plurality's reasoning, it proceeds from the implicit assumption that only duties deriving from laws that are specifically directed to "smoking and health," or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within § 5(b) of the Act, as amended. Given that New Jersey's tort-law "duty not to deceive," *ibid.,* is a general one, applicable to all commercial actors

and all kinds of commerce, it follows from this assumption that § 5(b) does not pre-empt claims based on breaches of that duty.

This analysis is suspect, to begin with, because the plurality is unwilling to apply it consistently. As Justice BLACKMUN cogently explains, see *ante,* at 2631 (opinion concurring in part and dissenting in part), if New Jersey's common-law duty to avoid false statements of material fact—as applied to the cigarette companies' behavior—is not "based on smoking and health," the same must be said of New Jersey's common-law duty to warn about a product's dangers. *Each* duty transcends the relationship between the cigarette companies and cigarette smokers; *neither* duty was specifically crafted with an eye toward "smoking and health." None of the arguments the plurality advances to support its distinction between the two is persuasive. That Congress specifically preserved, in both the 1965 and 1969 Acts, the Federal Trade Commission's authority to police deceptive advertising practices, see § 5(c) of the 1965 Act; § 7(b) of the 1969 Act; *ante,* at 2624, does not suggest that Congress intended comparable state authority to survive § 5(b). In fact, at least in the 1965 Act (which generally excluded federal as well as state regulation), the exemption suggested that § 5(b) was broad enough to reach laws governing fraud and misrepresentation. And it is not true that the States' laws governing fraud and misrepresentation in advertising impose identical legal standards, whereas their laws "concerning the warning necessary to render a product 'reasonably safe' " are quite diverse, *ante,* at 2624. The question whether an ad featuring a glamorous, youthful smoker with pearly-white teeth is "misrepresentative" would almost certainly be answered differently from State to State. See *ante,* at 2623 (discussing FTC's initial cigarette advertising rules).

Once one is forced to select a *consistent* methodology for evaluating whether a given legal duty is "based on smoking and health," it becomes obvious that the methodology must focus not upon the ultimate source of the duty (*e.g.,* the common law) but upon its proximate application. Use of the "ultimate source" approach (*i.e.,* a legal duty is not "based on smoking and health" unless the law from which it derives is directed only to smoking and health) would gut the statute, inviting the very "diverse, nonuniform, and confusing cigarette ... advertising regulations" Congress sought to avoid. 15 U.S.C. § 1331(2). And the problem is not simply the common law: Requirements could be imposed by state executive agencies as well, so long as they were operating under a *general* statute authorizing their supervision of "commercial advertising" or "unfair trade practices." New Jersey and many other States have such statutes already on the books. *E.g.,* N.J.Stat.Ann. § 56:8–1 *et seq.* (West 1989); N.Y.Gen.Bus.Law § 349 *et seq.* (McKinney 1988 and Supp.1992); Texas Bus. & Com.Code Ann. § 17.01 *et seq.* (1987 and Supp.1992).

I would apply to all petitioner's claims what I have called a "proximate application" methodology for determining whether they invoke duties "based on smoking and health"—I would ask, that is, whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health. On that basis, I would find petitioner's failure-to-warn and misrepresentation claims both pre-empted.

III

Finally, there is an additional flaw in the plurality's opinion, a systemic one that infects even its otherwise correct disposition of petitioner's post–1969 failure-to-warn claims. The opinion states that, since § 5(b) proscribes only "requirement[s] or prohibition[s] ... '*with respect to ... advertising or promotion,*' " state-law claims premised on the failure to warn consumers "through channels of communication other than advertising or promotion" are not covered. *Ante,* at 2623 (emphasis added); see *ante,* at 2621. This preserves not only the (somewhat fanciful) claims based on duties having no relation to the advertising

and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public-health agency), but also claims based on duties that can be complied with by taking action *either* within the advertising and promotional realm *or elsewhere.* Thus, if—as appears to be the case in New Jersey—a State's common law requires manufacturers to advise consumers of their products' dangers, but the law is indifferent as to *how* that requirement is met (*i.e.,* through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find pre-emption as long as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

I think that is inconsistent with the law of pre-emption. Advertising and promotion are the normal means by which a manufacturer communicates required product warnings to prospective customers, and by far the most economical means. It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still. As a practical matter, such a "tell-the-consumers-any-way-you-wish" law compels manufacturers to relinquish the advertising and promotion immunity accorded them by the Act. The test for pre-emption in this setting should be one of practical compulsion, *i.e.,* whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Cf., *e.g., Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 173, n. 25 (1978). Though the hypothetical law requiring disclosure to a state regulatory agency would seem to survive this test, I would have no difficulty finding that test met with respect to state laws that require the cigarette companies to meet general standards of "fair warning" regarding smoking and health.

* * *

Like Justice BLACKMUN, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision." *Ante,* at 2631 (opinion concurring in part and dissenting in part). Must express pre-emption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied pre-emption whenever the statute at issue contains an express pre-emption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes, does "state law" include legal duties imposed on voluntary acts (as we held last Term in *Norfolk & Western R. Co.*), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.

Selections from

Supreme Court of the United States

Otis McDONALD, et al., Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, et al.

Decided June 28, 2010.

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, and III, in which THE CHIEF JUSTICE, Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, and an opinion with respect to Parts II–C, IV, and V, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

Two years ago, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

I

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago's firearms laws. A City ordinance provides that "[n]o person shall ... possess ... any firearm unless such person is the holder of a valid registration certificate for such firearm." Chicago, Ill., Municipal Code § 8–20–040(a) (2009). The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. § 8–20–050(c). Like Chicago, Oak Park makes it "unlawful for any person to possess ... any firearm," a term that includes "pistols, revolvers, guns and small arms ... commonly known as handguns." Oak Park, Ill., Village Code §§ 27–2–1 (2007), 27–1–1 (2009).

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici,* however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted[1] and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.[2]

[1] See Brief for Heartland Institute as *Amicus Curiae* 6–7 (noting that handgun murder rate was 9.65 in 1983 and 13.88 in 2008).

[2] Brief for Buckeye Firearms Foundation, Inc., et al. as *Amici Curiae* 8–9 ("In 2002 and again in 2008, Chicago had more murders than any other city in the U.S., including the much larger Los Angeles and New York"

(internal quotation marks omitted)); see also Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17–21, and App. A (providing comparisons of Chicago's rates of assault, murder, and robbery to average crime rates in 24 other large cities).

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers. App. 16–17; Brief for State Firearm Associations as *Amici Curiae* 20–21; Brief for State of Texas et al. as *Amici Curiae* 7–8. Colleen Lawson is a Chicago resident whose home has been targeted by burglars. "In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home."[3] McDonald, Lawson, and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection. See App. 16–19, 43–44 (McDonald), 20–24 (C. Lawson), 19, 36 (Orlov), 20–21, 40 (D.Lawson).

[3] Brief for Women State Legislators et al. as *Amici Curiae* 2.

After our decision in *Heller,* the Chicago petitioners and two groups[4] filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge.

[4] The Illinois State Rifle Association and the Second Amendment Foundation, Inc.

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. See App. 83–84; *NRA, Inc. v. Oak Park,* 617 F.Supp.2d 752, 754 (N.D.Ill.2008). The court noted that the Seventh Circuit had "squarely upheld the constitutionality of a ban on handguns a quarter century ago," *id*., at 753 (citing *Quilici v. Morton Grove,* 695 F.2d 261 (7th Cir. 1982)), and that *Heller* had explicitly refrained from "opin[ing] on the subject of incorporation vel non of the Second Amendment," *NRA,* 617 F.Supp.2d, at 754. The court observed that a district judge has a "duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction." *Id.,* at 753.

The Seventh Circuit affirmed, relying on three 19th-century cases—*United States v. Cruikshank,* 92 U.S. 542 (1876), *Presser v. Illinois,* 116 U.S. 252 (1886), and *Miller v. Texas,* 153 U.S. 535 (1894)—that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter–House Cases,* 16 Wall. 36 (1873). The Seventh Circuit described the rationale of those cases as "defunct" and recognized that they did not consider the question whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms. *NRA, Inc. v. Chicago,* 567 F.3d 856, 857, 858 (2009). Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have "direct application," and it declined to predict how the Second Amendment would fare under this Court's modern "selective incorporation" approach. *Id.,* at 857–858 (internal quotation marks omitted).

We granted certiorari. 557 U.S. 965 (2009).

II

A

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter–House Cases, supra,* should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of *any* " 'civilized' " legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. *Ibid.* And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. *Id.,* at 21–23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

B

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore,* 7 Pet. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." *Id*., at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also *Lessee of Livingston v. Moore,* 7 Pet. 469, 551–552 (1833) ("[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states").

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

****

D

1

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See *Hurtado v. California,* 110 U.S. 516 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining v. New Jersey,* 211 U.S. 78, 99 (1908).

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." *Ibid*. See also, *e.g., Adamson v. California,* 332 U.S. 46 (1947); *Betts v. Brady,* 316 U.S. 455 (1942); *Palko v. Connecticut,* 302 U.S. 319 (1937); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936); *Powell v. Alabama,* 287 U.S. 45 (1932). While it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated,

this was "not because those rights are enumerated in the first eight Amendments." *Twining,* 211 U.S., at 99.

The Court used different formulations in describing the boundaries of due process. For example, in *Twining,* the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Id.*, at 102 (internal quotation marks omitted). In *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko,* the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S., at 325.

Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." *Duncan v. Louisiana,* 391 U.S. 145, 149, n. 14 (1968). Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q.R. Co., supra,* at 238. Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law." *Twining, supra,* at 113.

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. See, *e.g., Gitlow v. New York,* 268 U.S. 652, 666 (1925) (freedom of speech and press); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931) (same); *Powell, supra* (assistance of counsel in capital cases); *De Jonge, supra* (freedom of assembly); *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (free exercise of religion). But others did not. See, *e.g., Hurtado, supra* (grand jury indictment requirement); *Twining, supra* (privilege against self-incrimination).

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where "want of counsel in [the] particular case ... result[ed] in a conviction lacking in ... fundamental fairness." 316 U.S., at 473. Similarly, in *Wolf v. Colorado,* 338 U.S. 25 (1949), the Court held that the "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id*., at 27–28, 33.

2

An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, *e.g., Adamson, supra,* at 71–72 (Black, J., dissenting); *Duncan, supra,* at 166 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in *Barron*.[9] *Adamson, supra*, at 72 (dissenting opinion).[10] Nonetheless, the Court never has embraced Justice Black's "total

incorporation" theory.

[9] Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of "the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866) (hereinafter 39th Cong. Globe). Representative John Bingham, the principal author of the text of § 1, said that the Amendment would "arm the Congress ... with the power to enforce the bill of rights as it stands in the Constitution today." *Id*., at 1088; see also *id.,* at 1089–1090; A. Amar, The Bill of Rights: Creation and Reconstruction 183 (1998) (hereinafter Amar, Bill of Rights). After ratification of the Amendment, Bingham maintained the view that the rights guaranteed by § 1 of the Fourteenth Amendment "are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871). Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction, stated during the debates on the Amendment that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States." 39th Cong. Globe 2459; see also M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 112 (1986) (counting at least 30 statements during the debates in Congress interpreting § 1 to incorporate the Bill of Rights); Brief for Constitutional Law Professors as *Amici Curiae* 20 (collecting authorities and stating that "[n]ot a single senator or representative disputed [the incorporationist] understanding" of the Fourteenth Amendment).

[10] The municipal respondents and some of their *amici* dispute the significance of these statements. They contend that the phrase "privileges or immunities" is not naturally read to mean the rights set out in the first eight Amendments, see Brief for Historians et al. as *Amici Curiae* 13–16, and that "there is 'support in the legislative history for no fewer than four interpretations of the ... Privileges or Immunities Clause,' " Brief for Municipal Respondents 69 (quoting Currie, The Reconstruction Congress, 75 U. Chi. L.Rev. 383, 406 (2008); brackets omitted). They question whether there is sound evidence of " 'any strong public awareness of nationalizing the *entire* Bill of Rights.' " Brief for Municipal Respondents 69 (quoting Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L.J. 1509, 1600 (2007)). Scholars have also disputed the total incorporation theory. See, *e.g*., Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L.Rev. 5 (1949); Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine–Lived Cat, 42 Ohio St. L.J. 435 (1981).

Proponents of the view that § 1 of the Fourteenth Amendment makes all of the provisions of the Bill of Rights applicable to the States respond that the terms privileges, immunities, and rights were used interchangeably at the time, see, *e.g.,* Curtis, *supra,* at 64–65, and that the position taken by the leading congressional proponents of the Amendment was widely publicized and understood, see, *e.g*., Wildenthal, *supra,* at 1564–1565, 1590; Hardy, Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868, 30 Whittier L.Rev. 695 (2009). A number of scholars have found support for the total incorporation of the Bill of Rights. See Curtis, *supra,* at 57–130; Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57, 61 (1993); see also Amar, Bill of Rights 181–230. We take no position with respect to this academic debate.

3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i. e*., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See,

e.g., Gideon v. Wainwright, 372 U.S. 335, 341 (1963); *Malloy v. Hogan,* 378 U.S. 1, 5–6 (1964); *Pointer v. Texas,* 380 U.S. 400, 403–404 (1965); *Washington v. Texas,* 388 U.S. 14, 18 (1967); *Duncan,* 391 U.S., at 147–148; *Benton v. Maryland,* 395 U.S. 784, 794 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period.[11] The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan,* 391 U.S., at 149, n. 14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id*., at 149, and n. 14; see also *id.,* at 148 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions" (emphasis added; internal quotation marks omitted)).

[11] By contrast, the Court has never retreated from the proposition that the Privileges or Immunities Clause and the Due Process Clause present different questions. And in recent cases addressing unenumerated rights, we have required that a right also be "implicit in the concept of ordered liberty." See, *e.g*., *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights.[12] Only a handful of the Bill of Rights protections remain unincorporated.[13]

[12] With respect to the First Amendment, see *Everson v. Board of Ed. of Ewing,* 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (Free Exercise Clause); *De Jonge v. Oregon,* 299 U.S. 353 (1937) (freedom of assembly); *Gitlow v. New York,* 268 U.S. 652 (1925) (free speech); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697. (1931) (freedom of the press).

With respect to the Fourth Amendment, see *Aguilar v. Texas,* 378 U.S. 108 (1964) (warrant requirement); *Mapp v. Ohio,* 367 U.S. 643 (1961) (exclusionary rule); *Wolf v. Colorado,* 338 U.S. 25 (1949) (freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, see *Benton v. Maryland,* 395 U.S. 784 (1969) (Double Jeopardy Clause); *Malloy v. Hogan,* 378 U.S. 1 (1964) (privilege against self-incrimination); *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897) (Just Compensation Clause).

With respect to the Sixth Amendment, see *Duncan v. Louisiana,* 391 U.S. 145, (1968) (trial by jury in criminal cases); *Washington v. Texas,* 388 U.S. 14 (1967) (compulsory process); *Klopfer v. North Carolina,* 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas,* 380 U.S. 400 (1965) (right to confront adverse witness); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (assistance of counsel); *In re Oliver,* 333 U.S. 257 (1948) (right to a public trial).

With respect to the Eighth Amendment, see *Robinson v. California,* 370 U.S. 660 (1962) (cruel and unusual punishment); *Schilb v. Kuebel,* 404 U.S. 357 (1971) (prohibition against excessive bail).

[13] In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.

> We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. See *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 276, n. 22 (1989) (declining to decide whether the excessive-fines protection applies to the States); see also *Engblom v. Carey,* 677 F.2d 957, 961 (2d Cir. 1982) (holding as a matter of first impression that the "Third Amendment is incorporated into the Fourteenth Amendment for application to the states").
>
> Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.

Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy,* 378 U.S., at 10–11 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id*., at 10; see also *Mapp v. Ohio,* 367 U.S. 643, 655–656 (1961); *Ker v. California,* 374 U.S. 23, 33–34 (1963); *Aguilar v. Texas,* 378 U.S. 108, 110 (1964); *Pointer, supra*, at 406; *Duncan, supra*, at 149, 157–158; *Benton, supra*, at 794–795; *Wallace v. Jaffree,* 472 U.S. 38, 48–49 (1985).[14]

[14] There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. See *Apodaca v. Oregon,* 406 U.S. 404 (1972); see also *Johnson v. Louisiana,* 406 U.S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca,* eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. See *Johnson,supra,* at 395 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca,* 406 U.S., at 406 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id*., at 414–415 (Stewart, J., dissenting); *Johnson, supra,* at 381–382 (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca,* therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. See *Johnson, supra,* at 395–396 (Brennan, J., dissenting) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments" (footnote omitted)).

Employing this approach, the Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States. See, *e.g., Mapp, supra* (overruling in part *Wolf,* 338 U.S. 25); *Gideon,* 372 U.S. 335 (overruling *Betts,* 316 U.S. 455); *Malloy, supra* (overruling *Adamson,* 332 U.S. 46, and *Twining,* 211 U.S. 78); *Benton,* 395 U.S., at 794 (overruling *Palko,* 302 U.S. 319).

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Supreme Court of the United States

Manuel LUJAN, Jr., Secretary of the Interior, Petitioner
v.
DEFENDERS OF WILDLIFE, et al.

Decided June 12, 1992.

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.,* seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill,* 437 U.S. 153 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43, 47–48 (D. Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (8th Cir. 1988). On remand, the Secretary moved for summary

judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (D. Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (8th Cir. 1990). We granted certiorari, 500 U.S. 915 (1991).

II

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot–Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e.g., Allen v. Wright,* 468 U.S. 737, 751 (1984).

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.,* at 756; *Warth v. Seldin,* 422 U.S. 490, 508 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740–741, n. 16 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore, supra,* 495 U.S., at 155 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.,* at 38, 43.

[1] By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990); *Warth, supra,* 422 U.S., at 508. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883–889 (1990); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 114–115, and n. 31 (1979); *Simon, supra,* 426 U.S., at 45, n. 25; *Warth, supra,* 422 U.S., at 527, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations

embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 U.S., at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra,* 441 U.S., at 115, n. 31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989) (opinion of KENNEDY, J.); see also *Simon, supra,* 426 U.S., at 41–42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g., Warth, supra,* 422 U.S., at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen, supra,* 468 U.S., at 758; *Simon, supra,* 426 U.S., at 44–45; *Warth, supra,* 422 U.S., at 505.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. See, *e.g., Sierra Club v. Morton,* 405 U.S., at 734. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.,* at 734–735. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.,* at 735, 739. See generally *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and

hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.,* at 145–146. When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.,* at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " *Lyons,* 461 U.S., at 102 (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495–496 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. See *supra,* at 2136.[2]

[2] The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because "a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites." *Post,* at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the "soon" is supposed to mean. If "soon" refers to the standard mandated by our precedents—that the injury be "imminent," *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to return. But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. 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," ' " *id.,* at 158 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, *e.g., id.,* at 156–160,; *Los Angeles v. Lyons,* 461 U.S. 95, 102–106 (1983).

There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon "the affirmative actions of third parties beyond a plaintiff's control," *post,* at 2153. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's

failure to show that he will soon expose *himself* to the injury, see, *e.g., Lyons, supra,* at 105–106; *O'Shea v. Littleton,* 414 U.S. 488, 497 (1974); *Ashcroft v. Mattis,* 431 U.S. 171, 172–173, n. 2 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand ... detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. *Post,* at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation,* which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U.S., at 887–889; see also *Sierra Club,* 405 U.S., at 735. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, see *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.[3]

[3] The dissent embraces each of respondents' "nexus" theories, rejecting this portion of our analysis because it is "unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm" to the plaintiff. *Post,* at 2154. But summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, "certainly impending." The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not "*necessarily* " prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in *Sierra Club,* for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN's accusation that a special rule is being crafted for "environmental claims," *post,* at 2154, is correct, but *he* is the craftsman.

Justice STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post,* at 2148–2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." *Allen,* 468 U.S., at 759–760.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, *e.g.,* 16 U.S.C. § 1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); § 1535(d)(1) ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the agencies, see § 1536(a)(2) ("*Each Federal agency shall,* in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the

view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.[4] The Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] ... would result in consultation." *Defenders of Wildlife,* 851 F.2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the position that the regulation is not binding.[5] The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

[4] We need not linger over the dissent's facially impracticable suggestion, *post,* at 2154–2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post,* at 2155–2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post,* at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.,* that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the "*complete* relief" referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post,* at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction ... a one-way street running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

[5] Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post,* at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon,* 426 U.S., at 43–44, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.[6] There is no standing.

[6] The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post,* at 2157–2158. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the " 'negative impacts to the wildlife,' " *post,* at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F.2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.,* the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).[7] Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.[8]

[7] There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's

failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

[8] The dissent's discussion of this aspect of the case, *post,* at 2157–2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post,* at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan Whaling Assn. v. American Cetacean Soc.,* 478 U.S. 221 (1986), and *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989), *post,* at 2158–2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting," see 478 U.S., at 230–231, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 812–813 (9th Cir. 1987).

We have consistently held that a plaintiff 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. For example, in *Fairchild v. Hughes,* 258 U.S. 126, 129–130 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

> "[This is] not a case within the meaning of ... Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit...." *Ibid.*

In *Massachusetts v. Mellon,* 262 U.S. 447 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will

> execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.,* at 488–489.

In *Ex parte Lévitt,* 302 U.S. 633 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. "It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S., at 634. See also *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429, 433–434, (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson,* 418 U.S. 166 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.' " *Richardson, supra,* at 171, 176–177. And in *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind...." *Schlesinger, supra,* at 217, 220. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because " 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' " *Allen,* 468 U.S., at 754; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 483 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of " 'the public interest protections of the Eighth Amendment' "; once again, "[t]his allegation raise [d] only the 'generalized interest of all citizens in constitutional governance' ... and [was] an inadequate basis on which to grant ... standing." *Whitmore,* 495 U.S., at 160.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170, (1803), "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in

agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon,* 262 U.S., at 489, and to become " 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Allen, supra,* 468 U.S., at 760 (quoting *Laird v. Tatum,* 408 U.S. 1, 15 (1972)). We have always rejected that vision of our role:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard,* 321 U.S. 288, 309–310 (1944) (footnote omitted).

"Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club,* 405 U.S., at 740–741, n. 16.

Nothing in this contradicts the principle that "[t]he ... injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S., at 500 (quoting *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, n. 3 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 208–212 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 6 (1968)). As we said in *Sierra Club,* "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972). This component of the standing inquiry is not satisfied unless

> "[p]laintiffs ... demonstrate a 'personal stake in the outcome.' ... Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons,* 461 U.S. 95, 101–102 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante,* at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see *Sierra Club v. Morton, supra,* 405 U.S., at 735, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante,* at 2139–2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4 (1986) ("[R]espondents ... undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. See *Warth v. Seldin,* 422 U.S. 490, 500 (1975); *ante,* at 2145–2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

Justice STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing,[1] and the Court reiterates that holding today. See *ante,* at 2137.

[1] See, *e.g., Sierra Club v. Morton,* 405 U.S. 727, 734 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686–687 (1973); *Japan Whaling Assn. v. American Cetacean*

Society, 478 U.S. 221, 230–231, n. 4 (1986).

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante,* at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante,* at 2138–2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin,* 422 U.S. 490, 498–499 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct.... The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.' " *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974) (quoting *Golden v. Zwickler,* 394 U.S. 103, 109–110, (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e.g., Whitmore v. Arkansas,* 495 U.S. 149, 158–159 (1990); *Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983); *O'Shea,* 414 U.S., at 497. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skilbred have introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As Justice BLACKMUN explains, *post,* at 2152–2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

[2] As we recognized in *Sierra Club v. Morton,* 405 U.S., at 735, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened...." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents,

cf. *ante,* at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante,* at 2140–2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante,* at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post,* at 2156–2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 284–285 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.,* at 285, and therefore presume that " 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' " *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991) (quoting *Foley Bros.,* 336 U.S., at 285).

Section 7(a)(2) provides, in relevant part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[3]], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section...." 16 U.S.C. § 1536(a)(2).

[3] The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U.S.C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed.Reg.

19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic reference in the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed.Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

[4] Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U.S.C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F.2d 117, 122 (8th Cir. 1990); see also *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 282, 287–288 (1949) (statute requiring an 8–hour day provision in " '[e]very contract made to which the United States ... is a party' " is inapplicable to contracts for work performed in foreign countries).

[5] Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of endangered species is the "destruction of natural habitat." S.Rep. No. 93–307, p. 2 (1973); see also H.Rep. No. 93–412, p. 2 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; *TVA v. Hill,* 437 U.S. 153, 179 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

[6] Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies extraterritorially even if the latter does not. 911 F.2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U.S.C. § 1537(a). It also directs the Secretary of the Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import

endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people.*" §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.[7]

[7] Of course, Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements]," and that "encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments...." 16 U.S.C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F.2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed.Rule Civ.Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is

such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.,* at 249.

The Court never mentions the "genuine issue" standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, "affidavits or other evidence showing, through specific facts" the existence of injury. *Ante,* at 2137. The Court thereby confuses respondents' evidentiary burden (*i.e.,* affidavits asserting "specific facts") in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i.e.,* the existence of a "genuine issue" of "material fact") under Rule 56(c).

1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante,* at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

[1] The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in "mitigating the negative impacts to the wildlife involved." *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: "The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system." *Id.,* at 215. It adds: "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife." *Id.,* at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment "showed that the [Mahaweli] project could affect several endangered species." *Id.,* at 159.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses Kelly's and Skilbred's general statements that they intended to revisit the project sites as "simply not enough." *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," *ibid.,* the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. *Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury") (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a "description of concrete plans" or "specification of *when* the some day [for a return visit] will be," *ante,* at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore v. Arkansas,* 495 U.S. 149, 155–156 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles v. Lyons,* 461 U.S., at 105 (harm dependent on police's arresting plaintiff again and subjecting him to chokehold); *Rizzo v. Goode,* 423 U.S. 362, 372 (1976) (harm rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea v. Littleton,* 414 U.S. 488, 495–498 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden v. Zwickler,* 394 U.S. 103, 109 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14–year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

2

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante,* at 2139. To support that conclusion, the Court mischaracterizes our decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity." *Ante,* at 2139. In *National Wildlife Federation,* the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U.S., at 888. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, *e.g., Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e.g., Arkansas v. Oklahoma,* 503 U.S. 91 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot

show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the Asian elephants in another part of the world. *Ante,* at 2139. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante,* at 2146 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74–75, and n. 20 (1978) (plaintiff must show "substantial likelihood" that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the "action agencies" (*e.g.,* AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).[2] And he has previously taken the same position in this very litigation, having stated in his answer to the complaint that petitioner "admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act]." App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play "Three–Card Monte" with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

[2] This section provides in part:

> "(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required...."

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed.Reg. 19928 (1986) ("Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as 'nonbinding guidelines' that would govern only the Service's role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7").

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility

of their being indirectly bound by petitioner's regulation), the plurality concludes that "there is no reason they should be obliged to honor an incidental legal determination the suit produced." *Ante,* at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.[3] Under principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

[3] For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as "counsel" to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that " '[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.' " See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

"[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront v. Compagnie des Sucreries de Puerto Rico,* 217 U.S. 475, 487 (1910).

This principle applies even to the Federal Government. In *Montana v. United States,* 440 U.S. 147 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. "Thus, although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.,* at 155. See also *United States v. Mendoza,* 464 U.S. 154, 164, n. 9 (1984) (Federal Government estopped where it "constituted a 'party' in all but a technical sense"). In my view, the action agencies have had sufficient "laboring oars" in this litigation since its inception to be bound from subsequent relitigation of the extraterritorial scope of the § 7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

[4] The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: " 'The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*' ". *Ante,* at 2141, n. 4 (quoting *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830 (1989)). See also *Mollan v. Torrance,* 9 Wheat. 537, 539 (1824) (Marshall, C.J.). The plurality proclaims that "[i]t cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante,* at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies." *Ante,* at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed.Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in

the suit. *Ante,* at 2141. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante,* at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman–Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

The second redressability obstacle relied on by the plurality is that "the [action] agencies generally supply only a fraction of the funding for a foreign project." *Ante,* at 2142. What this Court might "generally" take to be true does not eliminate the existence of a genuine issue of fact to withstand summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." *Ibid.* The plurality neglects to mention that this "fraction" amounts to $170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: "Respondents have produced nothing to indicate that the projects they have

named will ... do less harm to listed species, if that fraction is eliminated." *Ante,* at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that "[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved." App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project." *Id.,* at 216.

I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was "overseeing" the rehabilitation of the Aswan project. *Id.,* at 101. See also *id.,* at 65 (Bureau of Reclamation publication stating: "In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project").

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Ante,* at 2143. Whatever the Court might mean with that very broad language, it cannot be saying that "procedural injuries" *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as "procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for

example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that "procedural" injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Ante,* at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221 (1986), the Court examined a statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which "diminis[h] the effectiveness" of an international whaling convention. *Id.,* at 226. The Court expressly found standing to sue. *Id.,* at 230–231, n. 4. In *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 348 (1989), this Court considered injury from violation of the "action-forcing" procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). The Secretary is also obligated to suggest "reasonable and prudent alternatives" to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own "biological assessment for the purpose of identifying any endangered species or threatened species" likely to be affected by agency action. § 1536(c)(1). After the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources" which would foreclose the "formulation or implementation of any reasonable and prudent alternative measures" to avoid jeopardizing listed species. § 1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante,* at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante,* at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. *Ante,* at 2145 (Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). Here Congress seeks not to delegate "executive" power but only to strengthen the procedures it has legislatively mandated. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States,* 500 U.S. 160, 165 (1991). "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*." *Ibid.* (emphasis added).

Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS v. Chadha,* 462 U.S. 919, 953–954, n. 16 (1983); *American Power & Light Co. v. SEC,* 329 U.S., at 105–106. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Ante,* at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, this Court has acknowledged "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," but "*these procedures are almost certain to affect the agency's substantive decision." Robertson v. Methow Valley Citizens Council,* 490 U.S., at 350 (emphasis added). See also *Andrus v. Sierra Club,* 442 U.S. 347, 350–351 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [the environmental-impact statement requirement] would be lost"). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. "Typically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright,* 468 U.S., at 752. There may be factual circumstances in which a congressionally imposed procedural

requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.' " *Mistretta v. United States,* 488 U.S. 361, 393 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled "procedural" in nature.

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In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163 (1803).

I dissent.

Supreme Court of the United States

TEXAS, Appellant,
v.
UNITED STATES et al.

Decided March 31, 1998.

Justice SCALIA delivered the opinion of the Court.

Appellant, the State of Texas, appeals from the judgment of a three-judge District Court for the District of Columbia. The State had sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, do not apply to implementation of certain sections of the Texas Education Code that permit the State to sanction local school districts for failure to meet state-mandated educational achievement levels. This appeal presents the question whether the controversy is ripe.

I

In Texas, both the state government and local school districts are responsible for the public schools. There are more than 1,000 school districts, each run by an elected school board. In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement. Tex. Educ.Code Ann. §§ 39.021–39.131 (1996). Chapter 39 contains detailed prescriptions for assessment of student academic skills, development of academic performance indicators, determination of accreditation status for school districts, and imposition of accreditation sanctions. It seeks to measure the academic performance of Texas schoolchildren, to reward the schools and school districts that achieve the legislative goals, and to sanction those that fall short.

When a district fails to satisfy the State's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions that are listed in ascending order of severity. §§ 39.131(a)(1)-(10). Those include, "to the extent the [C]ommissioner determines necessary," § 39.131(a), appointing a master to oversee the district's operations, § 39.131(a)(7), or appointing a management team to direct the district's operations in areas of unacceptable performance or to require the district to contract for services from another person, § 39.131(a)(8). When the Commissioner appoints masters or management teams, he "shall clearly define the[ir] powers and duties" and shall review the need for them every 90 days. § 39.131(e). A master or management team may approve or disapprove any action taken by a school principal, the district superintendent, or the district's board of trustees, and may also direct them to act. §§ 39.131(e)(1), (2). State law prohibits masters or management teams from taking any action concerning a district election, changing the number of members on or the method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget which establishes a different level of spending for the district from that set by the board. §§ 39.131(e)(3)-(6).

Texas is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, see 28 CFR pt. 51, App. (1997), and consequently, before it can implement changes affecting voting it must obtain preclearance from the United States District Court for the District of Columbia or from the Attorney General of the United States. 42 U.S.C. § 1973c. Texas submitted Chapter 39 to the Attorney General for administrative preclearance. The Assistant Attorney General[*] requested further information, including the criteria used to select special masters and management teams, a detailed description of their powers and duties, and the difference

between their duties and those of the elected boards. The State responded by pointing out the limits placed on masters and management teams in § 39.131(e), and by noting that the actual authority granted "is set by the Commissioner at the time of appointment depending on the needs of the district." App. to Juris. Statement 99a. After receiving this information, the Assistant Attorney General concluded that the first six sanctions do not affect voting and therefore do not require preclearance. He did not object to §§ 39.131(a)(7) and (8), insofar as the provisions are "enabling in nature," but he cautioned that "under certain foreseeable circumstances their implementation may result in a violation of Section 5" which would require preclearance. *Id.,* at 36a.

* The authority for determinations under § 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 CFR § 51.3 (1997).

On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that § 5 does not apply to the sanctions authorized by §§ 39.131(a)(7) and (8), because (1) they are not changes with respect to voting, and (2) they are consistent with conditions attached to grants of federal financial assistance that authorize and require the imposition of sanctions to ensure accountability of local education authorities. The District Court did not reach the merits of these arguments because it concluded that Texas's claim was not ripe. We noted probable jurisdiction. 521 U.S. 1150 (1997).

II

A claim is not ripe for adjudication if it rests upon " 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580–581 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Whether Texas will appoint a master or management team under §§ 39.131(a)(7) and (8) is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first "the imposition of sanctions which do not include the appointment of a master or management team," App. 10 (Original Complaint ¶ 12). He may, for example, "order the preparation of a student achievement improvement plan ..., the submission of the plan to the [C]ommissioner for approval, and implementation of the plan," § 39.131(a)(3), or "appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent," § 39.131(a)(6). It is only if these less intrusive options fail that a Commissioner may appoint a master or management team, Tr. of Oral Arg. 16, and even then, only "to the extent the [C]ommissioner determines necessary," § 39.131(a). Texas has not pointed to any particular school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Tr. of Oral Arg. 16–17. Under these circumstances, where "we have no idea whether or when such [a sanction] will be ordered," the issue is not fit for adjudication. *Toilet Goods Assn., Inc. v. Gardner,* 387 U.S. 158, 163 (1967); see also *Renne v. Geary,* 501 U.S. 312, 321–322 (1991).

Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness "requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, "[d]etermination of the scope ... of legislation in advance of its immediate adverse

effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Longshoremen v. Boyd,* 347 U.S. 222, 224 (1954). In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts. Thus, "[p]ostponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe" the provisions. *Renne, supra,* at 323.

And as for hardship to the parties: This is not a case like *Abbott Laboratories v. Gardner, supra,* at 152, where the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs, because they were compelled to affix required labeling to their products under threat of criminal sanction. Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action. (Prior to this litigation, Texas sought preclearance for the appointment of a master in a Dallas County school district, and despite a request for expedition the Attorney General took 90 days to give approval. See Brief for Petitioner 37, n. 28.) But even that inconvenience is avoidable. If Texas is confident that the imposition of a master or management team does not constitute a change affecting voting, it should simply go ahead with the appointment. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction. See *Presley v. Etowah County Comm'n,* 502 U.S. 491, 506 (1992); *City of Lockhart v. United States,* 460 U.S. 125, 129, n. 3 (1983). Texas claims that it suffers the immediate hardship of a "threat to federalism." But that is an abstraction—and an abstraction no graver than the "threat to personal freedom" that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected. Cf. *Toilet Goods Assn., supra,* at 164.

In sum, we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issues Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial. Accordingly, we agree with the District Court that this matter is not ripe for adjudication.

The judgment of the District Court is affirmed.

It is so ordered.

Supreme Court of the United States

FRIENDS OF THE EARTH, INCORPORATED, et al., Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

Decided Jan. 12, 2000.

Justice GINSBURG delivered the opinion of the Court.

This case presents an important question concerning the operation of the citizen-suit provisions of the Clean Water Act. Congress authorized the federal district courts to entertain Clean Water Act suits initiated by "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). To impel future compliance with the Act, a district court may prescribe injunctive relief in such a suit; additionally or alternatively, the court may impose civil penalties payable to the United States Treasury. § 1365(a). In the Clean Water Act citizen suit now before us, the District Court determined that injunctive relief was inappropriate because the defendant, after the institution of the litigation, achieved substantial compliance with the terms of its discharge permit. 956 F. Supp. 588, 611 (D.S.C.1997). The court did, however, assess a civil penalty of $405,800. *Id.,* at 610. The "total deterrent effect" of the penalty would be adequate to forestall future violations, the court reasoned, taking into account that the defendant "will be required to reimburse plaintiffs for a significant amount of legal fees and has, itself, incurred significant legal expenses." *Id.,* at 610–611.

The Court of Appeals vacated the District Court's order. 149 F.3d 303 (4th Cir. 1998). The case became moot, the appellate court declared, once the defendant fully complied with the terms of its permit and the plaintiff failed to appeal the denial of equitable relief. "[C]ivil penalties payable to the government," the Court of Appeals stated, "would not redress any injury Plaintiffs have suffered." *Id.,* at 307. Nor were attorneys' fees in order, the Court of Appeals noted, because absent relief on the merits, plaintiffs could not qualify as prevailing parties. *Id.,* at 307, n. 5.

We reverse the judgment of the Court of Appeals. The appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance. In directing dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit, see, *e.g., Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998), with our case law on post commencement mootness, see, *e.g., City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283 (1982). A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.

I

A

In 1972, Congress enacted the Clean Water Act (Act), also known as the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* Section 402 of the Act, 33 U.S.C. § 1342, provides for the issuance, by the Administrator of the Environmental Protection Agency (EPA) or by authorized States, of National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits impose

limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters. Noncompliance with a permit constitutes a violation of the Act. § 1342(h).

Under § 505(a) of the Act, a suit to enforce any limitation in an NPDES permit may be brought by any "citizen," defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). Sixty days before initiating a citizen suit, however, the would-be plaintiff must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator. § 1365(b)(1)(A). "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus ... render unnecessary a citizen suit." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 60 (1987). Accordingly, we have held that citizens lack statutory standing under § 505(a) to sue for violations that have ceased by the time the complaint is filed. *Id.,* at 56–63. The Act also bars a citizen from suing if the EPA or the State has already commenced, and is "diligently prosecuting," an enforcement action. 33 U.S.C. § 1365(b)(1)(B).

The Act authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. § 1365(a). In determining the amount of any civil penalty, the district court must take into account "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." § 1319(d). In addition, the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." § 1365(d).

B

In 1986, defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a hazardous waste incinerator facility in Roebuck, South Carolina, that included a wastewater treatment plant. (The company has since changed its name to Safety–Kleen (Roebuck), Inc., but for simplicity we will refer to it as "Laidlaw" throughout.) Shortly after Laidlaw acquired the facility, the South Carolina Department of Health and Environmental Control (DHEC), acting under 33 U.S.C. § 1342(a)(1), granted Laidlaw an NPDES permit authorizing the company to discharge treated water into the North Tyger River. The permit, which became effective on January 1, 1987, placed limits on Laidlaw's discharge of several pollutants into the river, including—of particular relevance to this case—mercury, an extremely toxic pollutant. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility, and imposed monitoring and reporting obligations.

Once it received its permit, Laidlaw began to discharge various pollutants into the waterway; repeatedly, Laidlaw's discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995. 956 F. Supp., at 613–621.

On April 10, 1992, plaintiff-petitioners Friends of the Earth (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) (referred to collectively in this opinion, together with later joined plaintiff-petitioner Sierra Club, as "FOE") took the preliminary step necessary to the institution of litigation. They sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against it under § 505(a) of the Act after the expiration of the requisite 60–day notice period, *i.e.,* on or after June 10,

1992. Laidlaw's lawyer then contacted DHEC to ask whether DHEC would consider filing a lawsuit against Laidlaw. The District Court later found that Laidlaw's reason for requesting that DHEC file a lawsuit against it was to bar FOE's proposed citizen suit through the operation of 33 U.S.C. § 1365(b)(1)(B). 890 F. Supp. 470, 478 (D.S.C.1995). DHEC agreed to file a lawsuit against Laidlaw; the company's lawyer then drafted the complaint for DHEC and paid the filing fee. On June 9, 1992, the last day before FOE's 60–day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay $100,000 in civil penalties and to make " 'every effort' " to comply with its permit obligations. *Id.,* at 479–481.

On June 12, 1992, FOE filed this citizen suit against Laidlaw under § 505(a) of the Act, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE had failed to present evidence demonstrating injury in fact, and therefore lacked Article III standing to bring the lawsuit. Record, Doc. No. 43. In opposition to this motion, FOE submitted affidavits and deposition testimony from members of the plaintiff organizations. Record, Doc. No. 71 (Exhs. 41–51). The record before the District Court also included affidavits from the organizations' members submitted by FOE in support of an earlier motion for preliminary injunctive relief. Record, Doc. No. 21 (Exhs. 5–10). After examining this evidence, the District Court denied Laidlaw's summary judgment motion, finding—albeit "by the very slimmest of margins"—that FOE had standing to bring the suit. App. in No. 97–1246(4th Cir.), pp. 207–208 (Tr. of Hearing 39–40 (June 30, 1993)).

Laidlaw also moved to dismiss the action on the ground that the citizen suit was barred under 33 U.S.C. § 1365(b)(1)(B) by DHEC's prior action against the company. The United States, appearing as *amicus curiae,* joined FOE in opposing the motion. After an extensive analysis of the Laidlaw–DHEC settlement and the circumstances under which it was reached, the District Court held that DHEC's action against Laidlaw had not been "diligently prosecuted"; consequently, the court allowed FOE's citizen suit to proceed. 890 F. Supp., at 499.[1] The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, Laidlaw violated the mercury discharge limitation in its permit 13 times. 956 F. Supp., at 621. The District Court also found that Laidlaw had committed 13 monitoring and 10 reporting violations during this period. *Id.,* at 601. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered. *Id.,* at 621.

[1] The District Court noted that "Laidlaw drafted the state—court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee." 890 F. Supp., at 489. Further, "the settlement agreement between DHEC and Laidlaw was entered into with unusual haste, without giving the Plaintiffs the opportunity to intervene." *Ibid.* The court found "most persuasive" the fact that "in imposing the civil penalty of $100,000 against Laidlaw, DHEC failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit." *Id.,* at 491.

On January 22, 1997, the District Court issued its judgment. 956 F. Supp. 588 (D.S.C.). It found that Laidlaw had gained a total economic benefit of $1,092,581 as a result of its extended period of noncompliance with the mercury discharge limit in its permit. *Id.,* at 603. The court concluded, however, that a civil penalty of $405,800 was adequate in light of the guiding factors listed in 33 U.S.C. § 1319(d). 956 F. Supp., at 610. In particular, the District Court stated that the lesser penalty was appropriate taking into account the judgment's "total deterrent effect." In reaching this determination, the court "considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees." *Id.,* at 610–611. The court declined to grant FOE's request for injunctive relief, stating that an injunction was inappropriate because "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992." *Id.,* at 611.

FOE appealed the District Court's civil penalty judgment, arguing that the penalty was inadequate, but did not appeal the denial of declaratory or injunctive relief. Laidlaw cross-appealed, arguing, among other things, that FOE lacked standing to bring the suit and that DHEC's action qualified as a diligent prosecution precluding FOE's litigation. The United States continued to participate as *amicus curiae* in support of FOE.

On July 16, 1998, the Court of Appeals for the Fourth Circuit issued its judgment. 149 F.3d 303 (4th Cir. 1998). The Court of Appeals assumed without deciding that FOE initially had standing to bring the action, *id.,* at 306, n. 3, but went on to hold that the case had become moot. The appellate court stated, first, that the elements of Article III standing—injury, causation, and redressability—must persist at every stage of review, or else the action becomes moot. *Id.,* at 306. Citing our decision in *Steel Co.,* the Court of Appeals reasoned that the case had become moot because "the only remedy currently available to [FOE]—civil penalties payable to the government—would not redress any injury [FOE has] suffered." 149 F.3d, at 306–307. The court therefore vacated the District Court's order and remanded with instructions to dismiss the action. In a footnote, the Court of Appeals added that FOE's "failure to obtain relief on the merits of [its] claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.' " *Id.,* at 307, n. 5 (quoting 33 U.S.C. § 1365(d)).

According to Laidlaw, after the Court of Appeals issued its decision but before this Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased. Respondent's Suggestion of Mootness 3.

We granted certiorari, 525 U.S. 1176 (1999), to resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act. See, *e.g., Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.,* 116 F.3d 814, 820 (7th Cir.), cert. denied, 522 U.S. 981 (1997); *Natural Resources Defense Council, Inc. v. Texaco Rfg. and Mktg., Inc.,* 2 F.3d 493, 503–504 (3rd Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.,* 993 F.2d 1017, 1020–1021 (2d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1135–1136 (11th Cir. 1990).

II

A

The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so we address them separately. Because the Court of Appeals was persuaded that the case had become moot and so held, it simply assumed without deciding that FOE had initial standing. See *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66–67 (1997) (court may assume without deciding that standing exists in order to analyze mootness). But because we hold that the Court of Appeals erred in declaring the case moot, we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation. We therefore address the question of standing before turning to mootness.

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete

and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

Laidlaw contends first that FOE lacked standing from the outset even to seek injunctive relief, because the plaintiff organizations failed to show that any of their members had sustained or faced the threat of any "injury in fact" from Laidlaw's activities. In support of this contention Laidlaw points to the District Court's finding, made in the course of setting the penalty amount, that there had been "no demonstrated proof of harm to the environment" from Laidlaw's mercury discharge violations. 956 F. Supp., at 602; see also *ibid.* ("[T]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.").

The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post,* at 713–714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing. App. in No. 97–1246 (4th Cir.), at 207–208 (Tr. of Hearing 39–40). For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Record, Doc. No. 71 (Exhs. 41, 42). Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges. *Ibid.* (Exh. 43, at 52–53; Exh. 44, at 33).

Other members presented evidence to similar effect. CLEAN member Angela Patterson attested that she lived two miles from the facility; that before Laidlaw operated the facility, she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges. Record, Doc. No. 21 (Exh. 10). CLEAN member Judy Pruitt averred that she lived one-quarter mile from Laidlaw's facility and would like to fish, hike, and picnic along the North Tyger River, but has refrained from those activities because of the discharges. *Ibid.* (Exh. 7). FOE member Linda Moore attested that she lived 20 miles from Roebuck, and would use the North Tyger River south of Roebuck and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants. Record, Doc. No. 71 (Exhs. 45, 46). In her deposition, Moore testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. *Ibid.* (Exh. 48, at 29, 36–37, 62–63, 72). CLEAN member Gail Lee attested that her home, which is near Laidlaw's facility, had a lower value than similar homes located farther from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy. Record, Doc. No. 21 (Exh. 9). Sierra Club member Norman Sharp averred that he had canoed approximately 40 miles downstream of the Laidlaw

facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants. *Ibid.* (Exh. 8).

These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972). See also *Defenders of Wildlife,* 504 U.S., at 562–563 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

Our decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), is not to the contrary. In that case an environmental organization assailed the Bureau of Land Management's "land withdrawal review program," a program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action under the Administrative Procedure Act, 5 U.S.C. § 702. We held that the plaintiff could not survive the summary judgment motion merely by offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." 497 U.S., at 889.

In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation. Id.,* at 888. Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative " 'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife.* 504 U.S., at 564.

Los Angeles v. Lyons, 461 U.S. 95 (1983), relied on by the dissent, *post,* at 714, does not weigh against standing in this case. In *Lyons,* we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy. 461 U.S., at 107, n. 7. In the footnote from *Lyons* cited by the dissent, we noted that "[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct," and that his "subjective apprehensions" that such a recurrence would even *take place* were not enough to support standing. *Id.,* at 108, n. 8. Here, in contrast, it is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons,* then, the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, *post,* at 714, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability. Civil penalties offer no redress to

private plaintiffs, Laidlaw argues, because they are paid to the Government, and therefore a citizen plaintiff can never have standing to seek them.

Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought. See, *e.g., Lyons,* 461 U.S., at 109 (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief); see also *Lewis v. Casey,* 518 U.S. 343, 358, n. 6 (1996) ("[S]tanding is not dispensed in gross."). But it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.

We have recognized on numerous occasions that "all civil penalties have some deterrent effect." *Hudson v. United States,* 522 U.S. 93, 102 (1997); see also, *e.g., Department of Revenue of Mont. v. Kurth Ranch,* 511 U.S. 767, 778 (1994). More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. "The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. ... [The district court may] seek to deter future violations by basing the penalty on its economic impact." *Tull v. United States,* 481 U.S. 412, 422–423 (1987).

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

The dissent argues that it is the *availability* rather than the *imposition* of civil penalties that deters any particular polluter from continuing to pollute. *Post,* at 718–719. This argument misses the mark in two ways. First, it overlooks the interdependence of the availability and the imposition; a threat has no deterrent value unless it is credible that it will be carried out. Second, it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.[2]

[2] The dissent suggests that there was little deterrent work for civil penalties to do in this case because the lawsuit brought against Laidlaw by DHEC had already pushed the level of deterrence to "near the top of the graph." *Post,* at 718. This suggestion ignores the District Court's specific finding that the penalty agreed to by Laidlaw and DHEC was far too low to remove Laidlaw's economic benefit from noncompliance, and thus was inadequate to deter future violations. 890 F. Supp. 470, 491–494, 497–498 (D.S.C.1995). And it begins to look especially farfetched when one recalls that Laidlaw itself prompted the DHEC lawsuit, paid the filing fee, and drafted the complaint. See *supra,* at 702, n. 1.

We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case. Justice Frankfurter's observations for the Court, made in a different context nearly 60 years ago, hold true here as well:

> "How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis." *Tigner v. Texas,* 310 U.S. 141, 148 (1940).[3]

[3] In *Tigner* the Court rejected an equal protection challenge to a statutory provision exempting agricultural producers from the reach of the Texas antitrust laws.

In this case we need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability. Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of $405,800. 956 F. Supp., at 610–611.

Laidlaw contends that the reasoning of our decision in *Steel Co.* directs the conclusion that citizen plaintiffs have no standing to seek civil penalties under the Act. We disagree. *Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. 523 U.S., at 106–107. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist. *Id.,* at 108; see also *Gwaltney,* 484 U.S., at 59 ("the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past"). In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.[4]

[4] In insisting that the redressability requirement is not met, the dissent relies heavily on *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973). That reliance is sorely misplaced. In *Linda R. S.,* the mother of an out-of-wedlock child filed suit to force a district attorney to bring a criminal prosecution against the absentee father for failure to pay child support. *Id.,* at 616. In finding that the mother lacked standing to seek this extraordinary remedy, the Court drew attention to "the special status of criminal prosecutions in our system," *id.,* at 619, and carefully limited its holding to the "unique context of a challenge to [the nonenforcement of] a criminal statute," *id.,* at 617. Furthermore, as to redressability, the relief sought in *Linda R. S.*—a prosecution which, if successful, would automatically land the delinquent father in jail for a fixed term, *id.,* at 618, with predictably negative effects on his earning power—would scarcely remedy the plaintiff's lack of child support payments. In this regard, the Court contrasted "the civil contempt model whereby the defendant 'keeps the keys to the jail in his own pocket' and may be released whenever he complies with his legal obligations." *Ibid.* The dissent's contention, *post,* at 716, that "precisely the same situation exists here" as in *Linda R. S.* is, to say the least, extravagant.
Putting aside its mistaken reliance on *Linda R. S.,* the dissent's broader charge that citizen suits for civil penalties under the Act carry "grave implications for democratic governance," *post,* at 715, seems to us overdrawn. Certainly the Federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law. In fact, the Department of Justice has endorsed this citizen suit from the outset, submitting *amicus* briefs in support of FOE in the District Court, the Court of Appeals, and this Court. See *supra,* at 702, 703. As we have already noted, *supra,* at 701, the Federal Government retains the power to foreclose a citizen suit by undertaking its own action. 33 U.S.C. § 1365(b)(1)(B). And if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to

"intervene as a matter of right" and bring the Government's views to the attention of the court. § 1365(c)(2).

B

Satisfied that FOE had standing under Article III to bring this action, we turn to the question of mootness.

The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct—either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite,* 455 U.S., at 289. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " *Id.,* at 289, n. 10 (citing *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid.*

The Court of Appeals justified its mootness disposition by reference to *Steel Co.,* which held that citizen plaintiffs lack standing to seek civil penalties for wholly past violations. In relying on *Steel Co.,* the Court of Appeals confused mootness with standing. The confusion is understandable, given this Court's repeated statements that the doctrine of mootness can be described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English,* 520 U.S., at 68, n. 22 (quoting *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980), in turn quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)) (internal quotation marks omitted).

Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as "standing set in a time frame" is not comprehensive. As just noted, 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. *Concentrated Phosphate Export Assn.,* 393 U.S., at 203. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending." *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) (citations and internal quotation marks omitted). Thus, in *Lyons,* as already noted, we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. 461 U.S., at 105–110. Elsewhere in the opinion, however, we noted that a citywide moratorium on police chokeholds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. *Id.,* at 101. The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

Furthermore, if mootness were simply "standing set in a time frame," the exception to mootness that arises when the defendant's allegedly unlawful activity is "capable of repetition, yet evading review," could not exist. When, for example, a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, *Olmstead v. L.C.,* 527 U.S. 581, 594, n. 6 (1999), despite the fact that she would have lacked initial standing had she filed the complaint after the transfer. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. See *Steel Co.,* 523 U.S., at 109 (" 'the mootness exception for disputes capable of repetition yet evading review ... will not revive a dispute which became moot before the action commenced' ") (quoting *Renne v. Geary,* 501 U.S. 312, 320 (1991)).

We acknowledged the distinction between mootness and standing most recently in *Steel Co.:*
"The United States ... argues that the injunctive relief does constitute remediation because 'there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation,' even if that occurs before a complaint is filed.... This makes a sword out of a shield. The 'presumption' the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity.... It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." 523 U.S., at 109.

Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs[5] does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died. See, *e.g., DeFunis v. Odegaard,* 416 U.S. 312 (1974) *(per curiam)* (non-class-action challenge to constitutionality of law school admissions process mooted when plaintiff, admitted pursuant to preliminary injunction, neared graduation and defendant law school conceded that, as a matter of ordinary school policy, plaintiff would be allowed to finish his final term); *Arizonans,* 520 U.S., at 67 (non-class-action challenge to state constitutional amendment declaring English the official language of the State became moot when plaintiff, a state employee who sought to use her bilingual skills, left state employment). But the argument surely highlights an important difference between the two doctrines. See generally *Honig v. Doe,* 484 U.S. 305, 329–332 (1988) (REHNQUIST, C. J., concurring).

[5] Of course we mean sunk costs to the judicial system, not to the litigants. *Lewis v. Continental Bank Corp.,* 494 U.S. 472 (1990) (cited by the dissent, *post,* at 721), dealt with the latter, noting that courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees.

In its brief, Laidlaw appears to argue that, regardless of the effect of Laidlaw's compliance, FOE doomed its own civil penalty claim to mootness by failing to appeal the District Court's denial of injunctive relief. Brief for Respondent 14–17. This argument misconceives the statutory scheme. Under § 1365(a), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero–Barcelo,*

456 U.S. 305, 313 (1982). Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter. Indeed, it meant no such thing in this case. The District Court denied injunctive relief, but expressly based its award of civil penalties on the need for deterrence. See 956 F. Supp., at 610–611. As the dissent notes, *post,* at 717, federal courts should aim to ensure " 'the framing of relief no broader than required by the precise facts.' " *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974). In accordance with this aim, a district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court—a process burdensome to court and permit holder alike. See *City of Mesquite,* 455 U.S., at 289 (although the defendant's voluntary cessation of the challenged practice does not moot the case, "[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice").

Laidlaw also asserts, in a supplemental suggestion of mootness, that the closure of its Roebuck facility, which took place after the Court of Appeals issued its decision, mooted the case. The facility closure, like Laidlaw's earlier achievement of substantial compliance with its permit requirements, might moot the case, but—we once more reiterate—only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.,* 393 U.S., at 203. The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter. FOE points out, for example—and Laidlaw does not appear to contest—that Laidlaw retains its NPDES permit. These issues have not been aired in the lower courts; they remain open for consideration on remand.[6]

[6] We note that it is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994) (mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review); see also *Walling v. James V. Reuter, Inc.,* 321 U.S. 671 (1944).

C

FOE argues that it is entitled to attorneys' fees on the theory that a plaintiff can be a "prevailing party" for purposes of 33 U.S.C. § 1365(d) if it was the "catalyst" that triggered a favorable outcome. In the decision under review, the Court of Appeals noted that its Circuit precedent construed our decision in *Farrar v. Hobby,* 506 U.S. 103 (1992), to require rejection of that theory. 149 F.3d, at 307, n. 5 (citing *S–1 & S–2 v. State Bd. of Ed. of N. C.,* 21 F.3d 49, 51 (4th Cir. 1994) (en banc)). Cf. *Foreman v. Dallas County,* 193 F.3d 314, 320 (5th Cir. 1999) (stating, in dicta, that "[a]fter *Farrar* ... the continuing validity of the catalyst theory is in serious doubt").

Farrar acknowledged that a civil rights plaintiff awarded nominal damages may be a "prevailing party" under 42 U.S.C. § 1988. 506 U.S., at 112. The case involved no catalytic effect. Recognizing that the issue was not presented for this Court's decision in *Farrar,* several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane,* 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Housing Authority,* 21 F.3d 541, 546–550 (3rd Cir. 1994); *Zinn v. Shalala,* 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., # 1,* 17 F.3d 260, 263, n. 2 (8th Cir. 1994); *Kilgour v. Pasadena,* 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska,* 31 F.3d 942, 951–952 (10th Cir. 1994); *Morris v. West Palm Beach,* 194 F.3d 1203, 1207 (11th Cir. 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar. Paris v. United States Dept. of Housing and Urban Development,* 988 F.2d 236, 238 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School,* 985 F.2d 255, 257 (6th Cir. 1993).

It would be premature, however, for us to address the continuing validity of the catalyst theory in the context of this case. The District Court, in an order separate from the one in which it imposed civil penalties against Laidlaw, stayed the time for a petition for attorneys' fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. See 149 F.3d, at 305 (describing order staying time for attorneys' fees petition). In the opinion accompanying its order on penalties, the District Court stated only that "this court has considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees," and referred to "potential fee awards." 956 F. Supp., at 610–611. Thus, when the Court of Appeals addressed the availability of counsel fees in this case, no order was before it either denying or awarding fees. It is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

Although the Court has identified a sufficient reason for rejecting the Court of Appeals' mootness determination, it is important also to note that the case would not be moot even if it were absolutely clear that respondent had gone out of business and posed no threat of future permit violations. The District Court entered a valid judgment requiring respondent to pay a civil penalty of $405,800 to the United States. No postjudgment conduct of respondent could retroactively invalidate that judgment. A record of voluntary postjudgment compliance that would justify a decision that injunctive relief is unnecessary, or even a decision that any claim for injunctive relief is now moot, would not warrant vacation of the valid money judgment.

Furthermore, petitioners' claim for civil penalties would not be moot even if it were absolutely clear that respondent's violations could not reasonably be expected to recur because respondent achieved substantial compliance with its permit requirements after petitioners filed their complaint but before the District Court entered judgment. As the Courts of Appeals (other than the court below) have uniformly concluded, a polluter's voluntary postcomplaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief.[*] This conclusion is consistent with the structure of the Clean Water Act, which attaches liability for civil penalties at the time a permit violation occurs. 33 U.S.C. § 1319(d) ("Any person who violates [certain provisions of the Act or certain permit conditions and limitations] shall be subject to a civil penalty ..."). It is also consistent with the character of civil penalties, which, for purposes of mootness analysis, should be equated with punitive damages rather than with injunctive or declaratory relief. See *Tull v. United States,* 481 U.S. 412, 422–423 (1987). No one contends that a defendant's postcomplaint conduct could moot a claim for punitive damages; civil penalties should be treated the same way.

[*] *Comfort Lake Assn. v. Dresel Contracting, Inc.,* 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.,* 116 F.3d 814, 820(7th Cir.), cert. denied, 522 U.S. 981 (1997); *Natural Resources Defense Council v. Texaco Refining & Mktg., Inc.,* 2 F.3d 493, 502–503 (3rd Cir. 1993);

Atlantic States Legal Foundation, Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1020–1021 (2d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1134–1137 (11th Cir. 1990); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.,* 890 F.2d 690, 696–697 (4th Cir. 1989). Cf. *Powell v. McCormack,* 395 U.S. 486, 496, n. 8 (1969) ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests").

The cases cited by the Court in its discussion of the mootness issue all involved requests for injunctive or declaratory relief. In only one, *Los Angeles v. Lyons,* 461 U.S. 95 (1983), did the plaintiff seek damages, and in that case the opinion makes it clear that the inability to obtain injunctive relief would have no impact on the damages claim. *Id.,* at 105, n. 6, 109. There is no precedent, either in our jurisprudence, or in any other of which I am aware, that provides any support for the suggestion that postcomplaint factual developments that might moot a claim for injunctive or declaratory relief could either moot a claim for monetary relief or retroactively invalidate a valid money judgment.

Justice KENNEDY, concurring.

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Court begins its analysis by finding injury in fact on the basis of vague affidavits that are undermined by the District Court's express finding that Laidlaw's discharges caused no demonstrable harm to the environment. It then proceeds to marry private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals. Finally, the Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court's watered-down requirements for initial standing. I dissent from all of this.

I

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (hereinafter *Lujan*); *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990). The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants' testimony asserting that their enjoyment of the North Tyger River has been diminished due to "concern" that the water was polluted, and that they "believed" that Laidlaw's mercury exceedances had reduced the value of their homes. *Ante,* at 704–705. These averments alone cannot carry the plaintiffs' burden of demonstrating that they have suffered a "concrete and particularized" injury, *Lujan,* 504 U.S., at 560. General allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth "specific facts" to support their claims. *Id.,* at 56. And where, as here, the case has proceeded to judgment, those specific facts must be " 'supported adequately by the evidence adduced at trial,' " *ibid.* (quoting *Gladstone,*

Realtors v. Village of Bellwood, 441 U.S. 91, 115, n. 31 (1979)). In this case, the affidavits themselves are woefully short on "specific facts," and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been "no demonstrated proof of harm to the environment," 956 F. Supp. 588, 602 (D.S.C.1997), that the "permit violations at issue in this citizen suit did not result in any health risk or environmental harm," *ibid.,* that "[a]ll available data ... fail to show that Laidlaw's *actual* discharges have resulted in harm to the North Tyger River," *id.,* at 602–603, and that "the overall quality of the river exceeds levels necessary to support ... recreation in and on the water," *id.,* at 600.

The Court finds these conclusions unproblematic for standing, because "[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff." *Ante,* at 704. This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. *E.g., Lujan, supra,* at 563. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing "concerns" about the environment are not enough, for "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions," *Los Angeles v. Lyons,* 461 U.S. 95, 107, n. 8 (1983). At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects. Cf. *Gladstone, supra,* at 115 (noting that standing could be established by "convincing evidence" that a decline in real estate values was attributable to the defendant's conduct). Plaintiffs here have made no attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of "concern."

Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective "concerns" actually affected their conduct. Linda Moore, for example, said in her affidavit that she would use the affected waterways for recreation if it were not for her concern about pollution. Record, Doc. No. 71 (Exhs. 45, 46). Yet she testified in her deposition that she had been to the river only twice, once in 1980 (when she visited someone who lived by the river) and once after this suit was filed. Record, Doc. No. 62 (Moore Deposition 23–24). Similarly, Kenneth Lee Curtis, who claimed he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was "a kid," *ibid.* (Curtis Deposition, pt. 2, p. 38), and when asked whether the reason he stopped visiting the river was because of pollution, answered "no," *id.,* at 39. As to Curtis's claim that the river "looke[d] and smell[ed] polluted," this condition, if present, was surely not caused by Laidlaw's discharges, which according to the District Court "did not result in any health risk or environmental harm." 956 F.Supp., at 602. The other affiants cited by the Court were not deposed, but their affidavits state either that they *would* use the river if it were not polluted or harmful (as the court subsequently found it is not), Record, Doc. No. 21 (Exhs. 7, 8, and 9), or said that the river looks polluted (which is also incompatible with the court's findings), *ibid.* (Exh. 10). These affiants have established nothing but "subjective apprehensions."

The Court is correct that the District Court explicitly found standing—albeit "by the very slimmest of margins," and as "an awfully close call." App. in No. 97–1246 (4th Cir.), pp. 207–208 (Tr. of Hearing 39–40 (June 30, 1993)). That cautious finding, however, was made in 1993, long before the court's 1997 conclusion that Laidlaw's discharges did not harm the environment. As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion. *Gladstone,* 441 U.S., at 115, and n. 31; *Wyoming v. Oklahoma,* 502 U.S. 437, 446 (1992). Laidlaw challenged the existence of injury in fact on appeal to the Fourth Circuit, but that court did not reach the question. Thus no lower court has reviewed the injury-in-fact issue in light of the extensive studies that led the District Court to conclude that the environment was not harmed by Laidlaw's discharges.

Inexplicably, the Court is untroubled by this, but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the "conclusory allegations of an affidavit," *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888 (1990), the Court is content to do just that today. By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard.

II

The Court's treatment of the redressability requirement—which would have been unnecessary if it resolved the injury-in-fact question correctly—is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminished enjoyment of the affected waterways and decreased property values. They allege that these injuries are caused by Laidlaw's continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified "penalty" for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 106–107 (1998). The Court nonetheless finds the redressability requirement satisfied here, distinguishing *Steel Co.* on the ground that in this case petitioners allege ongoing violations; payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. *Ante,* at 706–707. It holds that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit.

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance. I shall discuss these three points in turn.

A

In *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973), the plaintiff, mother of an illegitimate child, sought, on behalf of herself, her child, and all others similarly situated, an injunction against discriminatory application of Art. 602 of the Texas Penal Code. Although that provision made it a misdemeanor for "any parent" to refuse to support his or her minor children under 18 years of age, it was enforced only against married parents. That refusal, the plaintiff contended, deprived her and her child of the equal protection of the law by denying them the deterrent effect of the statute upon the father's failure to fulfill his support obligation. The Court held that there was no Article III standing. There was no " 'direct' relationship," it said, "between the alleged injury and the claim sought to be adjudicated," since "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.,* at 618. "[Our cases] demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.,* at 619.

Although the Court in *Linda R.S.* recited the "logical nexus" analysis of *Flast v. Cohen,* 392 U.S. 83 (1968), which has since fallen into desuetude, "it is clear that standing was denied ... because of the unlikelihood that the relief requested would redress appellant's claimed injury." *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 79, n. 24 (1978). There was no "logical nexus" between nonenforcement of the statute and Linda R. S.'s failure to receive support payments because "[t]he prospect that prosecution will ... result in payment of support" was "speculative," *Linda R. S., supra,* at 618—that is to say, it was uncertain whether the relief would prevent the injury.[1] Of course precisely the same situation exists here. The principle that "in American jurisprudence ... a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State.

[1] The decision in *Linda R.S.* did not turn, as today's opinion imaginatively suggests, on the father's short-term inability to pay support if imprisoned. *Ante,* at 708, n. 4. The Court's only comment upon the imprisonment was that, unlike imprisonment for civil contempt, it would not condition the father's release upon payment. The Court then continued: "The prospect that prosecution will, at least in the future"—*i.e.,* upon completion of the imprisonment—"result in payment of support can, at best, be termed only speculative." *Linda R. S.,* 410 U.S., at 618.

The Court's opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for tort damages to be paid not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the "remediation" that is the traditional business of Anglo–American courts is relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, see *Lujan,* 504 U.S., at 573–574, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

Thus, relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury. *Lewis v. Casey,* 518 U.S. 343, 357–360 (1996); *Lyons,* 461 U.S., at 105–107, and n. 7. In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an

"undifferentiated public interest" into an "individual right" vindicable in the courts. *Lujan, supra,* at 577; *Steel Co.,* 523 U.S., at 106. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974), that the requirement of injury in fact "insures the framing of relief no broader than required by the precise facts." A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

B

As I have just discussed, it is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, "speculative as a matter of law." Even if that were not so, however, the deterrent effect in the present case would surely be speculative as a matter of fact.

The Court recognizes, of course, that to satisfy Article III, it must be "likely," as opposed to "merely speculative," that a favorable decision will redress plaintiffs' injury, *Lujan, supra,* at 561. See *ante,* at 704. Further, the Court recognizes that not *all* deterrent effects of *all* civil penalties will meet this standard—though it declines to "explore the outer limits" of adequate deterrence, *ante,* at 707. It concludes, however, that in the present case "the civil penalties sought by FOE carried with them a deterrent effect" that satisfied the "likely [rather than] speculative" standard. *Ibid.* There is little in the Court's opinion to explain why it believes this is so.

The Court cites the District Court's conclusion that the penalties imposed, along with anticipated fee awards, provided "adequate deterrence." *Ante,* at 703, 707; 956 F. Supp., at 611. There is absolutely no reason to believe, however, that this meant "deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur." The statute does not even *mention* deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. (That element can come in, if at all, under the last, residual category of "such other matters as justice may require." 33 U.S.C. § 1319(d).) The statute does require the court to consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, [and] the economic impact of the penalty on the violator...." *Ibid.,* see 956 F. Supp., at 601. The District Court meticulously discussed, in subsections (a) through (e) of the portion of its opinion entitled "Civil Penalty," *each one* of those specified factors, and then—under subsection (f) entitled "Other Matters As Justice May Require," it discussed "1. Laidlaw's Failure to Avail Itself of the Reopener Clause," "2. Recent Compliance History," and "3. The Ever–Changing Mercury Limit." There is no mention whatever—in this portion of the opinion or anywhere else—of the degree of deterrence necessary to prevent future harm to these particular plaintiffs. Indeed, neither the District Court's final opinion (which contains the "adequate deterrence" statement) nor its earlier opinion dealing with the preliminary question whether South Carolina's previous lawsuit against Laidlaw constituted "diligent prosecution" that would bar citizen suit, see 33 U.S.C. § 1365(b)(1)(B), displayed *any awareness* that deterrence of *future injury to the plaintiffs* was necessary to support standing.

The District Court's earlier opinion did, however, quote with approval the passage from a District Court case which began: " 'Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.' " App. 122, quoting *PIRG v. Powell Duffryn Terminals, Inc.,* 720 F.Supp. 1158, 1166 (D.N.J. 1989). When the District Court concluded the "Civil Penalty" section

of its opinion with the statement that "[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case," 956 F.Supp., at 611, it was obviously harking back to this general statement of what the statutorily prescribed factors (and the "as justice may require" factors, which in this case did not include particularized or even generalized deterrence) were designed to achieve. It meant no more than that the court believed the civil penalty it had prescribed met the statutory standards.

The Court points out that we have previously said " 'all civil penalties have some deterrent effect,' " *ante,* at 706 (quoting *Hudson v. United States,* 522 U.S. 93, 102 (1997)). That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the *availability* of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single *imposition* of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. See *id.,* at 96; *Department of Revenue of Mont. v. Kurth Ranch,* 511 U.S. 767, 773 (1994); *Tull v. United States,* 481 U.S. 412, 414 (1987).

If the Court had undertaken the necessary inquiry into whether significant deterrence of the plaintiffs' feared injury was "likely," it would have had to reason something like this: Strictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the *fear* of a penalty for *future* pollution. That fear will be virtually nonexistent if the prospective polluter knows that all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has, as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph when, as here, the prospective polluter has already been subjected to *state* penalties for the past pollution. The deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for Laidlaw's past conduct.

I cannot say for certain that this marginal increase is zero; but I can say for certain that it is entirely speculative whether it will make the difference between these plaintiffs' suffering injury in the future and these plaintiffs' going unharmed. In fact, the assertion that it will "likely" do so is entirely farfetched. The speculativeness of that result is much greater than the speculativeness we found excessive in *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 43 (1976), where we held that denying § 501(c)(3) charitable-deduction tax status to hospitals that refused to treat indigents was not sufficiently likely to assure future treatment of the indigent plaintiffs to support standing. And it is much greater than the speculativeness we found excessive in *Linda R.S. v. Richard D.,* discussed *supra,* at 715–716, where we said that "[t]he prospect that prosecution [for nonsupport] will ... result in payment of support can, at best, be termed only speculative," 410 U.S., at 618.

In sum, if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

C

Article II of the Constitution commits it to the President to "take Care that the Laws be faithfully executed," Art. II, § 3, and provides specific methods by which all persons exercising significant executive power are to be appointed, Art. II, § 2. As Justice KENNEDY'S concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued—and I, like the Court, do not address it. But Article III, no less than Article II, has consequences for the structure of our government, see *Schlesinger,* 418 U.S., at 222, and it is worth noting the changes in that structure which today's decision allows.

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. See *supra,* at 700–702. And once the target is chosen, the suit goes forward without meaningful public control.[2] The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. See Greve, The Private Enforcement of Environmental Law, 65 Tulane L.Rev. 339, 355–359 (1990). Thus is a public fine diverted to a private interest.

[2] The Court points out that the Government is allowed to intervene in a citizen suit, see *ante,* at 708, n. 4; 33 U.S.C. § 1365(c)(2), but this power to "bring the Government's views to the attention of the court," *ante,* at 708, n. 4, is meager substitute for the power to decide whether prosecution will occur. Indeed, according the Chief Executive of the United States the ability to intervene does no more than place him on a par with John Q. Public, who can intervene—whether the Government likes it or not—when the United States files suit. § 1365(b)(1)(B).

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. 33 U.S.C. § 1365(b)(1)(B). This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken—which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.[3] See § 1365(b)(1)(A) (providing that citizen plaintiff need only wait 60 days after giving notice of the violation to the government before proceeding with action). This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

[3] The Court observes that "the Federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law," since it has "endorsed this citizen suit from the outset." *Ante,* at 708, n. 4. Of course, in doubtful cases a long and uninterrupted history of Presidential acquiescence and approval can shed light upon the constitutional understanding. What we have here—acquiescence and approval by a single administration—does not deserve passing mention.

III

Finally, I offer a few comments regarding the Court's discussion of whether FOE's claims became moot by reason of Laidlaw's substantial compliance with the permit limits. I do not disagree with the

conclusion that the Court reaches. Assuming that the plaintiffs had standing to pursue civil penalties in the first instance (which they did not), their claim might well not have been mooted by Laidlaw's voluntary compliance with the permit, and leaving this fact-intensive question open for consideration on remand, as the Court does, *ante,* at 711, seems sensible.[4] In reaching this disposition, however, the Court engages in a troubling discussion of the purported distinctions between the doctrines of standing and mootness. I am frankly puzzled as to why this discussion appears at all. Laidlaw's claimed compliance is squarely within the bounds of our "voluntary cessation" doctrine, which is the basis for the remand. *Ante,* at 710.[5] There is no reason to engage in an interesting academic excursus upon the differences between mootness and standing in order to invoke this obviously applicable rule.[6]

[4] In addition to the compliance and plant-closure issues, there also remains open on remand the question whether the current suit was foreclosed because the earlier suit by the State was "diligently prosecuted." See 33 U.S.C. § 1365(b)(1)(B). Nothing in the Court's opinion disposes of the issue. The opinion notes the District Court's finding that Laidlaw itself played a significant role in facilitating the State's action. *Ante,* at 702, n. 1, 707, n. 2. But there is no incompatibility whatever between a defendant's facilitation of suit and the State's diligent prosecution—as prosecutions of felons who confess their crimes and turn themselves in regularly demonstrate. Laidlaw was entirely within its rights to prefer state suit to this private enforcement action; and if it had such a preference it would have been prudent—given that a State must act within 60 days of receiving notice of a citizen suit, see § 1365(b)(1)(A), and given the number of cases state agencies handle—for Laidlaw to make sure its case did not fall through the cracks. South Carolina's interest in the action was not a feigned last minute contrivance. It had worked with Laidlaw in resolving the problem for many years, and had previously undertaken an administrative enforcement action resulting in a consent order. 890 F. Supp. 470, 476 (D.S.C.1995). South Carolina has filed an *amicus* brief arguing that allowing citizen suits to proceed despite ongoing state enforcement efforts "will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States." Brief for South Carolina as *Amicus Curiae* 6.

[5] Unlike Justice STEVENS' concurrence, the opinion for the Court appears to recognize that a claim for civil penalties is moot when it is clear that no future injury to the plaintiff at the hands of the defendant can occur. The concurrence suggests that civil penalties, like traditional damages remedies, cannot be mooted by absence of threatened injury. The analogy is inapt. Traditional money damages are payable to compensate for the harm of past conduct, which subsists whether future harm is threatened or not; civil penalties are privately assessable (according to the Court) to deter threatened future harm to the plaintiff. Where there is no threat to the plaintiff, he has no claim to deterrence. The proposition that impossibility of future violation does not moot the case holds true, of course, for civil-penalty suits by the government, which do not rest upon the theory that some particular future harm is being prevented.

[6] The Court attempts to frame its exposition as a corrective to the Fourth Circuit, which it claims "confused mootness with standing." *Ante,* at 708. The Fourth Circuit's conclusion of nonjusticiability rested upon the belief (entirely correct, in my view) that the only remedy being pursued on appeal, civil penalties, would not redress FOE's claimed injury. 149 F.3d 303, 306 (4th Cir. 1998). While this might be characterized as a conclusion that FOE had no standing to pursue civil penalties from the outset, it can also be characterized, as it was by the Fourth Circuit, as a conclusion that, when FOE declined to appeal denial of the declaratory judgment and injunction, and appealed only the inadequacy of the civil penalties (which it had no standing to pursue) the *case as a whole became moot.* Given the Court's erroneous conclusion that civil penalties can redress private injury, it of course rejects both formulations—but neither of them necessitates the Court's academic discourse comparing the mootness and standing doctrines.

Because the discussion is not essential—indeed, not even relevant—to the Court's decision, it is of limited significance. Nonetheless, I am troubled by the Court's too-hasty retreat from our

characterization of mootness as "the doctrine of standing set in a time frame." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 68, n. 22 (1997). We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). A court may not proceed to hear an action if, subsequent to its initiation, the dispute loses "its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law." *Hall v. Beals,* 396 U.S. 45, 48 (1969) *(per curiam).* See also *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *Steffel v. Thompson,* 415 U.S. 452, 459 (1974). Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.,* 375 U.S. 301, 306, n. 3 (1964), it may not be ignored when inconvenient, *United States v. Alaska S.S. Co.,* 253 U.S. 113, 116 (1920) (moot question cannot be decided, "[h]owever convenient it might be"), or, as the Court suggests, to save "sunk costs," compare *ante,* at 710, with *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 480 (1990) ("[R]easonable caution is needed to be sure that mooted litigation is not pressed forward ... solely in order to obtain reimbursement of sunk costs").

It is true that mootness has some added wrinkles that standing lacks. One is the "voluntary cessation" doctrine to which the Court refers. *Ante,* at 708. But it is inaccurate to regard this as a reduction of the basic requirement for standing that obtained at the beginning of the suit. A genuine controversy must exist at both stages. And just as the initial suit could be brought (by way of suit for declaratory judgment) before the defendant actually violated the plaintiff's alleged rights, so also the initial suit can be continued even though the defendant has stopped violating the plaintiff's alleged rights. The "voluntary cessation" doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Steel Co.,* 523 U.S., at 109. Similarly, the fact that we do not find cases moot when the challenged conduct is "capable of repetition, yet evading review" does not demonstrate that the requirements for mootness and for standing differ. "Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist." *Honig v. Doe,* 484 U.S. 305, 341 (1988) (SCALIA, J., dissenting) (emphasis deleted).

Part of the confusion in the Court's discussion is engendered by the fact that it compares standing, on the one hand, with mootness *based on voluntary cessation,* on the other hand. *Ante,* at 709. The required showing that it is "absolutely clear" that the conduct "could not reasonably be expected to recur" is *not* the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of " 'standing set in a time frame.' " See *Arizonans, supra,* at 67, 68, n. 22 (case mooted where plaintiff's change in jobs deprived case of "still vital claim for prospective relief"); *Spencer v. Kemna,* 523 U.S. 1, 7 (1998) (case mooted by petitioner's completion of his sentence, since "throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision" (internal quotation marks omitted)); *Lewis, supra,* at 478–480 (case against State mooted by change in federal law that eliminated parties' "personal stake" in the outcome).

In sum, while the Court may be correct that the parallel between standing and mootness is imperfect due to realistic evidentiary presumptions that are by their nature applicable only in the mootness context, this does not change the underlying principle that " '[t]he requisite personal interest that must

exist at the commencement of the litigation ... must continue throughout its existence....' " ***Arizonans,** *supra,* at 68, n. 22 (quoting *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980)).

* * *

By uncritically accepting vague claims of injury, the Court has turned the Article III requirement of injury in fact into a "mere pleading requirement," *Lujan,* 504 U.S., at 561; and by approving the novel theory that public penalties can redress anticipated private wrongs, it has come close to "mak[ing] the redressability requirement vanish," *Steel Co., supra,* at 107. The undesirable and unconstitutional consequence of today's decision is to place the immense power of suing to enforce the public laws in private hands. I respectfully dissent.

Supreme Court of the United States.

Donald J. TRUMP, President of the United States, et al., Appellants
v.
NEW YORK, et al.

December 18, 2020

Per Curiam.

Every ten years, the Nation undertakes an "Enumeration" of its population "in such Manner" as Congress "shall by Law direct." U.S. Const., Art. I, § 2, cl. 3. This census plays a critical role in apportioning Members of the House of Representatives among the States, allocating federal funds to the States, providing information for intrastate redistricting, and supplying data for numerous initiatives conducted by governmental entities, businesses, and academic researchers. *Department of Commerce* v. *New York*, 588 U.S. ——, —— (2019).

Congress has given both the Secretary of Commerce and the President functions to perform in the enumeration and apportionment process. The Secretary must "take a decennial census of population ... in such form and content as he may determine," 13 U.S.C. § 141(a), and then must report to the President "[t]he tabulation of total population by States" under the census "as required for the apportionment," § 141(b). The President in turn must transmit to Congress a "statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained" under the census. 46 Stat. 26, 2 U.S.C. § 2a(a). In that statement, the President must apply a mathematical formula called the "method of equal proportions" to the population counts in order to calculate the number of House seats for each State. *Ibid.*; see *Department of Commerce v. Montana*, 503 U.S. 442, 451–452 (1992).

This past July, the President issued a memorandum to the Secretary respecting the apportionment following the 2020 census. The memorandum announced a policy of excluding "from the apportionment base aliens who are not in a lawful immigration status." 85 Fed. Reg. 44680 (2020). To facilitate implementation "to the maximum extent feasible and consistent with the discretion delegated to the executive branch," the President ordered the Secretary, in preparing his § 141(b) report, "to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy." *Ibid.* The President directed the Secretary to include such information in addition to a tabulation of population according to the criteria promulgated by the Census Bureau for counting each State's residents. *Ibid.*; see 83 Fed. Reg. 5525 (2018).

This case arises from one of several challenges to the memorandum brought by various States, local governments, organizations, and individuals. A three-judge District Court held that the plaintiffs, appellees here, had standing to proceed in federal court because the memorandum was chilling aliens and their families from responding to the census, thereby degrading the quality of census data used to allocate federal funds and forcing some plaintiffs to divert resources to combat the chilling effect. —— F. Supp. 3d ——, —— – ——, (S.D.N.Y., Sept. 10, 2020) (*per curiam*). According to the District Court, the memorandum violates § 141(b) by ordering the Secretary to produce two sets of numbers—a valid tabulation derived from the census, and an invalid tabulation excluding aliens based on administrative records outside the census. *Id.,* at ——. The District Court also ruled that the exclusion of aliens on the basis of legal status would contravene the requirement in § 2a(a) that the President state the "whole number of persons in each State" for purposes of apportionment. *Id.,* at ——. The District Court declared the memorandum unlawful and enjoined the Secretary from including the information needed to

implement the memorandum in his § 141(b) report to the President. *Id.,* at ——. The Government appealed, and we postponed consideration of our jurisdiction. 592 U.S. —— (2020).

A foundational principle of Article III is that "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (internal quotation marks omitted). As the plaintiffs concede, any chilling effect from the memorandum dissipated upon the conclusion of the census response period. The plaintiffs now seek to substitute an alternative theory of a "legally cognizable injury" premised on the threatened impact of an unlawful apportionment on congressional representation and federal funding. *Id.,* at 100. As the case comes to us, however, we conclude that it does not—at this time—present a dispute "appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (internal quotation marks omitted).

Two related doctrines of justiciability—each originating in the case-or-controversy requirement of Article III—underlie this determination. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). First, a plaintiff must demonstrate standing, including "an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical." *Carney* v. *Adams*, *ante*, at 6, —— U.S. ——, —— (2020) (internal quotation marks omitted). Second, the case must be "ripe"—not dependent on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

At present, this case is riddled with contingencies and speculation that impede judicial review. The President, to be sure, has made clear his desire to exclude aliens without lawful status from the apportionment base. But the President qualified his directive by providing that the Secretary should gather information "to the extent practicable" and that aliens should be excluded "to the extent feasible." 85 Fed. Reg. 44680. Any prediction how the Executive Branch might eventually implement this general statement of policy is "no more than conjecture" at this time. *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983).

To begin with, the policy may not prove feasible to implement in any manner whatsoever, let alone in a manner substantially likely to harm any of the plaintiffs here. Pre-apportionment litigation always "presents a moving target" because the Secretary may make (and the President may direct) changes to the census up until the President transmits his statement to the House. *Franklin v. Massachusetts*, 505 U.S. 788, 797–798 (1992). And as the Government recognizes, Tr. of Oral Arg. 39, any such changes must comply with the constitutional requirement of an "actual Enumeration" of the persons in each State, as opposed to a conjectural estimate. See *Utah v. Evans*, 536 U.S. 452, 475–476 (2002); see also 13 U.S.C. § 195. Here the record is silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner. See Reply Brief 4–5. Uncertainty likewise pervades which (and how many) aliens the President will exclude from the census if the Secretary manages to gather and match suitable administrative records. We simply do not know whether and to what extent the President might direct the Secretary to "reform the census" to implement his general policy with respect to apportionment. *Franklin*, 505 U.S. at 798.

While the plaintiffs agree that the dispute will take a more concrete shape once the Secretary delivers his report under § 141(b), Tr. of Oral Arg. 64, 75, they insist that the record already establishes a "substantial risk" of reduced representation and federal resources, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n. 5 (2013). That conclusion, however, involves a significant degree of guesswork. Unlike other pre-apportionment challenges, the Secretary has not altered census operations in a concrete manner that will

predictably change the count. See, *e.g., Department of Commerce* v. *New York*, 588 U.S., at ——; *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 331–332 (1999). The count here is complete; the present dispute involves the apportionment process, which remains at a preliminary stage. The Government's eventual action will reflect both legal and practical constraints, making any prediction about future injury just that—a prediction.

Everyone agrees by now that the Government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status. Tr. of Oral Arg. 20, 63–64. Yet the only evidence speaking to the predicted change in apportionment unrealistically assumes that the President will exclude the entire undocumented population. App. 344, Decl. of Christopher Warshaw ¶11. Nothing in the record addresses the consequences of a partial implementation of the memorandum, much less supports the dissent's speculation that excluding aliens in ICE detention will impact interstate apportionment. *Post*, at 5–6, 9 (opinion of BREYER, J.); see Reply Brief 6.

The impact on funding is no more certain. According to the Government, federal funds are tied to data derived from the census, but not necessarily to the apportionment counts addressed by the memorandum. Brief for Appellants 19–20. Under that view, changes to the Secretary's § 141(b) report or to the President's § 2a(a) statement will not inexorably have the direct effect on downstream access to funds or other resources predicted by the dissent. *Post*, at —— – ——. How that question will be addressed by the Secretary and the President is yet another fundamental uncertainty impeding proper judicial consideration at this time.

The remedy crafted by the District Court underscores the contingent nature of the plaintiffs' injuries. Its injunction prohibits the Secretary from informing the President in his § 141(b) report of the number of aliens without lawful status. In addition to implicating the President's authority under the Opinions Clause, U.S. Const., Art. II, § 2, cl. 1, the injunction reveals that the source of any injury to the plaintiffs is the action that the Secretary or President *might* take in the future to exclude unspecified individuals from the apportionment base—not the policy itself "in the abstract," *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009). Letting the Executive Branch's decisionmaking process run its course not only brings "more manageable proportions" to the scope of the parties' dispute, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), but also "ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives," *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). And in the meantime the plaintiffs suffer no concrete harm from the challenged policy itself, which does not require them "to do anything or to refrain from doing anything." *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

At the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature. Consistent with our determination that standing has not been shown and that the case is not ripe, we express no view on the merits of the constitutional and related statutory claims presented. We hold only that they are not suitable for adjudication at this time.

The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

The Constitution specifies that the number of Representatives afforded to each State is based on an apportionment of the total population, with each State receiving its proportional share. The Government has announced a policy to exclude aliens without lawful status from the apportionment base for the decennial census. The Government does not deny that, if carried out, the policy will harm the plaintiffs. Nor does it deny that it will implement that policy imminently (to the extent it is able to do so). Under a straightforward application of our precedents, the plaintiffs have standing to sue. The question is ripe for resolution. And, in my view, the plaintiffs should also prevail on the merits. The plain meaning of the governing statutes, decades of historical practice, and uniform interpretations from all three branches of Government demonstrate that aliens without lawful status cannot be excluded from the decennial census solely on account of that status. The Government's effort to remove them from the apportionment base is unlawful, and I believe this Court should say so.

The Court disagrees. It argues that it is now uncertain just how fully the Secretary will implement the Presidential memorandum. In my view, that uncertainty does not warrant our waiting to decide the merits of the plaintiffs' claim. It is true that challenges to apportionment have often come *after* the President has transmitted his tabulation to the House. See Brief for United States 16 (deeming as preferable "this Court's normal approach: to decide such cases post-apportionment" (citing *Utah v. Evans*, 536 U.S. 452, 458–459 (2002), *Wisconsin v. City of New York*, 517 U.S. 1, 10–11 (1996), and *Franklin v. Massachusetts*, 505 U.S. 788, 790–791 (1992))). The Government asked us to take that approach here. See Tr. of Oral Arg. 7–8. But we have also reached and resolved controversies concerning the decennial census based on a substantial risk of an anticipated apportionment harm. See *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 332 (1999) (holding that it is "not necessary for this Court to wait until the census has been conducted to consider" government conduct that may affect apportionment). And that is what I believe the Court should do here. Waiting to adjudicate plaintiffs' claims until *after* the President submits his tabulation to Congress, as the Court seems to prefer, *ante,* at ——, risks needless and costly delays in apportionment. Because there is a "substantial likelihood that the [plaintiffs'] requested relief ....will redress the alleged injury," *United States House of Representatives*, 525 U.S. at 332, I would find that we can reach plaintiffs' challenge now, and affirm the lower court's holding.

I

The Court reasons that "standing has not been shown" because it is too soon to tell if the Government will act "in a manner substantially likely to harm any of the plaintiffs here." *Ante,* at ——, ——. As I have said, I believe to the contrary. Plaintiffs have alleged a justiciable controversy, and that controversy is ripe for resolution.

A

Begin with the threatened injury. The plaintiffs allege two forms of future injury: a loss of representation in the apportionment count and decreased federal funding tied to the census totals. For an injury to satisfy Article III, it "must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); internal quotation marks omitted). We have long said that when plaintiffs "demonstrate a realistic danger of sustaining a direct injury as a result of [a policy's] operation or enforcement," they need " 'not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

Here, inquiry into the threatened injury is unusually straightforward. The harm is clear on the face of the

policy. The title of the Presidential memorandum reads: "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44679 (2020) (Presidential memorandum). That memorandum announces "the policy of the United States [shall be] to exclude from the apportionment base aliens who are not in a lawful immigration status ... to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.,* at 44680. Notwithstanding the "contingencies and speculation" that "riddl[e]" this case, *ante,* at ——— (opinion of the Court), the Government has not backed away from its stated aim to exclude aliens without lawful status from apportionment. See Brief for United States 14 (urging that the Secretary "be allowed to implement the Memorandum, at which point suit can be brought"); see also *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 393 (1988) (finding standing where "plaintiffs have alleged an actual and well-founded fear that the law will be enforced" and the Government "has not suggested that the newly enacted [policy] will not be enforced"). The memorandum also announces the reason for this policy: to diminish the "political influence" and "congressional representation" of States "home to" unauthorized immigrants. 85 Fed. Reg. 44680. It notes that "one State"—now known to be California, see Brief for Appellees State of New York et al. 7—is "home to more than 2.2 million illegal aliens," and excluding such individuals from apportionment "could result in the allocation of two or three [fewer] congressional seats than would otherwise be allocated." 85 Fed. Reg. 44680. Other consequences will flow from this attempt to alter apportionment. We have previously noted that "the States use the results in drawing intrastate political districts," and "[t]he Federal Government [also] considers census data in dispensing funds through federal programs to the States." *Wisconsin v. City of New York*, 517 U.S. 1, 5–6 (1996).

The implementation of the memorandum will therefore bring about the very "representational and funding injuries" that the plaintiffs seek to avoid. Brief for Appellees State of New York et al. 10.

B

Given the clarity of the Presidential memorandum, it is unsurprising the Government does not contest that plaintiffs have alleged a threatened injury. Rather, it contends that both the alleged representational and funding injuries remain "too speculative" to satisfy Article III's ripeness requirement prior to the President's actual enumeration. Brief for United States 19. That is because—although the Secretary's report to the President is due in just two weeks—the Bureau's plan to implement the memorandum remains uncertain and "depends on various unknowable contingencies about the data," and until "later in December or January, the Bureau cannot predict or even estimate the results." Reply Brief for United States 4. The Government contends that given these uncertainties, "it is far from a 'virtual certainty' that any appellee will 'lose a [House] seat' when the Memorandum is implemented." *Id.,* at 5. It also says it is "too speculative" that plaintiffs will be disproportionately deprived of federal funding, as it is not yet certain that the tabulation the President submits to Congress for apportionment purposes will also be used as the total population for federal statutes that apportion funds on the basis of States' proportional population. Brief for United States 19–20. At root, the Government contends that "ripeness principles support deferring judicial review of the Memorandum until it is implemented." *Id.,* at 21.

Whether viewed as a question of standing or ripeness, the Government's arguments are insufficient. We have said that plaintiffs need not "demonstrate that it is literally certain that the harms they identify will come about" to establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n. 5 (2013). Rather, an "allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a ' "substantial risk" that the harm will occur.' " *Driehaus*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414, n. 5). Looking to the facts here, the memorandum presents the "substantial risk" that our precedents require.

The Government's current plans suggest it will be able to exclude a significant number of people under its policy. To start, even a few weeks out, the Government still does not disclaim its intent to carry out the policy to the full extent it can do so. See Tr. of Oral Arg. 9–10 (stating that "we don't know what's feasible, about excluding all illegal aliens," but recognizing that "some subsets are going to be much stronger cases for the exercise of [the President's] discretion than other subsets"). Indeed, the Bureau is committed to excluding as many people as possible even if it must act beyond the December 31 statutory deadline to do so. *Id.,* at 6–7. And there is a "substantial risk" that it will be able to do so to the point that it causes significant harm. Both here and in related litigation below, the Government has said that as of early December, it was already feasible to exclude aliens without lawful status housed in ICE detention centers on census day, a "category [that] is likely in the tens of thousands, spread out over multiple States." Reply Brief for United States 6; see also Brief for Appellees New York Immigration Coalition et al. 15 (citing a prior Government estimate that doing so will exclude approximately "50,000 ICE detainees"). Beyond these detainees, appellees note that the Government has also identified at least several million more aliens without lawful status that it can "individually identify" and seek to exclude from the tabulation. *Id.,* at 15–16. We have been told the Bureau is "working very hard to try to report on" (and exclude from the apportionment tabulation) a large number of aliens without lawful status, including "almost 200,000 persons who are subject to final orders of removal," "700,000 DACA recipients," and about "3.2 million non-detained individuals in removal proceedings." Tr. of Oral Arg. 28–29. All told, the Bureau already possesses the administrative records necessary to exclude at least four to five million aliens. *Id.,* at 29. Those figures are certainly large enough to affect apportionment.

Of equal importance, plaintiffs argue that aside from apportionment itself, the exclusion of aliens without lawful status from the apportionment count will also negatively affect federal funding that is based on per-State proportional decennial population totals. Brief for Appellees New York Immigration Coalition et al. 18–19; see also *Department of Commerce* v. *New York*, 588 U.S. ——, —— – —— (2019) (noting that even a small undercount of noncitizen households can lead those States to "lose out on federal funds that are distributed on the basis of state population"). Indeed, a number of federal statutes require that funding be allocated based on the results "certified," 16 U.S.C. § 669c(c)(3), "stated," 49 U.S.C. § 47114(d)(1)(B), or "reported," 52 U.S.C. § 20901(d)(4), by the decennial census. These phrases seem always to have been understood to refer to the apportionment tabulation reported to the President by the Secretary of Commerce (the report here at issue), because that is the only tabulation that the law requires to be "certified" or "reported" as part of the decennial census. See 16 U.S.C. § 669c(c)(3); 52 U.S.C. § 20901(d)(4). See generally Brief for Professor Andrew Reamer, Ph. D. as *Amicus Curiae* 2–3. The Government counters that appellees have not identified any reason why the individuals unlawfully removed from the tabulation could not be *added back in* for purposes of applying funding statutes. Reply Brief for United States 7. But there is no indication that the Secretary could or would do any such thing—unless of course a court holds that the removal was unlawful. And the possibility of adding back those who have otherwise been unlawfully removed from the count does not undercut a plaintiff's standing to pursue a claim of unlawfulness in the first instance.

Moreover, the statute says that "the President shall transmit to the Congress a statement showing the whole number of persons in each State ... *as ascertained under the* ... decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added). Statute after statute pegs its funding to a State's share of "the total ... population of all the States as determined by the last preceding decennial census." See, *e.g.,* 7 U.S.C. § 361c(c)(2) (allocating funding by a State's share of "the total rural [and farm] population of all" States); § 2663(b)(4) (same); 49 U.S.C. § 5305(d)(1)(A)(i) (for State share of "population of urbanized areas"); § 5311(c)(3)(B)(iii) (for State share of "the population of all rural areas"); see also U.S. Census Bureau, L. Blumerman & P. Vidal, Uses of Population and Income Statistics in Federal Funds Distribution—With a

Focus on Census Bureau Data 18 (2009) (estimating that as of 2009 at least 24 federal programs automatically distributed at least $10 billion in annual funding to States keyed directly to the decennial census's State population figures). Given the connection between the decennial census and funding allocation, a change of a few thousand people in a State's enumeration can affect its share of federal resources.

I do not agree with the Court that the lingering uncertainty over the Government's plans renders this litigation unripe, nor that the apportionment process is at a "preliminary stage." *Ante,* at ——. For one thing, the Government has spent over a year collecting the administrative records that will be used to fulfill the Presidential memorandum. See Exec. Order No. 13880, 84 Fed. Reg. 33823 (2019) (calling for federal departments to share administrative records so the Department of Commerce can "generate a more reliable count of the unauthorized alien population in the country ... [and] an estimate of the aggregate number of aliens unlawfully present in each State"). For another, the Government has told us in related litigation that further delays in proceeding with apportionment beyond the statutory deadline would harm "the ability to meet contingent redistricting deadlines" in the States, because " 'delays would mean deadlines that are established in state constitutions or statutes will be impossible to meet.' " See Reply Brief in Support of Application for Stay Pending Appeal in *Ross v. National Urban League*, O.T. 2020, No. 20A62, p. 11. Acting on that concern, we granted the Government's stay pending appeal so as to hasten the Government's efforts ahead of these deadlines. See *Ross* v. *National Urban League*, 592 U.S. –— (2020). Presumably, waiting to resolve this issue until after the President submits his tabulation will cause further hardship by delaying redistricting further. States will begin to consider the consequences of reapportionment soon. See, *e.g.,* Del. Code Ann., Tit. 29, § 805 (2020) ("After the official reporting of the 2020 federal decennial census by the President to Congress ... the General Assembly shall, not later than June 30, 2021, reapportion and redistrict the State ... for the general election of 2022"). It is of course possible that the Bureau will be unable to find a significant number of matches between the millions of records it has and the census data it is producing in time for the President to exclude them from his tabulation submitted to Congress. But even if the Secretary were to limit severely his compliance with the President's memorandum—say, by choosing to "report" only those 50,000 aliens that are estimated to be in ICE detention centers and omitting them from his census "tabulation"—that omission alone presents a "substantial risk" of affecting the census calculation for purposes of apportionment and funding. That is the very kind of injury of which plaintiffs complain. Taken together, these considerations demonstrate that now is the appropriate time to resolve this case. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (HARLAN, J. for the Court) (explaining that the timing of judicial review turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").

To repeat, the President's stated goal is to reduce the number of Representatives apportioned to the States that are home to a disproportionate number of aliens without lawful status. The Government has confirmed that it can identify millions of these people through administrative records. But if the Census Bureau fails to fulfill its mandate to exclude aliens without lawful status and reduce the number of Representatives to which certain States are entitled, it will be for reasons not in the record. Where, as here, the Government acknowledges it is working to achieve an allegedly illegal goal, this Court should not decline to resolve the case simply because the Government speculates that it might not fully succeed.

For these reasons, I believe that the plaintiffs have alleged a "substantial risk" that unlawfully subtracting aliens without lawful status from the tabulation of the total population that the President submits to Congress will inflict both apportionment and appropriations injuries on them. Those injuries are substantially likely to occur in the reasonably near future. This case squarely presents a concrete dispute and we should resolve it now.

II

On the merits, I agree with the three lower courts that have decided the issue, and I would hold the Government's policy unlawful. See *New York* v. *Trump*, ——— F. Supp. 3d. ———, ——— (S.D.N.Y., Sept. 10, 2020) (*per curiam*) (Juris. Statement 83a–94a); *San Jose* v. *Trump*, ——— F. Supp. 3d ———, ——— – ——— (N.D. Cal., Oct. 22, 2020) (slip op., at 72–85); *Useche* v. *Trump*, No. 8:20–cv–02225, 2020 WL 6545886 (D Md., Nov. 6, 2020) (slip op., at 21–30). Once again, the memorandum calls for "the exclusion of illegal aliens from the apportionment base" that will be used for the "reapportionment of Representatives following the 2020 census," and orders the Secretary of Commerce to transmit information permitting the President to carry out that policy. 85 Fed. Reg. 44680. The plaintiffs challenge that policy on both constitutional and statutory grounds, arguing that it contravenes the directives to report the "tabulation of total population by States ... as required for the apportionment," 13 U.S.C. § 141(b), and to include the "whole number of persons in each State, excluding Indians not taxed." U.S. Const., Amdt. 14, § 2; 2 U.S.C. § 2a(a). Consistent with this Court's usual practice, I would avoid the constitutional dispute and resolve this case on the statutory question alone.

While that statutory question is important, it is not difficult. Our tools of statutory construction all point to "usual residence" as the primary touchstone for enumeration in the decennial census. The concept of residency does not turn, and has never turned, solely on a person's immigration status. The memorandum therefore violates Congress' clear command to count every person residing in the country, and should be set aside.

A

First, we have the text. The modern apportionment scheme dates back to 1929. See 46 Stat. 21 (1929 Act). The relevant language provides that the apportionment base shall include "the whole number of persons in each State" "as ascertained under the ... decennial census." § 22, *id*., at 26 (codified at 2 U.S.C. § 2a(a)); see 13 U.S.C. § 141(b) (requiring the Secretary to transmit the "tabulation of *total population* by States" as required for apportionment (emphasis added)). The usual meaning of "persons," of course, includes aliens without lawful status. This Court has said as much, and the Government does not argue otherwise. See *Plyler v. Doe*, 457 U.S. 202, 211 (1982). Similarly, the plain meaning of the phrase "in each State," both in 1929 and now, does not turn on immigration status. Rather, as we explained in *Franklin*, that phrase has always been understood to connote some idea of "usual residence," picking up a person who is an " 'inhabitant' " of the State. 505 U.S. at 804–805; see also *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). Neither "resident" nor "inhabitant" takes account of whether someone is lawfully, as opposed to unlawfully, present. See "Inhabitant," Webster's New International Dictionary 1109 (1927) ("One who dwells or resides permanently in a place"); "Resident," *id*., at 1814 ("One who resides in a place; one who dwells in a place for a period of more or less duration").

Moreover, the statute (like the Constitution) explicitly excludes only one category of persons from the apportionment, "Indians not taxed," 2 U.S.C. § 2a(a), though it is evident they "reside" within the United States. Congress clearly knew how to exclude a certain population that would otherwise meet the traditional residency requirement when it wished to do so. Yet it did not single out aliens without lawful status in the 1929 Act.

Second, historical practice leaves little doubt about the statute's meaning. From the founding era until now, enumeration in the decennial census has always been concerned with residency, not immigration status. The very first Act setting forth the decennial census procedure stated that persons should be

counted if they " 'usually resid[e] in the United States.' " *Franklin*, 505 U.S. at 804 (citing Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103). The 1820 decennial census included "foreigners not nationalized" among the schedule of whole number of persons to be tabulated within each State. See Act of March 14, 1820, 3 Stat. 550. The 1860 census included escaped slaves living in the North, although those persons were unlawfully present at that time. See *San Jose*, ——— F. Supp. 3d., at ——— (citing Record in No. 5:20–cv–5167, ECF No. 64–22, pp. 5–7 (Decl. of Shannon D. Lankenau)). The 1920 census population count included a minor who had been denied lawful admission to the United States, but who was nonetheless paroled within the country during World War I until she could be sent home. See Record in No. 20–cv–5770, Doc. 149–2, Exh. 61, ¶3 (Decl. of Jennifer Mendelsohn) (discussing the inclusion of the minor petitioner in *Kaplan v. Tod*, 267 U.S. 228 (1925), in the census count). All told, at the time Congress wrote the 1929 Act, the United States had conducted more than a dozen decennial censuses. As the Government acknowledged below, none of them excluded residents solely because of immigration status. Juris. Statement 91a. Any contemporary understanding of the words "persons in each State" as ascertained under the "decennial census" would have reflected this longstanding and uniform practice. See *McQuiggin v. Perkins*, 569 U.S. 383, 398, n. 3 (2013) ("Congress legislates against the backdrop of existing law"). Taken together, the history is clear as to the statute's reach; it includes the people who reside here, lawful status or not.

Third, the records from the legislative debate confirm that Congress was aware that the words of the statute bore this meaning. By 1929, federal immigration laws had been on the books for more than four decades, if not longer. See *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). Some state laws for apportioning representatives explicitly excluded aliens, aware that an apportionment based simply on "the whole number of persons" under the federal decennial census would otherwise include them. See 71 Cong. Rec. 1977 (1929) (discussing a New York state statute that defined the apportionment base to include the number of "inhabitants, excluding aliens"). Time and again throughout the debate over what became the 1929 Act, members considered (and rejected) proposals that would have excluded aliens from the apportionment base. See, *e.g.*, *id*., at 2065–2068, 2360, 2451–2455. The debates evince a shared understanding that without such an amendment, the Act would include those "aliens" present "without the consent of the American people." *Id.*, at 1919. See also *id.*, at 1976 (Sen. Barkley) (discussing "unlawful immigrants" "who have no legal status"). This understanding was shaped not only by the ordinary meaning of the words, but also by legislators' view of the meaning of those words as they appear in the Constitution.

In particular, Senator David A. Reed of Pennsylvania noted his support for the policy of excluding aliens without lawful status, but refrained from voting in favor of a proposal to do just that because he did not believe that the Constitution allowed it. *Id*., at 1958. See also *id.*, at 1821–1822 (reprinting C. Turney, Power Of Congress To Exclude Aliens From Enumeration For Purposes Of Apportionment Of Representatives (April 30, 1929)); 71 Cong. Rec. 2065–2066 (discussing a proposed amendment that would immediately remove aliens from apportionment "upon the ratification of any amendment to the Constitution excluding aliens"). That same year, two constitutional amendments were introduced in Congress to exclude aliens from the apportionment base. Neither succeeded. See *San Jose*, ——— F. Supp. 3d., at ——— (citing Hearing on H.J. Res. 102 and H.J. Res. 351 before the House Committee on the Judiciary, 70th Cong., 2d Sess., 1 (1929)). All told, Congress was well aware of the implications of its chosen language for the precise question we face here.

Fourth, the decades following the 1929 Act tell the same story. Just like every census that came before, no census since has excluded people based solely on immigration status. Instead, the census has continued to look to usual residence as the relevant criterion. At numerous points, the Executive Branch

has reaffirmed its view that the law simply does not allow for the exclusion of aliens without lawful status who reside in the United States. See, *e.g.*, 135 Cong. Rec. 22521 (1989) (printing Letter from C. Crawford, Assistant Attorney Gen., to Sen. Bingaman (Sept. 22, 1989)); Hearing before the Subcommittee on Energy, Nuclear Proliferation, and Government Processes of the Senate Committee on Governmental Affairs, Enumeration Of Undocumented Aliens In The Decennial Census, 99th Cong., 1st Sess., 19 (1985) ("Traditional understanding of the Constitution and the legal direction provided by the Congress has meant that for every census since the first one in 1790, we have tried to count residents of the country, regardless of their status") (Statement of Census Bureau Director J. Keane); *Federation for Am. Immigration Reform v. Klutznick*, 486 F.Supp. 564, 576 (D.D.C. 1980) ("The Census Bureau has always attempted to count every person residing in a State on census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders"). Those in the Legislative Branch have routinely reached the same result. See, *e.g.*, 135 Cong. Rec. 14551 (Statement of Sen. Bumpers); Hearing on S. 2366 before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess., 12 (1980) (Statement of Sen. Javits); 86 Cong. Rec. 4372 (1940) (Statement of Rep. Celler). While some members may have considered the constitutional question unsettled, all accepted that the governing statutes would have to be changed to exclude undocumented immigrants. See, *e.g.*, 135 Cong. Rec. 14540 (Statement of Sen. Shelby) (proposing an amendment to allow the Census Bureau to depart from its "established policy" and exclude aliens); Hearing on S. 2366, at 1 (discussing a bill that would "require that the numbers be adjusted downward to account for people who are not in this country legally"). The apparently uniform view was that the statute requires the inclusion of all people who usually reside within the United States. See *Franklin*, 505 U.S. at 804. Each branch, interpreting the law for itself, has followed the text and history to the same conclusion.

The 2020 census, in fact, proceeded along this course, at least until the Presidential memorandum. According to the Census Bureau's regulations, the "enumeration procedures" for the 2020 census "are guided by the constitutional and statutory mandates to count all residents of the several states." 83 Fed. Reg. 5525, 5526 (2018). In adopting the Rule, the Census Bureau considered a comment expressing concern over the inclusion of "undocumented people," but adhered to its policy of counting all foreign citizens "if, at the time of the census, they are living and sleeping most of the time at a residence in the United States." *Id.*, at 5530. The Rule goes on to clarify that "*[p]eople in federal detention centers on Census day, such as ... Immigration and Customs Enforcement (ICE) Service Processing Centers, and ICE contract detention facilities*" will be "counted at the facility." *Id.*, at 5535. That Rule did not suggest that enumeration would turn on immigration status. The novelty of the interpretation reflected in the memorandum, after nearly 100 years of a contrary and consistent position, is yet another strong indication that the Government's reading of the statute is wrong. See *Montana v. Wyoming*, 563 U.S. 368, 387 (2011).

To summarize: The text of the 1929 Act is concerned with usual residence, not immigration status. The history, both before and after the legislation, has for decades been in accord with that straightforward interpretation. And all three branches of Government, when facing the exact question presented in this case, have uniformly arrived at the same result.

B

In the face of this evidence, the Government principally relies on scattered historic sources from the founding era, which it argues imbue the words of the statute with a more restrictive meaning. The Government's argument relies on two assumptions. First, the Framers intended for the constitutional language "whole number of free persons" to be read as synonymous with the word "inhabitant," a legal

term of art the Government believes excludes those who are in the country in violation of the law. Second, when Congress carried forward the constitutional text into the 1929 Act, it understood those words to have that narrower meaning.

There are defects in both links of this chain. First, the argument is not convincing with respect to the widely accepted meaning of the Constitution, either in the founding era or at the time the Fourteenth Amendment was enacted. In *Franklin*, we understood the term "inhabitant" as comparable to the concept of "usual residency," which, as the analysis above demonstrates, does not turn on immigration status. 505 U.S. at 804–805. The historical evidence put forward by the Government does not undermine that result.

Many of the Government's sources simply show that the "usual residence" criterion has been applied to immigrants. See Dept. of Commerce and Labor, Bureau of the Census, Thirteenth Census of the United States: Instructions to Enumerators, April 15, 1910, 21 (1910) (stating that "aliens who have left this country" should not be counted because "nothing definite can be known as to whether such aliens intend to return to this country"); *Bas v. Steele*, 2 F.Cas. 988, 993 (CC Pa. 1818) (concluding a foreign trader visiting a port with cargo had not established "domicil[e]" in the United States because "[g]oing to a place to obtain a cargo, and coming away, does not give a [him] a domicil[e], or make him an inhabitant"). Other sources show that immigration laws themselves have taken account of similar criteria for other purposes. See *Department of Homeland Security* v. *Thuraissigiam*, 591 U.S. ——, —— (2020) (discussing the significance of " 'acquir[ing] any domicil[e] or residence within the United States' " for Due Process rights to attach for those not naturalized or otherwise officially admitted to the country (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892))); see also *Kaplan*, 267 U.S. at 230 (asking whether a minor was legally "dwelling" in the United States for purposes of a naturalization statute). These few instances of a court asking whether an immigrant is "domiciled" in the country or has an "intent to return" to the United States do not show that immigration status is somehow a proxy for the concept of residency. To the contrary, they show that these principles can be applied to those lawfully and unlawfully present on the same terms.

The Government's argument for a narrower construction of "inhabitant" turns largely on Vattel's founding-era treatise on the law of nations, which distinguishes between the "inhabitants" and "citizens" of a nation. Brief for United States 36 (citing 1 Vattel, The Law of Nations § 213 (1760)). Even assuming that the Government offers the best reading of his work, and that this reading of Vattel informed the Framers' understanding of that field, his treatise simply cannot bear the weight the Government puts on it. Vattel's work discussed international law, not the United States' scheme for apportionment among the States, an issue not intrinsically related to the law of nations nor one for which founding-era thinkers drew on Vattel. The Apportionment Clause emerged from an extensive and uniquely American debate over both State representation and taxation. The final language tied the two together, such that the burdens of taxation would flow in proportion to the benefits of representation. See Brief for Historians of the Census as *Amici Curiae* 6–11. And however influential Vattel may have been for other topics, the Federal Government did not begin to restrict immigration into the United States until after the Civil War. See Brief for State of California et al. as *Amicus Curiae* 17. While the Government offers isolated works from a different body of law—regarding a word that does not appear in the constitutional text—the better guide to the Constitution's meaning is the specific historical evidence about domestic apportionment, as well as the decades of consistent practice that comports with the Clause's plain terms.

Second, and more importantly for this case, the Framers' intent is not our focus. Instead, the question is the meaning of the statute enacted in 1929. Even if the Government's sources evince some ambiguity over the meaning of the Constitution's census provisions in 1787 or 1868—a doubtful proposition—the

historical record had resolved it by the time of the 1929 Act. There is simply no basis for thinking that when Congress enacted the statute that mirrored the constitutional language it was intending to depart so fundamentally from the procedures that had been consistently applied up to that point.

Apart from the historical evidence, the Government offers little more than its assertion that excluding aliens without lawful status makes good policy sense. As the memorandum reasons, "[e]xcluding ... illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government." 85 Fed. Reg. 44680. Whatever the merits of that policy, it is not the approach to representative democracy that is set forth in the statute. Congress chose instead a view of democracy wherein the Representatives are apportioned based on "the whole number of persons in each state," not the whole number of voters, citizens, or lawful residents.

The Government is surely correct that the statute provides the President and the Secretary some degree of discretion in carrying out their statutory responsibilities. The concept of "usual residence" is an indeterminate one, which "has continued to hold broad connotations." *Franklin*, 505 U.S. at 805. The exercise of that discretion may involve a number of judgment calls. How long must a person reside in a State before it can be presumed that she intends to remain? Should prisoners be counted in the State of their incarceration, or the State where they resided prior to, and where they intend to return following, their confinement? In resolving such issues, the Executive's judgment has consistently been directed toward the meaning of "usual residence." A policy that draws lines based on immigration status does no such thing. Most aliens without lawful status have lived exclusively in the United States for many years. See Krogstad, Passel, and Cohn, Pew Research Center, Five Facts About Illegal Immigration in the U.S. (2019). The Government does not suggest otherwise. Its own Residency Rule, which treated ICE detainees' residency in the same manner as other federal prisoners, recognizes the lack of any logical relationship between immigration status and residence. Put simply, discretion to interpret and apply a statutory command is not a blank check to depart from it. That, I fear, is what the Government has tried to do here.

Thus, the touchstone for counting persons in the decennial census is their usual residence, not their immigration status. That alone is enough to resolve this case, because the memorandum seeks to exclude anywhere between tens of thousands and millions of persons from the census count based solely on their immigration status, and it does so for the stated goal of changing the apportionment total at the expense of the plaintiffs. The Government seems to believe that its policy can stand so long as any alien without lawful status is excludable on some other basis. However reasonable such an ad hoc approach might be in theory, that is not the policy the memorandum announces, nor does it support excluding aliens without lawful status *as a class*. To the extent there is some overlap between aliens without lawful status and persons who would not be counted under the ordinary census procedures, that cannot justify the exclusion of aliens simply on account of their immigration status. It is our task to review the policy as promulgated, and that policy draws a distinction that the statute does not allow

III

It is worth considering the costs of the Presidential memorandum's departure from settled law. The modern census emerged from periods of intense political conflict, whereby politicians sought to exploit census procedures to their advantage. See *Evans*, 536 U.S. at 497 (THOMAS, J., concurring in part and dissenting in part); *Montana*, 503 U.S. at 451–452, and n. 25. In enacting the 1929 Act, Congress sought to address that problem by using clear and broad language that would cabin discretion and remove opportunities for political gamesmanship. History shows that, all things considered, that approach has served us fairly well. Departing from the text is an open invitation to use discretion to increase an electoral advantage. This produces the hostility that the 1929 Congress sought to resolve.

Because I believe plaintiffs' claims are justiciable, ripe for review, and meritorious, I would affirm the lower court's holding. I respectfully dissent.

Select Provisions from United States Code Title 28

28 U.S. Code § 1331
Federal question
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code § 1332
Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
- **(1)** citizens of different States;
- **(2)** citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
- **(3)** citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- **(4)** a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—
- **(1)** a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—
  - **(A)** every State and foreign state of which the insured is a citizen;
  - **(B)** every State and foreign state by which the insurer has been incorporated; and
  - **(C)** the State or foreign state where the insurer has its principal place of business; and
- **(2)** the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

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(e) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S. Code § 1367
Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- **(1)** the claim raises a novel or complex issue of State law,
- **(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- **(3)** the district court has dismissed all claims over which it has original jurisdiction, or
- **(4)** in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S. Code § 1441
Removal of civil actions

(a) **GENERALLY.—** Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) **REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—**

- **(1)** In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
- **(2)** A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) **JOINDER OF FEDERAL LAW CLAIMS AND STATE LAW CLAIMS.—**

- **(1)** If a civil action includes—
  - **(A)** a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

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Supreme Court of the United States

The HERTZ CORP., Petitioner,
v.
Melinda FRIEND et al.

Decided Feb. 23, 2010

Justice BREYER delivered the opinion of the Court.

The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State where it has its principal place of business.*" 28 U.S.C. § 1332(c)(1) (emphasis added). We seek here to resolve different interpretations that the Circuits have given this phrase. In doing so, we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." See, *e.g., Wisconsin Knife Works v. National Metal Crafters,* 781 F.2d 1280, 1282 (7th Cir. 1986); *Scot Typewriter Co. v. Underwood Corp.,* 170 F.Supp. 862, 865 (S.D.N.Y.1959) (Weinfeld, J.). We believe that the "nerve center" will typically be found at a corporation's headquarters.

I

In September 2007, respondents Melinda Friend and John Nhieu, two California citizens, sued petitioner, the Hertz Corporation, in a California state court. They sought damages for what they claimed were violations of California's wage and hour laws. App. to Pet. for Cert. 20a. And they requested relief on behalf of a potential class composed of California citizens who had allegedly suffered similar harms.

Hertz filed a notice seeking removal to a federal court. 28 U.S.C. §§ 1332(d)(2), 1453. Hertz claimed that the plaintiffs and the defendant were citizens of different States. §§ 1332(a)(1), (c)(1). Hence, the federal court possessed diversity-of-citizenship jurisdiction. Friend and Nhieu, however, claimed that the Hertz Corporation was a California citizen, like themselves, and that, hence, diversity jurisdiction was lacking.

To support its position, Hertz submitted a declaration by an employee relations manager that sought to show that Hertz's "principal place of business" was in New Jersey, not in California. The declaration stated, among other things, that Hertz operated facilities in 44 States; and that California—which had about 12% of the Nation's population, Pet. for Cert. 8—accounted for 273 of Hertz's 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about $811 million of its $4.371 billion in annual revenue; and about 3.8 million of its approximately 21 million annual transactions, *i.e.,* rentals. The declaration also stated that the "leadership of Hertz and its domestic subsidiaries" is located at Hertz's "corporate headquarters" in Park Ridge, New Jersey; that its "core executive and administrative functions ... are carried out" there and "to a lesser extent" in Oklahoma City, Oklahoma; and that its "major administrative operations ... are found" at those two locations. App. to Pet. for Cert. 26a–30a.

The District Court of the Northern District of California accepted Hertz's statement of the facts as undisputed. But it concluded that, given those facts, Hertz was a citizen of California. In reaching this conclusion, the court applied Ninth Circuit precedent, which instructs courts to identify a corporation's "principal place of business" by first determining the amount of a corporation's business activity State by State. If the amount of activity is "significantly larger" or "substantially predominates" in one State, then

that State is the corporation's "principal place of business." If there is no such State, then the "principal place of business" is the corporation's " 'nerve center,' " *i.e.,* the place where " 'the majority of its executive and administrative functions are performed.' " *Friend v. Hertz,* No. C–07–5222 MMC, 2008 WL 7071465 (N.D.Cal., Jan. 15, 2008), p. 3 (hereinafter Order); *Tosco Corp. v. Communities for a Better Environment,* 236 F.3d 495, 500–502 (9th Cir. 2001) *(per curiam)*.

Applying this test, the District Court found that the "plurality of each of the relevant business activities" was in California, and that "the differential between the amount of those activities" in California and the amount in "the next closest state" was "significant." Order 4. Hence, Hertz's "principal place of business" was California, and diversity jurisdiction was thus lacking. The District Court consequently remanded the case to the state courts.

Hertz appealed the District Court's remand order. 28 U.S.C. § 1453(c). The Ninth Circuit affirmed in a brief memorandum opinion. 297 Fed. Appx. 690 (2008). Hertz filed a petition for certiorari. And, in light of differences among the Circuits in the application of the test for corporate citizenship, we granted the writ. Compare *Tosco Corp., supra,* at 500–502, and *Capitol Indemnity Corp. v. Russellville Steel Co.,* 367 F.3d 831, 836 (8th Cir. 2004) (applying "total activity" test and looking at "all corporate activities"), with *Wisconsin Knife Works, supra,* at 1282 (applying "nerve center" test).

II

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III

We begin our "principal place of business" discussion with a brief review of relevant history. The Constitution provides that the "judicial Power shall extend" to "Controversies ... between Citizens of different States." Art. III, § 2. This language, however, does not automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits. *Kline v. Burke Constr. Co.,* 260 U.S. 226, 233–234 (1922); *Mayor v. Cooper,* 6 Wall. 247, 252 (1868).

Congress first authorized federal courts to exercise diversity jurisdiction in 1789 when, in the First Judiciary Act, Congress granted federal courts authority to hear suits "between a citizen of the State where the suit is brought, and a citizen of another State." § 11, 1 Stat. 78. The statute said nothing about corporations. In 1809, Chief Justice Marshall, writing for a unanimous Court, described a corporation as an "invisible, intangible, and artificial being" which was "certainly not a citizen." *Bank of United States v. Deveaux,* 5 Cranch 61, 86. But the Court held that a corporation could invoke the federal courts' diversity jurisdiction based on a pleading that the corporation's shareholders were all citizens of a different State from the defendants, as "the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name." *Id.,* at 91–92.

In *Louisville, C. & C.R. Co. v. Letson,* 2 How. 497 (1844), the Court modified this initial approach. It held that a corporation was to be deemed an artificial person of the State by which it had been created, and its citizenship for jurisdictional purposes determined accordingly. *Id.,* at 558–559. Ten years later, the Court in *Marshall v. Baltimore & Ohio R. Co.,* 16 How. 314 (1854), held that the reason a corporation was a citizen of its State of incorporation was that, for the limited purpose of determining corporate

citizenship, courts could conclusively (and artificially) presume that a corporation's *shareholders* were citizens of the State of incorporation. *Id.,* at 327–328. And it reaffirmed *Letson.* 16 How., at 325–326. Whatever the rationale, the practical upshot was that, for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation. 13F C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3623, pp. 1–7 (3d ed. 2009) (hereinafter Wright & Miller).

In 1928, this Court made clear that the "state of incorporation" rule was virtually absolute. It held that a corporation closely identified with State A could proceed in a federal court located in that State as long as the corporation had filed its incorporation papers in State B, perhaps a State where the corporation did no business at all. See *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 522–525 (refusing to question corporation's reincorporation motives and finding diversity jurisdiction). Subsequently, many in Congress and those who testified before it pointed out that this interpretation was at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties. See, *e.g.,* S.Rep. No. 530, 72d Cong., 1st Sess., 2, 4–7 (1932). Through its choice of the State of incorporation, a corporation could manipulate federal-court jurisdiction, for example, opening the federal courts' doors in a State where it conducted nearly all its business by filing incorporation papers elsewhere. *Id.,* at 4 ("Since the Supreme Court has decided that a corporation is a citizen ... it has become a common practice for corporations to be incorporated in one State while they do business in another. And there is no doubt but that it often occurs simply for the purpose of being able to have the advantage of choosing between two tribunals in case of litigation"). See also Hearings on S. 937 et al. before a Subcommittee of the Senate Committee on the Judiciary, 72d Cong., 1st Sess., 4–5 (1932) (Letter from Sen. George W. Norris to Atty. Gen. William D. Mitchell (May 24, 1930)) (citing a "common practice for individuals to incorporate in a foreign State simply for the purpose of taking litigation which may arise into the Federal courts"). Although various legislative proposals to curtail the corporate use of diversity jurisdiction were made, see, *e.g.,* S. 937, S. 939, H.R. 11508, 72d Cong., 1st Sess. (1931–1932), none of these proposals were enacted into law.

At the same time as federal dockets increased in size, many judges began to believe those dockets contained too many diversity cases. A committee of the Judicial Conference of the United States studied the matter. See Reports of the Proceedings of the Regular Annual Meeting and Special Meeting (Sept. 24–26 & Mar. 19–20, 1951), in H.R. Doc. No. 365, 82d Cong., 2d Sess., 26–27 (1952). And on March 12, 1951, that committee, the Committee on Jurisdiction and Venue, issued a report (hereinafter Mar. Committee Rep.).

Among its observations, the committee found a general need "to prevent frauds and abuses" with respect to jurisdiction. *Id.,* at 14. The committee recommended against eliminating diversity cases altogether. *Id.,* at 28. Instead it recommended, along with other proposals, a statutory amendment that would make a corporation a citizen both of the State of its incorporation and any State from which it received more than half of its gross income. *Id.,* at 14–15 (requiring corporation to show that "less than fifty per cent of its gross income was derived from business transacted within the state where the Federal court is held"). If, for example, a citizen of California sued (under state law in state court) a corporation that received half or more of its gross income from California, that corporation would not be able to remove the case to federal court, even if Delaware was its State of incorporation.

During the spring and summer of 1951, committee members circulated their report and attended circuit conferences at which federal judges discussed the report's recommendations. Reflecting those criticisms, the committee filed a new report in September, in which it revised its corporate citizenship recommendation. It now proposed that " 'a corporation shall be deemed a citizen of the state of its

original creation ... [and] shall also be deemed a citizen of a state where it has its principal place of business.' " Judicial Conference of the United States, Report of the Committee on Jurisdiction and Venue 4 (Sept. 24, 1951) (hereinafter Sept. Committee Rep.)—the source of the present-day statutory language. See Hearings on H.R. 2516 et al. before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 1st Sess., 9 (1957) (hereinafter House Hearings). The committee wrote that this new language would provide a "simpler and more practical formula" than the "gross income" test. Sept. Committee Rep. 2. It added that the language "ha[d] a precedent in the jurisdictional provisions of the Bankruptcy Act." *Id*., at 2–3.

In mid–1957, the committee presented its reports to the House of Representatives Committee on the Judiciary. House Hearings 9–27; see also H.R. Rep. No. 1706, 85th Cong., 2d Sess., 27–28 (1958) (hereinafter H.R. Rep. 1706) (reprinting Mar. and Sept. Committee Reps.); S.Rep. No. 1830, 85th Cong., 2d Sess., 15–31 (1958) (hereinafter S. Rep. 1830) (same). Judge Albert Maris, representing Judge John Parker (who had chaired the Judicial Conference Committee), discussed various proposals that the Judicial Conference had made to restrict the scope of diversity jurisdiction. In respect to the "principal place of business" proposal, he said that the relevant language "ha[d] been defined in the Bankruptcy Act." House Hearings 37. He added:

> "All of those problems have arisen in bankruptcy cases, and as I recall the cases—and I wouldn't want to be bound by this statement because I haven't them before me—I think the courts have generally taken the view that where a corporation's interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort."
>
> "But that has been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here without having to go over it again from the beginning." *Ibid.*

The House Committee reprinted the Judicial Conference Committee Reports along with other reports and relevant testimony and circulated it to the general public "for the purpose of inviting further suggestions and comments." *Id.,* at III. Subsequently, in 1958, Congress both codified the courts' traditional place of incorporation test and also enacted into law a slightly modified version of the Conference Committee's proposed "principal place of business" language. A corporation was to "be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." § 2, 72 Stat. 415.

IV

The phrase "principal place of business" has proved more difficult to apply than its originators likely expected. Decisions under the Bankruptcy Act did not provide the firm guidance for which Judge Maris had hoped because courts interpreting bankruptcy law did not agree about how to determine a corporation's "principal place of business." Compare *Burdick v. Dillon,* 144 F. 737, 738 (1st Cir. 1906) (holding that a corporation's "principal office, rather than a factory, mill, or mine ... constitutes the 'principal place of business' "), with *Continental Coal Corp. v. Roszelle Bros.,* 242 F. 243, 247 (6th Cir. 1917) (identifying the "principal place of business" as the location of mining activities, rather than the "principal office"); see also Friedenthal, New Limitations on Federal Jurisdiction, 11 Stan. L.Rev. 213, 223 (1959) ("The cases under the Bankruptcy Act provide no rigid legal formula for the determination of the principal

place of business").

After Congress' amendment, courts were similarly uncertain as to where to look to determine a corporation's "principal place of business" for diversity purposes. If a corporation's headquarters and executive offices were in the same State in which it did most of its business, the test seemed straightforward. The "principal place of business" was located in that State. See, *e.g., Long v. Silver,* 248 F.3d 309, 314–315 (4th Cir. 2001); *Pinnacle Consultants, Ltd. v. Leucadia Nat. Corp.,* 101 F.3d 900, 906–907 (2d Cir. 1996).

But suppose those corporate headquarters, including executive offices, are in one State, while the corporation's plants or other centers of business activity are located in other States? In 1959, a distinguished federal district judge, Edward Weinfeld, relied on the Second Circuit's interpretation of the Bankruptcy Act to answer this question in part:

> "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective. The test applied by our Court of Appeals, is that place where the corporation has an 'office from which its business was directed and controlled'—the place where 'all of its business was under the supreme direction and control of its officers.' " *Scot Typewriter Co.,* 170 F.Supp., at 865.

Numerous Circuits have since followed this rule, applying the "nerve center" test for corporations with "far-flung" business activities. See, *e.g., Topp v. CompAir Inc.,* 814 F.2d 830, 834 (1st Cir. 1987); see also 15 J. Moore et al., Moore's Federal Practice § 102.54[2], p. 102–112.1 (3d ed. 2009) (hereinafter Moore's).

Scot's analysis, however, did not go far enough. For it did not answer what courts should do when the operations of the corporation are not "far-flung" but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located. See, *e.g., Diaz–Rodriguez v. Pep Boys Corp*., 410 F.3d 56, 60–61 (1st Cir. 2005); *R.G. Barry Corp. v. Mushroom Makers, Inc.,* 612 F.2d 651, 656–657 (2d Cir. 1979); see also 15 Moore's § 102.54, at 102–112.1.

Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general "business activities" approach has proved unusually difficult to apply. Courts must decide which factors are more important than others: for example, plant location, sales or servicing centers; transactions, payrolls, or revenue generation. See, *e.g., R.G. Barry Corp., supra,* at 656–657 (place of sales and advertisement, office, and full-time employees); *Diaz–Rodriguez, supra,* at 61–62 (place of stores and inventory, employees, income, and sales).

The number of factors grew as courts explicitly combined aspects of the "nerve center" and "business activity" tests to look to a corporation's "total activities," sometimes to try to determine what treatises have described as the corporation's "center of gravity." See, *e.g., Gafford v. General Elec. Co.,* 997 F.2d 150, 162–163 (6th Cir. 1993); *Amoco Rocmount Co. v. Anschutz Corp.,* 7 F.3d 909, 915 (10th Cir. 1993); 13F Wright & Miller § 3625, at 100. A major treatise confirms this growing complexity, listing, Circuit by Circuit, cases that highlight different factors or emphasize similar factors differently, and reporting that the "federal courts of appeals have employed various tests"—tests which "tend to overlap" and which are

sometimes described in "language" that "is imprecise." 15 Moore's § 102.54[2], at 102–112. See also *id.,* §§ 102.54[2], [13], at 102–112 to 102–122 (describing, in 14 pages, major tests as looking to the "nerve center," "locus of operations," or "center of corporate activities"). Not surprisingly, different Circuits (and sometimes different courts within a single Circuit) have applied these highly general multifactor tests in different ways. *Id.,* §§ 102.54[3]-[7], [11]-[13] (noting that the First Circuit "has never explained a basis for choosing between 'the center of corporate activity' test and the 'locus of operations' test"; the Second Circuit uses a "two-part test" similar to that of the Fifth, Ninth, and Eleventh Circuits involving an initial determination as to whether "a corporation's activities are centralized or decentralized" followed by an application of either the "place of operations" or "nerve center" test; the Third Circuit applies the "center of corporate activities" test searching for the "headquarters of a corporation's day-to-day activity"; the Fourth Circuit has "endorsed neither [the 'nerve center' nor the 'place of operations'] test to the exclusion of the other"; the Tenth Circuit directs consideration of the "total activity of the company considered as a whole"). See also 13F Wright & Miller § 3625 (describing, in 73 pages, the "nerve center," "corporate activities," and "total activity" tests as part of an effort to locate the corporation's "center of gravity," while specifying different ways in which different circuits apply these or other factors).

This complexity may reflect an unmediated judicial effort to apply the statutory phrase "principal place of business" in light of the general purpose of diversity jurisdiction, *i.e.,* an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court, *Pease v. Peck,* 18 How. 595, 599 (1856). But, if so, that task seems doomed to failure. After all, the relevant purposive concern—prejudice against an out-of-state party—will often depend upon factors that courts cannot easily measure, for example, a corporation's image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.

V

A

In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals' divergent and increasingly complex interpretations. Having done so, we now return to, and expand, Judge Weinfeld's approach, as applied in the Seventh Circuit. See, *e.g., Scot Typewriter Co., supra*, at 865; *Wisconsin Knife Works,* 781 F.2d, at 1282. We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.,* the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the "State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The word "place" is in the singular, not the plural. The word "principal" requires us to pick out the "main, prominent" or "leading" place. 12 Oxford English Dictionary 495 (2d ed. 1989) (def.(A)(I)(2)). Cf. *Commissioner v. Soliman,* 506 U.S. 168, 174 (1993) (interpreting "principal place of business" for tax

purposes to require an assessment of "whether any one business location is the 'most important, consequential, or influential' one"). And the fact that the word "place" follows the words "State where" means that the "place" is a place *within* a State. It is not the State itself.

A corporation's "nerve center," usually its main headquarters, is a single place. The public often (though not always) considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are "significantly larger" than in the next-ranking State. 297 Fed. Appx., at 691.

This approach invites greater litigation and can lead to strange results, as the Ninth Circuit has since recognized. Namely, if a "corporation may be deemed a citizen of California on th[e] basis" of "activities [that] roughly reflect California's larger population ... nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes." *Davis v. HSBC Bank Nev., N. A.,* 557 F.3d 1026, 1029–1030 (2009). But why award or decline diversity jurisdiction on the basis of a State's population, whether measured directly, indirectly (say proportionately), or with modifications?

Second, administrative simplicity is a major virtue in a jurisdictional statute. *Sisson v. Ruby,* 497 U.S. 358, 375 (1990) (SCALIA, J., concurring in judgment) (eschewing "the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible"). Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Cf. *Navarro Savings Assn. v. Lee,* 446 U.S. 458, 464, n. 13 (1980). Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999)). So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. *Arbaugh, supra,* at 514.

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Cf. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 621 (1983) (recognizing the "need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation"). Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply *comparatively speaking*. The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an initial version of its proposal that suggested a numerical test. A corporation would be deemed a citizen of the State that accounted for more than half of its gross

income. Mar. Committee Rep. 14–15; see *supra,* at 1189. The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. Sept. Committee Rep. 2; see also H.R. Rep. 1706, at 28; S. Rep. 1830, at 31. That history suggests that the words "principal place of business" should be interpreted to be no more complex than the initial "half of gross income" test. A "nerve center" test offers such a possibility. A general business activities test does not.

B

We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, toward the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

We also recognize that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. § 1332, see *supra,* at 1188. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them. Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system.

The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994); *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936); see also 13E Wright & Miller § 3602.1, at 119. When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof. *McNutt, supra,* at 189; 15 Moore's § 102.14, at 102–32 to 102–32.1. And when faced with such a challenge, we reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission's Form 10–K listing a corporation's "principal executive offices" would, without more, be sufficient proof to establish a corporation's "nerve center." See, *e.g.,* SEC Form 10–K, online at http://www.sec.gov/about/forms/form10–k.pdf (as visited Feb. 19, 2010, and available in Clerk of Court's case file). Cf. *Dimmitt & Owens Financial, Inc. v. United States,* 787 F.2d 1186, 1190–1192 (7th Cir. 1986) (distinguishing "principal executive office" in the tax lien context, see 26 U.S.C. § 6323(f)(2), from "principal place of business" under 28 U.S.C. § 1332(c)). Such possibilities would readily permit jurisdictional manipulation, thereby subverting a major reason for the insertion of the "principal place of business" language in the diversity statute. Indeed, if the record reveals attempts at manipulation—for example, that the alleged "nerve center" is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat—the courts should instead take as the "nerve center" the place of actual direction, control, and coordination, in the absence of such

manipulation.

VI

Petitioner's unchallenged declaration suggests that Hertz's center of direction, control, and coordination, its "nerve center," and its corporate headquarters are one and the same, and they are located in New Jersey, not in California. Because respondents should have a fair opportunity to litigate their case in light of our holding, however, we vacate the Ninth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States

BRISTOL–MYERS SQUIBB COMPANY, Petitioner
v.
SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, et al.

Decided June 19, 2017.

Justice ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol–Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal.5th 783, 790 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. 1 Cal.5th, at 790–791. This amounts to a little over one percent of the company's nationwide sales revenue. *Id.,* at 790.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.,* at 789. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman,* 571 U.S. —— (2014), the California Supreme Court

instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted." App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 228 Cal.App.4th 605 (2014). Under *Daimler,* it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS. 228 Cal.App.4th 605.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." 1 Cal.5th, at 806. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Ibid.* (internal quotation marks omitted). Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." *Ibid*. This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.,* at 803–806. The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." *Id.,* at 804. And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State. *Ibid*.

Three justices dissented. "The claims of ... nonresidents injured by their use of Plavix they purchased and used in other states," they wrote, "in no sense arise from BMS's marketing and sales of Plavix in California," and they found that the "mere similarity" of the residents' and nonresidents' claims was not enough. *Id.,* at 819 (opinion of Werdegar, J.). The dissent accused the majority of "expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.,* at 816, 206 Cal.Rptr.3d 636.

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U.S. ——— (2017).[1]

1 California law provides that its courts may exercise jurisdiction "on any basis not inconsistent with the Constitution ... of the United States," Cal. Civ. Proc. Code Ann. § 410.10 (West 2004); see Daimler AG v. Bauman, 571 U.S. ———, ——— (2014).

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, *e.g., Daimler, supra,* at ——— – ———; *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980); *International Shoe Co. v. Washington,* 326 U.S. 310, 316–317 (1945); *Pennoyer v. Neff,* 95 U.S. 714, 733 (1878). Because "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause," *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 918 (2011), which "limits the power of a state court to render a valid personal judgment against a nonresident defendant," *World–Wide Volkswagen, supra,* at 291. The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State. See *Walden v. Fiore,* 571 U.S. ———, ——— – ——— (2014); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe,* our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. *Goodyear,* 564 U.S., at 919. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id*., at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.,* at 919. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State. *Daimler,* 571 U.S., at ——.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the *suit* " must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." *Id.,* at —— (internal quotation marks omitted; emphasis added); see *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984). In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear,* 564 U.S., at 919 (internal quotation marks and brackets omitted). For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Kulko v. Superior Court of Cal., City and County of San Francisco,* 436 U.S. 84, 92 (1978); see *Daimler, supra,* at —— – ——, n. 20; *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102 (1987); *World–Wide Volkswagen,* 444 U.S., at 292. But the "primary concern" is "the burden on the defendant." *Id.,* at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla,* 357 U.S. 235, 251 (1958). "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State ... implie[s] a limitation on the sovereignty of all its sister States." *World–Wide Volkswagen,* 444 U.S., at 293. And at times, this federalism interest may be decisive. As we explained in *World–Wide Volkswagen,* "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.,* at 294.

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear,* 564 U.S., at 919 (internal quotation marks and brackets in original omitted). When there is no such connection,

specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See *id.,* at 931, n. 6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.' " *Id.,* at 927 (quoting *International Shoe,* 326 U.S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction." *Walden,* 571 U.S., at ——. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden, supra,* illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." *Id.,* at ——–. Because the "*relevant* conduct occurred entirely in Georgi[a] ... the mere fact that [this] conduct affected plaintiffs with connections to the forum State d [id] not suffice to authorize jurisdiction." *Id.,* at ——– (emphasis added).

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden,* all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World–Wide Volkswagen, supra,* at 295 (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770 (1984), a New York resident sued Hustler in New

Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement." *Id*., at 776 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff's request for damages suffered outside the State, *id.,* at 774, but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id*., at 778, n. 9.

The Court's decision in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State.[2] According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.,* at 812.

[2] The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant's own interests, specifically, the res judicata effect of an adverse judgment. 472 U.S., at 803–806.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.,* at 808–812. Since *Shutts* concerned the due process rights of *plaintiffs,* it has no bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be "absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs." Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue.[3] Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts, supra,* at 812, n. 3.

[3] Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

C

In a last ditch contention, respondents contend that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, "[t]he requirements of *International Shoe* ... must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk,* 444 U.S. 320, 332 (1980); see

Walden, 571 U.S., at ——— ("[A] defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal.5th, at 815 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person.... It's not possible for us to track particularly to McKesson"). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,* 484 U.S. 97, 102, n. 5 (1987).

* * *

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

It is so ordered.

Justice SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman,* 571 U.S. ——— (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol–Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol–Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol–Myers billions of dollars in annual revenues.

Bristol–Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol–Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol–Myers' revenue worldwide.

The 2005 publication of an article in the New England Journal of Medicine questioning the efficacy and safety of Plavix put Bristol–Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by the drug in other States.[1] They filed their suits in California Superior Court, raising product-liability claims against Bristol–Myers and McKesson. Their claims are "materially identical," as Bristol–Myers concedes. See Brief for Petitioner 4, n. 1. Bristol–Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol–Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol–Myers is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' "identical" claims.

[1] Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante,* at 1778; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1. For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

II

A

As the majority explains, since our pathmarking opinion in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), the touchstone of the personal-jurisdiction analysis has been the question whether a defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.,* at 316 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). For decades this Court has considered that question through two different jurisdictional frames: "general" and "specific" jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, nn. 8–9 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 919 (2011).[2]

[2] Respondents do not contend that the California courts would be able to exercise general jurisdiction over

Bristol–Myers—a concession that follows directly from this Court's opinion in *Daimler AG v. Bauman,* 571 U.S. —— (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co. v. Tyrrell,* 581 U.S. ——, —— (2017) (SOTOMAYOR, J., concurring in part and dissenting in part); *Daimler,* 571 U.S., at —— (SOTOMAYOR, J., concurring in judgment). But I accept respondents' concession, for the purpose of this case, that Bristol–Myers is not subject to general jurisdiction in California.

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.,* at 923–924. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, Federal Practice and Procedure § 1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.,* at 22–27, n. 10 (collecting authority). First, the defendant must have " 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State' " or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873, 877 (2011) (plurality opinion) (quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)). Second, the plaintiff's claim must "arise out of or relate to" the defendant's forum conduct. *Helicopteros,* 466 U.S., at 414. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 113–114 (1987); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477–478 (1985). The factors relevant to such an analysis include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.,* at 477 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents' claims.

First, there is no dispute that Bristol–Myers "purposefully avail[ed] itself," *Nicastro,* 564 U.S., at 877, of California and its substantial pharmaceutical market. Bristol–Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante,* at 1777 – 1778. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra,* at 1784 – 1785. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol–Myers' in-state conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. *International Shoe,* 326 U.S., at 319. So respondents could not, for instance, hale Bristol–Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol–Myers took in California. But respondents' claims against Bristol–Myers look nothing like such a claim. Respondents' claims against Bristol–Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol–Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol–Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King,* 471 U.S., at 477 (internal quotation marks omitted), is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co. v. Italian Colors Restaurant,* 570 U.S. ——, —— (2013) (KAGAN, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands"). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol–Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol–Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. See 1 Cal.5th 783, 799, n. 2 (2016). Instead, Bristol–Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims," *ante,* at 1781 – 1782—a result that it says follows from "settled principles [of] specific jurisdiction," *ante,* at 1780 – 1781. But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden v. Fiore,* 571 U.S. —— (2014). That is plainly not true. *Walden* concerned the requirement that a defendant "purposefully avail" himself of a forum State or "purposefully direc[t]" his conduct toward that State, *Nicastro,* 564 U.S., at 877 not the separate requirement that a plaintiff's claim "arise out of or relate to" a defendant's forum contacts. The lower court understood the case that way. See *Fiore v. Walden,* 688 F.3d 558, 576–582 (9th Cir. 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondent 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden v. Fiore,* O.T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, *e.g.,* 4 Wright § 1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship. See 571 U.S., at —— ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol–Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante,* at 1781 – 1782, can *Walden* be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton,* a New York resident brought suit against an Ohio corporation, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.,* at 781; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol–Myers faces many more plaintiffs' claims. See *ante,* at 1782 – 1783. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante,* at 1780. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which " 'the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; ... the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation' " but personal jurisdiction still will not lie. *Ante,* at 1780 – 1781 (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U.S., at 316 (internal quotation marks omitted). The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim,[3] the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

[3] Bristol–Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). See Brief for Civil Procedure Professors as *Amici Curiae* 14–18; see also *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol–Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open ... question"). *Ante,* at 1783 – 1784. Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the

consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is " 'essentially at home.' "[4] See *Daimler,* 571 U.S., at ——. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

[4] The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin v. Scardelletti,* 536 U.S. 1, 9–10 (2002) ("Nonnamed class members ... may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L.J. 597, 616–617 (1987).

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Cf. *id.,* at —— – —— (SOTOMAYOR, J., concurring in judgment). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.,* the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horribles," *ante,* at 1783, but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It "does not offend 'traditional notions of fair play and substantial justice,' " *International Shoe,* 326 U.S., at 316 to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Supreme Court of the United States

William MARBURY
v.
James MADISON, Secretary of State of the United States.

MARSHALL, Chief Justice

[After losing the elections of 1800, President John Adams and his Federalist Party remained in office until the spring of 1801. During this period, the Federalists passed new legislation creating several new federal judicial offices, including judicial positions of Justices of the Peace in the District of Columbia. President Adams appointed Marbury and others to serve in these offices. The Senate confirmed their nominations, and the President prepared and affixed seals to the papers appointing Marbury and the others to their offices. In the rush of business at the end of Adams' presidency, there was insufficient time to deliver the "commissions." The new president, Thomas Jefferson, ordered his Secretary of State, James Madison, not to deliver the commissions. Marbury and the other appointees then sued Madison in the Supreme Court of the United States, asking the Court to compel Madison to deliver the commissions. The Supreme Court required Madison to reply, but he refused. The Court then considered whether it should grant Marbury the requested relief – a "writ of mandamus," traditionally directed to a government official who had failed to fulfill a mandatory legal duty.]

*** * * ***

…. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded. . . .

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

[I]

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

[A nominee has a right to his office after the following procedures, set out in Article II, have been completed: nomination by the President, consent by the Senate, appointment by the President, and signing of the commission by the President. The Secretary of State is required to affix the U.S. seal to all such appointments, and failure to affix the seal or deliver the commission does not negate the validity of the commission. The ministerial duties of the Secretary of State are prescribed by statute.]

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

[II]

2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

*** * * ***

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this [rule is not to be followed], it must arise from the peculiar character of the case.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the

performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

[The statute requiring the Secretary of State to apply a seal to the commissions and deliver them created a specific duty, leaving no political discretion to be exercised after the President had signed the commissions. In general, therefore, petitioner Marbury should be entitled to a remedy from the courts.]

[III]

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

[A]

1st. The nature of the writ.

[The 1789 Judiciary Act gives the Supreme Court power to issue "writs of mandamus." Accordingly, the Court must examine the role of such a writ to determine if it is appropriate in this case. Since such a writ is available under British tradition when a statute imposes a legal duty, and since the statute here imposed on Madison the legal duty to seal and deliver commissions signed by the President, a writ of mandamus is the appropriate remedial device. An exception preventing the use of the mandamus when there exist "questions in their nature political" is not relevant here because, as noted earlier, Madison has no political discretion to refuse to deliver the commissions.]

[B]

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

[1]

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

[After listing the topics of federal judicial power, Art. III, cl. 2, para. 2 continues by dividing the Supreme Court's power between appellate and original jurisdiction:] "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." [Thus, only two of the topics listed in Article III section 2 may come to the Supreme Court in its original jurisdiction. The topic of "cases arising under the constitution" is not listed as appropriate for the Court's original jurisdiction. Marbury's attempt to bring this case to us in the Court's original jurisdiction, therefore, appears to be inconsistent with the definition of the Court's judicial power set out in Article III.]

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

[2]

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

[a] That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

*** * * ***

[b] [This is especially true when the Constitution is a written one that limits the power of the several organs of the government.] The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed….

[c] Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. …

[d] If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? ….

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions….

[e] The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

[f] [Other provisions explicitly foresee that courts will be required to obey the Constitution rather than conflicting statutory law.]

*** * * ***

The constitution declares that “no bill of attainder or ex post facto law shall be passed.”

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

[g] From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

[h] [Finally,] in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument

[The petition for a writ of mandamus is dismissed.]

Supreme Court of California

Nga LI, Plaintiff and Appellant,
v.
YELLOW CAB COMPANY OF CALIFORNIA et al., Defendants and Respondents.

March 31, 1975.
As Modified April 24, 1975.

SULLIVAN, Justice.

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As we explain in detail Infra, we conclude that we should. In the course of reaching our ultimate decision we conclude that: (1) The doctrine of comparative negligence is preferable to the 'all-or-nothing' doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1714 of the Civil Code, which has been said to 'codify' the 'all-or-nothing' rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course—leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called 'pure' form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

The accident here in question occurred near the intersection of Alvarado Street and Third Street in Los Angeles. At this intersection Third Street runs in a generally east-west direction along the crest of a hill, and Alvarado Street, running generally north and south, rises gently to the crest from either direction. At approximately 9 p.m. on November 21, 1968, plaintiff Nga Li was proceeding northbound on Alvarado in her 1967 Oldsmobile. She was in the inside lane, and about 70 feet before she reached the Third Street intersection she stopped and then began a left turn across the three southbound lanes of Alvarado, intending to enter the driveway of a service station. At this time defendant Robert Phillips, an employee of defendant Yellow Cab Company, was driving a company-owned taxicab southbound in the middle lane on Alvarado. He came over the crest of the hill, passed through the intersection, and collided with the right rear portion of plaintiff's automobile, resulting in personal injuries to plaintiff as well as considerable damage to the automobile.

The court, sitting without a jury, found as facts that defendant Phillips was traveling at approximately 30 miles per hour when he entered the intersection, that such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado 'was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard.' The dispositive conclusion of law was as follows: 'That the driving of NGA LI was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence.' Judgment for defendants was entered accordingly.

I

'Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.' (Rest.2d Torts, s 463.) Thus the American Law Institute, in its second restatement of the law, describes the kind of conduct on the part of one seeking recovery for damage caused by negligence which renders him subject to the doctrine of contributory negligence. What the effect of such conduct will be is left to a further section, which states the doctrine in its clearest essence: 'Except where the defendant has the last clear chance, the plaintiff's contributory negligence Bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.' (Rest.2d Torts, s 467.) (Italics added.)

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself (see Baltimore & P.R. Co. v. Jones (1877) 95 U.S. 439, 442. 506; Buckley v. Chadwick (1955) 45 Cal.2d 183, 192, 288 P.2d 12, 289 P.2d 242), has been the law of this state from its beginning. (See Innis v. The Steamer Senator (1851) 1 Cal. 459, 460—461; Griswold v. Sharpe (1852) 2 Cal. 17, 23—24; Richmond v. Sacramento Valley Railroad Company (1861) 18 Cal. 351, 356—358; Gay v. Winter (1867) 34 Cal. 153, 162—163; Needham v. S.F. & S.J.R. Co. (1869) 37 Cal. 409, 417—423.) Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks, in both the legislative[1] and the judicial[2] arenas, seeking its amelioration or repudiation. We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us to the conclusion that the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.

[1] (See, for example, Sen.Bill No. 43 (1971 Reg.Sess.); Assem.Bill No. 694 (1971 Reg.Sess.); Sen.Bill No. 132 (1972 Reg.Sess.); Assem.Bill No. 102 (1972 Reg.Sess.); Sen.Bill No. 10 (1973 Reg.Sess.); Sen.Bill No. 557 (1973 Reg.Sess.); Assem.Bill No. 50 (1973 Reg.Sess.); Assem.Bill No. 801 (1973 Reg.Sess.); Assem.Bill No. 1666 (1973 Reg.Sess.); Sen.Bill No. 2021 (1974 Reg.Sess.).)

[2] See Tucker v. United Railroads (1916) 171 Cal. 702, 704—705, 154 P. 835; Sego v. Southern Pacific Co. (1902) 137 Cal. 405, 407, 70 P. 279; Summers v. Burdick (1961) 191 Cal.App.2d 464, 471, 13 Cal.Rptr. 68; Haerdter v. Johnson (1949) 92 Cal.App.2d 547, 553, 207 P.2d 855.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.[3] Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task.[4] The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.

[3] Dean Prosser states the kernel of critical comment in these terms: 'It (the rule) places upon one party the entire burden of a loss for which two are, by hypothesis, responsible.' (Prosser, Torts (4th ed. 1971) s 67,

p. 433.) Harper and James express the same basic idea: '(T)here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule.' (2 Harper & James, The Law of Torts (1956) s 22.3, p. 1207.)

[4] Dean Prosser, in a 1953 law review article on the subject which still enjoys considerable influence, addressed himself to the commonly advanced justificatory arguments in the following terms: 'There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States. The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about 'proximate cause,' saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.' (Prosser, Comparative Negligence (1953) 41 Cal.L.Rev. 1, 3—4; fns. omitted. For a more extensive consideration of the same subject, see 2 Harper & James, Supra, s 22.2, pp. 1199—1207.)

To be distinguished from arguments raised in justification of the 'all or nothing' rule are practical considerations which have been said to counsel against the adoption of a fairer and more logical alternative. The latter considerations will be discussed in a subsequent portion of this opinion.

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: 'Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one.' (Prosser, Comparative Negligence, Supra, p. 4; fn. omitted.) (See also Prosser, Torts, Supra, s 67, pp. 436—437; Comments of Malone and Wade in Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide? (1968) 21 Vand.L.Rev. 889, at pp. 934, 943; Ulman, A Judge Takes the Stand (1933) pp. 30—34; cf. Comment of Kalven, 21 Vand.L.Rev. 889, 901—904.) It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in

the ability of law and legal institutions to assign liability on a just and consistent basis. (See Keeton, Creative Continuity in the Law of Torts (1962) 75 Harv.L.Rev. 463, 505; Comment of Keeton in Comments on Maki v. Frelk, Supra, 21 Vand.L.Rev. 889, at p. 916[5]; Note (1974) 21 U.C.L.A. L. Rev. 1566, 1596—1597.)

[5] Professor Keeton states the matter as follows in his Vanderbilt Law Review comment: 'In relation to contributory negligence, as elsewhere in the law, uncertainty and lack of evenhandedness are produced by casuistic distinctions. This has happened, for example, in doctrines of last clear chance and in distinctions between what is enough to sustain a finding of primary negligence and what more is required to sustain a finding of contributory negligence. Perhaps even more significant, however, is the casuistry of tolerating blatant jury departure from evenhanded application of the legal rules of negligence and contributory negligence with the consequence that a kind of rough apportionment of damages occurs, but in unpoliced, irregular, and unreasonably discriminatory fashion. Moreover, the existence of this practice sharply reduces the true scope of the substantive change effected by openly adopting comparative negligence. ( ) Thus, stability, predictability, and evenhandedness are better served by the change to comparative negligence than by adhering in theory to a law that contributory fault bars when this rule has ceased to be the law in practice.' (21 Vand.L.Rev. at p. 916).

A contrary conclusion is drawn in an article by Lewis F. Powell, Jr., now an Associate Justice of the United States Supreme Court. Because a loose form of comparative negligence is already applied in practice by independent American juries, Justice Powell argues, the 'all-or-nothing' rule of contributory negligence ought to be retained as a check on the jury's tendency to favor the plaintiff. (Powell, Contributory Negligence: A Necessary Check on the American Jury (1957) 43 A.B.A.J. 1055.)

It is in view of these theoretical and practical considerations that to this date 25 states,[6] have abrogated the 'all or nothing' rule of contributory negligence and have enacted in its place general apportionment Statutes calculated in one manner or another to assess liability in proportion to fault. In 1973 these states were joined by Florida, which effected the same result by Judicial decision. (Hoffman v. Jones (Fla. 1973) 280 So.2d 431.) We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery—and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.[6a]

[6] Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. (Schwartz, Comparative Negligence (1974), Appendix A, pp. 367—369.)

In the federal sphere, comparative negligence of the 'pure' type (see Infra) has been the rule since 1908 in cases arising under the Federal Employers' Liability Act (see 45 U.S.C. s 53) and since 1920 in cases arising under the Jones Act (see 46 U.S.C. s 688) and the Death on the High Seas Act (see 46 U.S.C. s 766.)

[6a] In employing the generic term 'fault' throughout this opinion we follow a usage common to the literature on the subject of comparative negligence. In all cases, however, we intend the term to import nothing more than 'negligence' in the accepted legal sense.

The foregoing conclusion, however, clearly takes us only part of the way. It is strenuously and ably urged by defendants and two of the amici curiae that whatever our views on the relative merits of contributory and comparative negligence, we are precluded from making those views the law of the state by judicial decision. Moreover, it is contended, even if we are not so precluded, there exist considerations of a practical nature which should dissuade us from embarking upon the course which we have indicated. We

proceed to take up these two objections in order.

II

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin—its genesis being traditionally attributed to the opinion of Lord Ellenborough in Butterfield v. Forrester (K.B.1809) 103 Eng.Rep. 926—the enactment of section 1714 of the Civil Code[7] in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds. Subsequent cases of this court, it is pointed out, have unanimously affirmed that—barring the appearance of some constitutional infirmity—the 'all-or-nothing' rule is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention.

[7] Section 1714 of the Civil Code has never been amended. It provides as follows: 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or persn, Except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.' (Italics added.)

We are further urged to observe that a basic distinction exists between the situation obtaining in Florida prior to the decision of that state's Supreme Court abrogating the doctrine (Hoffman v. Jones, Supra, 280 So.2d 431), and the situation now confronting this court. There, to be sure, the Florida court was also faced with a statute, and the dissenting justice considered that fact sufficient to bar judicial change of the rule. The statute there in question, however, merely declared that the general English common and statute law in effect on July 4, 1776, was to be in force in Florida except to the extent it was inconsistent with federal constitutional and statutory law and acts of the state Legislature. (Fla. Stat., s 2.01, F.S.A.) The majority simply concluded that there was no clearcut common law rule of contributory negligence prior to the 1809 Butterfield decision (Butterfield v. Forrester, Supra, 103 Eng. Rep. 926), and that therefore that rule was not made a part of Florida law by the statute.[8] (280 So.2d at pp. 434—435.) In the instant case, defendants and the amici curiae who support them point out, the situation is quite different: here the Legislature has specifically enacted the rule of contributory negligence as the law of this state. In these circumstances, it is urged, the doctrine of separation of powers requires that any change must come from the Legislature.

[8] It should be observed that the Florida court held alternatively that even if contributory negligence Was recognized by the common law prior to the day of American independence, and therefore was made a part of Florida law by the statute, it remained subject to judicial overruling because of its common law origin. (280 So.2d at pp. 435—436.)

We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided. As we proceed to point out and elaborate below, it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Before turning our attention to section 1714 itself we make some observations concerning the 1872 Civil Code as a whole. Professor Arvo Van Alstyne, in an excellent and instructive article entitled The California Civil Code which appears as the introductory commentary to West's Annotated Civil Code (1954), has

carefully and authoritatively traced the history and examined the development of this, the first code of substantive law to be adopted in this state. Based upon the ill-fated draft Civil Code prepared under the direction and through the effort of David Dudley Field for adoption in the state of New York, the California code found acceptance for reasons largely related to the temperament and needs of an emerging frontier society. 'In the young and growing commonwealth of California, the basically practical views of Field commanded wider acceptance than the more theoretic and philosophic arguments of the jurists of the historic school. In 1872, the advantages of codification of the unwritten law, as well as of a systematic revision of statute law, loomed large, since that law, drawing heavily upon the judicial traditions of the older states of the Union, was still in a formative stage. The possibility of widely dispersed popular knowledge of basic legal concepts comported well with the individualistic attitudes of the early West.' (Van Alstyne, Supra, p. 6.)

However, the extreme conciseness and brevity of expression which was characteristic of the 1872 code, although salutary from the point of view of popular access to basic legal concepts, early led to uncertainty and dispute as to whether it should be regarded as the exclusive or primary source of the law of private rights. Due largely to the influence of a series of articles on the subject by Professor John Norton Pomeroy, this problem of interpretation was soon resolved, and by 1920 this court was able to state with confidence: 'The Civil Code was not designed to embody the whole law of private and civil relations, rights and duties; it is incomplete and partial; and except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter, a section of the Code purporting to embody such doctrine or rule will be construed in light of common-law decisions on the same subject.' (Estate of Elizalde (1920) 182 Cal. 427, 433, 188 P. 560, 562; see also Van Alstyne, Supra, pp. 29—35.)

In addition, the code itself provides explicit guidance as to how such construction shall proceed. 'The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.' (Civ. Code (1872) s 4.) Also, '(t)he provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as Continuations thereof, and not as new enactments.' (Civ. Code (1872) s 5; italics added.) The effect of these sections was early expressed by us in In re Jessup (1889) 81 Cal. 408, 419 in the following terms: '(E)ven as to the Code, 'liberal construction' does not mean enlargement or restriction of a plain provision of a written law. If a provision of the Code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object, and promote justice.' (See also Baxter v. Shanley-Furness Co. (1924) 193 Cal. 558, 560; see generally 45 Cal.Jur.2d, Statutes, s 162, pp. 663—667.)

The foregoing view of the character, function, and proper mode of interpretation of the Civil Code has imbued it with admirable flexibility from the standpoint of adaption to changing circumstances and conditions. As Professor Van Alstyne states the matter: '(The code's) incompleteness, both in scope and in detail(,) have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations. In the field of torts, in particular, which the Civil Code touches upon only briefly and sporadically, the courts have been free from Code restraint in evolving the details of such currently vital rules as those pertaining to last clear chance, the right of privacy, Res ipsa loquitur, unfair competition, and the 'impact rule' in personal injury cases . . .. ( ) In short, the Civil Code has not, as its critics had predicted, restricted the orderly development of the law in its most rapidly changing areas

along traditional patterns. That this is true is undoubtedly due in large measure to the generality of Code treatment of its subject matter, stress being placed upon basic principles rather than a large array of narrowly drawn rules. In addition, the acceptance of Professor Pomeroy's concept of the Civil Code as a continuation of the common law created an atmosphere in which Code interpretation could more easily partake of common law elasticity.' (Van Alstyne, Supra, pp. 36—37.)

It is with these general precepts in mind that we turn to a specific consideration of section 1714. That section, which we have already quoted in full (fn. 7, Ante), provides in relevant part as follows: 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, Except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.' (Italics added.)

The present-day reader of the foregoing language is immediately struck by the fact that it seems to provide in specific terms for a rule of Comparative rather than Contributory negligence—i.e., for a rule whereby plaintiff's recovery is to be diminished To the extent that his own actions have been responsible for his injuries. The use of the compound conjunction 'except so far as'—rather than some other conjunction setting up a wholly disqualifying condition—clearly seems to indicate an intention on the part of the Legislature to adopt a system other than one wherein contributory fault on the part of the plaintiff would operate to Bar recovery.[9] Thus it could be argued—as indeed it has been argued with great vigor by plaintiff and the amici curiae who support her position—that no Change in the law is necessary in this case at all. Rather, it is asserted, all that is here required is a recognition by this court that section 1714 announced a rule of comparative negligence in this state in 1872 and a determination to brush aside all of the misguided decisions which have concluded otherwise up to the present day. (See also Bodwell, It's Been Comparative Negligence For Seventy-Nine Years (1952) 27 L.A. Bar Bull. 247.)

[9] This impression is strengthened by a comparison of the language of section 1714 with the section of the Field draft on which it was modeled. Section 853 of the 1865 draft of the New York Civil Code, whose manifest intention was to state the strict rule of contributory negligence, uses the word 'unless' in the position wherein its successor section 1714 substitutes 'except so far as.' (See fn. 12, Infra.) As we shall explain, however, wisdom does not lie in drawing hasty conclusions from this change in language.

Our consideration of this arresting contention—and indeed of the whole question of the true meaning and intent of section 1714—cannot proceed without reference to the Code Commissioners' Note which appeared immediately following section 1714 in the 1872 code.[10] That note provided in full as follows: 'Code La., s 2295; Code Napoleon, s 1383; Austin vs. Hudson River R.R. Co., 25 N.Y., p. 334; Jones vs. Bird, 5 B. & Ald., p. 837; Dodd vs. Holmes, 1 Ad. & El., p. 493. This section modifies the law heretofore existing.—See 20 N.Y., p. 67; 10 M. & W., p. 546; 5 C.B. (N.S.), p. 573. This class of obligations imposed by law seems to be laid down in the case of Baxter vs. Roberts, July Term, 1872, Sup.Ct. Cal. (44 Cal. 187). Roberts employed Baxter to perform a service which he (Roberts) knew to be perilous, without giving Baxter any notice of its perilous character; Baxter was injured. Held: that Roberts was responsible in damages for the injury which Baxter sustained. (See facts of case.)' (1 Annot. Civ. Code (Haymond & Burch 1874 Ed.) p. 519; italics added.)

[10] In determining whether a specific code section was intended to depart from or merely restate the common law, weight is to be accorded the notes and comments of the Code Commissioners. (See O'Hara v. Wattson (1916) 172 Cal. 525, 534—535.)

Each of the parties and amici in this case has applied himself to the task of legal cryptography which the interpretation of this not involves. The variety of answers which has resulted is not surprising. We first address ourselves to the interpretation advanced by plaintiff and the amici curiae in support of her

contention set forth above, that section 1714 in fact announced a rule of comparative rather than contributory negligence.

The portion of the note which is relevant to our inquiry extends from its beginning up to the series of three cases cited following the italicized sentence: 'This section modifies the law heretofore existing.' Plaintiff and her allies point out that the first authorities cited are two statutes from civil law jurisdictions, Louisiana and France; then comes the italicized sentence; finally there are cited three cases which state the common law of contributory negligence modified by the doctrine of last clear chance. The proper interpretation, they urge, is this: Civil law jurisdictions, they assert, uniformly apportion damages according to fault. The citation to statutes of such jurisdictions, followed by a sentence indicating that a change is intended, followed in turn by the citation of cases expressing the common law doctrine—these taken together, it is urged, support the clear language of section 1714 by indicating the rejection of the common law 'all-or-nothing' rule and the adoption in its place of civil law principles of apportionment.

This argument fails to withstand close scrutiny. The civil law statutes cited in the note, like the common law cases cited immediately following them, deal not with 'defenses' to negligence but with the basic concept of negligence itself.[11] In fact the Code Commissioners' Note to the parallel section of the Field draft cites the very same statutes and the very same cases in direct support of its statement of the basic rule.[12] Moreover, in 1872, when section 1714 was enacted and the Code Commissioners' Note was written, neither France nor Louisiana applied concepts of comparative negligence. The notion of 'faute commune' did not become firmly rooted in French law until 1879 and was not codified until 1915. (See Turk, Comparative Negligence on the March (1950) 28 Chi.Kent L.Rev. 189, 239—240.) Louisiana, in spite of an 1825 statute which appeared to establish comparative negligence,[13] firmly adhered to the 'all-or-nothing' common law rule in 1872 and has done so ever since. (See Schwartz, Supra, s 1.3, p. 10, fn. 76; Turk, Supra, at pp. 318—326.) In fact, in 1872 there was no American jurisdiction applying concepts of true comparative negligence for general purposes,[14] and the only European jurisdictions doing so were Austria and Portugal. (Turk, Supra, at p. 241.) Among those jurisdictions applying such concepts in the limited area in which they have traditionally been applied, to wit, admiralty, was California itself: in section 973 of the very Civil Code which we are now considering (now Harb. & Nav. Code, s 292) apportionment was provided for when the negligence of the plaintiff was slight. Yet the Code Commissioners' Note did not advert to this section.

11 Section 1383 of the Code Napoleon (1804) provided: 'Chacun est responsable du dommage qu'il a cause non seulement par son fait, mais encore par sa ne gligence ou par son imprudence.' (Every person is responsible for the damage that he has caused not only by his act, but also by his negligence or by his imprudence.)
In 1872, article 2295 of the Louisiana Civil Code (now art. 2316) provided: 'Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.'

12 Section 853 of the 1865 Field draft of the New York Civil Code, along with its Code Commissioners' Note, provided: 'Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person;[1] Unles the latter has, willfully, or by want or ordinary care, incurred the risk of such injury.[2] The extent of liability in such cases as defined by the Title on Compensatory Relief.

1. 'Code La., 2295; Code Napoleon, 1383; Austin v. Hudson River R.R. Co., 25 N.Y. 334; Jones v. Bird, 5 B. & Ald., 837, Dodd v. Holmes, 1 Ad. & El., 493.
2. 'Johnson v. Hudson River R.R. Co., 20 N.Y. 69.'

[13] The statute here in question (La.Code 1825, art. 2303) was not that cited by the Code Commissioners. (See fn. 11, Ante, and accompanying text.)

[14] In 1872 two American jurisdictions, Illinois and Kansas, applied concepts of slight versus gross negligence—which was not really comparative negligence but another form of 'all-or-nothing' rule according to which a slightly negligent plaintiff could recover 100 percent of his damages against a grossly negligent defendant. One jurisdiction, Georgia, had a true comparative negligence statute, but it was limited in application to railroad accidents. (Turk, Supra, at pp. 304—318, 326—333.)

In view of all of the foregoing we think that it would indeed be surprising if the 1872 Legislature, intending to accomplish the marked departure from common law which the adoption of comparative negligence would represent, should have chosen to do so in language which differed only slightly from that used in the Field draft to describe the common law rule. (See fn. 12, Ante; see also Buckley v. Chadwick, Supra, 45 Cal.2d 183, 192—193.) It would be even more surprising if the Code Commissioners, in stating the substance of the intended change, should fail to mention the law of any jurisdiction, American or foreign, which then espoused the new doctrine in any form, and should choose to cite in their note the very statutes and decisions which the New York Code Commissioners had cited in support of their statement of the common law rule. (See fn. 12, Ante, and accompanying text.) It is in our view manifest that neither the Legislature nor the Code Commissioners harbored any such intention—and that the use of the words 'except so far as' in section 1714 manifests an intention Other than that of declaring comparative negligence the law of California in 1872.[15]

[15] The statement in some cases to the effect that section 1714 states a civil law rather than a common law principle (see Rowland v. Christian (1968) 69 Cal.2d 108, 112; Fernandez v. Consolidated Fisheries, Inc. (1950) 98 Cal.App.2d 91, 95—96) is correct insofar as it indicates that the duty to refrain from injuring others through negligence has its roots in civil law concepts. (See Turk, Supra, at p. 209.) It is incorrect, however, insofar as it might be read to indicate that defenses affecting recovery for breach of that basic duty are also rooted in the civil law. As we have shown, the defense of contributory negligence and its mitigative corollary, the doctrine of last clear chance, as they are stated in the statute, are clearly of common law origin.

That intention, we have concluded, was simply to insure that the rule of contributory negligence, as applied in this state, would not be the harsh rule then applied in New York but would be mitigated by the doctrine of last clear chance. The New York rule, which did Not incorporate the latter doctrine, had been given judicial expression several years before in the case of Johnson v. Hudson River Railroad Company (1859) 20 N.Y. 65. It is apparent from Code Commissioners' Note that this rule was considered too harsh for adoption in California, and that the Legislature therefore determined to adopt a provision which would not have the effect of barring a negligent plaintiff from recovery without regard to the quantity or quality of his negligence.[16]

[16] 'Although . . . the bulk of the Code was based on the New York draft code, it nevertheless cannot be classified as a mere duplication thereof. On the contrary, the original California Civil Code bears the unmistakable imprint of a thoroughgoing critical reconsideration and evaluation of the New York provisions, and their recasting where necessary in the light of California statutory and decision law, with a view to the improvement of the whole structure.' (Van Alstyne, Supra, at p. 11.)

Turning to the text of the note, we observe that, as indicated above (fn. 11, Ante, and accompanying text), the first group of citations, both statutory and decisional, deal with defining the basic concept of negligence and announcing a rule of recovery therefor. Then appears the sentence 'This section modifies the law heretofore existing,' followed immediately by the citation of three cases. The first of these, as we have indicated, is Johnson v. Hudson River Railroad Company (1859) 20 N.Y. 65; that case represented the

strict New York rule of contributory negligence, derived directly from the 1809 Butterfield case, under which Any negligence on the part of the plaintiff barred recovery; and it had been specifically cited for that proposition in the Field draft section 853. (See fn. 12, Ante.) The second and third cases cited by the California commissioners were Davies v. Mann (1842) 10 M & W 546, and Tuff v. Warman (1858) 5 C.B.(N.S.) 573; these cases stated the emerging doctrine of last clear chance, which the English courts had begun to apply in order to ameliorate the harsh Butterfield rule. Interestingly, the last cited of these cases contains language which might well have been the source of the term 'except so far as' which the California Legislature used to indicate its parting of the ways with the New York rule: 'It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself So far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.' (Tuff v. Warman, Supra, 5 C.B.(N.S.) 573, 585; italics added.)[17]

[17] It is difficult to understand why the Code Commissioners did not incorporate in their note citations to California cases dealing with the plaintiff's duty of care and the doctrine of last clear chance. Perhaps it was felt that a citation of the seminal English cases was sufficient to recognize the emerging principles. In any event, it is worthy of note that this court, in the 1869 decision of Needham v. S.F. & S.J.R. Co. (1869) 37 Cal. 409, had carefully examined the New York rule and had firmly rejected it in favor of the more humane English view. Of more than passing interest in the present premises is the following language from our opinion: 'To this doctrine (the strict New York rule), however, notwithstanding the very respectable authority by which it is sustained, we are unable to assent. About the general rule upon which it is founded—that a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of—there can be no dispute. (Gay v. Winter, 34 Cal. 153.) The reason of this rule is, that both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, which would seem to be the true reason in the estimation of the New York Courts. The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded.' (37 Cal. 409, 419; italics added.) This language clearly contains the germ of a comparative approach, if not the outright statement that such an approach would be adopted if apportionment of damages were technically possible.

We think that the foregoing establishes conclusively that the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance. It remains to determine whether by so doing the Legislature intended to restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability.

This question must be answered in the negative. As we have explained above, the peculiar nature of the 1872 Civil Code as an avowed Continuation of the common law has rendered it particularly flexible and adaptable in its response to changing circumstances and conditions. To reiterate the words of Professor Van Alstyne, '(the code's) incompleteness, both in scope and detail (,) have provided ample room for

judicial development of important new systems of rules, frequently built upon Code foundations.' (Van Alstyne, Supra, at p. 36.) Section 1714 in particular has shown great adaptability in this respect. For example, the statute by its express language speaks of causation only in terms of actual cause or cause in fact ('Every one is responsible . . . for an injury occasioned to another by his want of ordinary care.'), but this has not prevented active judicial development of the twin concepts of proximate causation and duty of care. (See, e.g., Vesely v. Sager (1971) 5 Cal.3d 153, 158—167; Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850, 865—868; Dillon v. Legg (1968) 68 Cal.2d 728, 739—748; Stewart v. Cox (1961) 55 Cal.2d 857, 861—863; Biakanja v. Irving (1958) 49 Cal.2d 647; Richards v. Stanley (1954) 43 Cal.2d 60, 63—66.) Conversely, the presence of this statutory language has not hindered the development of rules which, in certain limited circumstances, permit a finding of liability in the absence of direct evidence establishing the defendant's negligence as the actual cause of damage. (See Summers v. Tice (1948) 33 Cal.2d 80; Ybarra v. Spangard (1944) 25 Cal.2d 486.) By the same token we do not believe that the general language of section 1714 dealing with defensive considerations should be construed so as to stifle the orderly evolution of such considerations in light of emerging techniques and concepts. On the contrary we conclude that the rule of liberal construction made applicable to the code by its own terms (Civ. Code, s 4, discussed Ante) together with the code's peculiar character as a continuation of the common law (see Civ. Code, s 5, also discussed Ante) permit if not require that section 1714 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes.

The aforementioned precepts are basically two. The first is that one whose negligence has caused damage to another should be liable therefor. The second is that one whose negligence has contributed to his own injury should not be permitted to cast the burden of liability upon another. The problem facing the Legislature in 1872 was how to accommodate these twin precepts in a manner consonant with the then progress of the common law and yet allow for the incorporation of future developments. The manner chosen sought to insure that the harsh accommodation wrought by the New York rule—i.e., Barring recovery to one guilty of Any negligence—would not take root in this state. Rather the Legislature wished to encourage a more humane rule—one holding out the hope of recovery to the negligent plaintiff in some circumstances.

The resources of the common law at that time (in 1872) did not include techniques for the apportionment of damages strictly according to fault—a fact which this court had lamented three years earlier (see fn. 17, Ante). They did, however, include the nascent doctrine of last clear chance which, while it too was burdened by an 'all-or-nothing' approach, at least to some extent avoided the often unconscionable results which could and did occur under the old rule precluding recovery when Any negligence on the part of the plaintiff contributed in Any degree to the harm suffered by him. Accordingly the Legislature sought to include the concept of last clear chance in its formulation of a rule of responsibility. We are convinced, however, as we have indicated, that in so doing the Legislature in no way intended to thwart future judicial progress toward the humane goal which it had embraced. Therefore, and for all of the foregoing reasons, we hold that section 1714 of the Civil Code was not intended to and does not preclude present judicial action in furtherance of the purposes underlying it.

III

We are thus brought to the second group of arguments which have been advanced by defendants and the amici curiae supporting their position. Generally speaking, such arguments expose considerations of a practical nature which, it is urged, counsel against the adoption of a rule of comparative negligence in this state even if such adoption is possible by judicial means.

The most serious of these considerations are those attendant upon the administration of a rule of

comparative negligence in cases involving multiple parties. One such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaluate relative negligence in such circumstances, and to compound this difficulty such an evaluation would not be res judicata in a subsequent suit against the absent wrongdoer. Problems of contribution and indemnity among joint tortfeasors lurk in the background. (See generally Prosser, Comparative Negligence, Supra, 41 Cal. L. Rev. 1, 33—37; Schwartz, Comparative Negligence, Supra, ss 16.1—16.9, pp. 247—274.)

A second and related major area of concern involves the administration of the actual process of fact-finding in a comparative negligence system. The assigning of a specific percentage factor to the amount of negligence attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts. The temptation for the jury to resort to a quotient verdict in such circumstances can be great. (See Schwartz, Supra, s 17.1, pp. 275—279.) These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry (see, e.g., Schwartz, Supra, s 17.1, pp. 278—279), and the utilization of special verdicts[18] or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence. (See Schwartz, Supra, s 17.4, pp. 282—291; Prosser, Comparative Negligence, Supra, 41 Cal. L. Rev., pp. 28—33.)

[18] It has been argued by one of the amici curiae that the mandatory use of special verdicts in negligence cases would require amendment of section 625 of the Code of Civil Procedure, which reposes the matter of special findings within the sound discretion of the trial court. (See Cembrook v. Sterling Drug Inc. (1964) 231 Cal.App.2d 52, 62—65.) This, however, poses no problem at this time. For the present we impose no mandatory requirement that special verdicts be used but leave the entire matter of jury supervision within the sound discretion of the trial courts.

The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. Although several states which apply comparative negligence concepts retain the last clear chance doctrine (see Schwartz, Supra, s 7.2, p. 134), the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. (See Schwartz, Supra, s 7.2, pp. 137—139; Prosser, Comparative Negligence, Supra, 41 Cal.L.Rev., p. 27.) As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff Unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . .. Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.' (Grey v. Fibreboard Paper Products Co. (1966) 65 Cal.2d 240, 245—246; see also Fonseca v. County of Orange (1972) 28 Cal.App.3d 361, 368—369; see generally, 4 Witkin, Summary of Cal.Law, Torts, s 723, pp. 3013—3014; 2 Harper & James, The Law of Torts, Supra, s 21.1, pp. 1162—1168; cf. Prosser, Torts, Supra, s 68, pp. 439—441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (See generally, Schwartz,

Supra, ch. 9, pp. 153—175.)

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. In jurisdictions following the 'all-or-nothing' rule, contributory negligence is no defense to an action based upon a claim of willful misconduct (see Rest.2d Torts, s 503; Prosser, Torts, Supra, s 65, p. 426), and this is the present rule in California. (Williams v. Carr (1968) 68 Cal.2d 579, 583.)[19] As Dean Prosser has observed, '(this) is in reality a rule of comparative fault which is being applied, and the court is refusing to set up the lesser fault against the greater.' (Prosser, Torts, Supra, s 65, p. 426.) The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order,[20] and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. In has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional. (Schwartz, Supra, s 5.3, p. 108.) The law of punitive damages remains a separate consideration. (See Schwartz, Supra, s 5.4, pp. 109—111.)

[19] BAJI No. 3.52 (1971 re-revision) currently provides: 'Contributory negligence of a plaintiff is not a bar to his recovery for an injury caused by the wilful or wanton misconduct of a defendant. ( ) Wilful or wanton misconduct is intentional wrongful conduct, done either with knowledge, express or implied, that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. An intent to injure is not a necessary element of wilful or wanton miconduct. ( ) To prove such misconduct it is not necessary to establish that defendant himself recognized his conduct as dangerous. It is sufficient if it be established that a reasonable man under the same or similar circumstances would be aware of the dangerous character of such conduct.'

[20] 'Disallowing the contributory negligence defense in this context is different from last clear chance; the defense is denied not because defendant had the last opportunity to avoid the accident but rather because defendant's conduct was so culpable it was different in 'kind' from the plaintiff's. The basis is culpability rather than causation.' (Schwartz, Supra, s 5.1, p. 100; fn. omitted.)

The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned—see generally Schwartz, Supra, s 21.1, pp. 335—339) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case. Two of the indicated areas (i.e., multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise. As the Florida court stated with respect to the same subject, 'it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation.' (Hoffman v. Jones, Supra,280 So.2d 431, 439.)

Our previous comments relating to the remaining two areas of concern (i.e., the status of the doctrines of last clear chance and assumption of risk, and the matter of judicial supervision of the finder of fact) have provided sufficient guidance to enable the trial courts of this state to meet and resolve particular problems in this area as they arise. As we have indicated, last clear chance and assumption of risk (insofar as the latter doctrine is but a variant of contributory negligence) are to be subsumed under the general process of assessing liability in proportion to fault, and the matter of jury supervision we leave for the moment

within the broad discretion of the trial courts.

Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise. Pending future judicial or legislative developments, we are content for the present to assume the position taken by the Florida court in this matter: 'We feel the trial judges of this State are capable of applying (a) comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this opinion.' (280 So.2d at pp. 439—440.)

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called 'pure' form of comparative negligence, apportions liability in direct proportion to fault in all cases. This was the form adopted by the Supreme Court of Florida in Hoffman v. Jones, Supra, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators. (See e.g., Prosser, Comparative Negligence, Supra, 41 Cal.L.Rev. 1, 21—25; Prosser, Torts, Supra, s 67, pp. 437—438; Schwartz, Supra, s 21.3, pp. 341—348; Comments on Maki v. Frelk-Comparative v. Contributory Negligence: Should the Court or Legislature Decide?, Supra, 21 Vand.L.Rev. 889 (Comment by Keeton at p. 906, Comment by Leflar at p. 918 (.) The second basic form of comparative negligence, of which there are several variants, applies apportionment based on fault Up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant—when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less at fault. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a 'pure' rather than a '50 percent' system is adopted, but this has been seriously questioned. (See authorities cited in Schwartz, Supra, s 21.3, pp. 344—346; see also Vincent v. Pabst Brewing Co. (1970) 47 Wis.2d 120, 138, 177 N.W.2d 513 (dissenting opinion).)

We have concluded that the 'pure' form of comparative negligence is that which should be adopted in this state. In our view the '50 percent' system simply shifts the lottery aspect of the contributory negligence rule[21] to a different ground. As Dean Prosser has noted, under such a system '(i)t is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much justified criticism of a rule under which a plaintiff who is charged with 49 percent of a total negligence recovers 51 percent of his damages, while one who is charged with 50 percent recovers nothing at all.'[22] Prosser, Comparative Negligence, Supra, 41 Cal.L.Rev. 1, 25; fns. omitted.) In effect 'such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence.' (Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company, Supra, 18 Wayne L.Rev. 3, 50; see also Schwartz, Supra, s 21.3, p. 347.)

[21] 'The rule that contributory fault bars completely is a curious departure from the central principle of nineteenth century Anglo-American tort law—that wrongdoers should bear the losses they cause. Comparative negligence more faithfully serves that central principle by causing the wrongdoers to share the burden of resulting losses in reasonable relation to their wrongdoing, rather than allocating the heavier burden to the one who, as luck would have it, happened to be more seriously injured.' (Comments on Maki

v. Frelk, Supra, 21 Vand.L.Rev. 889, Comment by Keeton, pp. 912—913.)

[22] This problem is compounded when the injurious result is produced by the combined negligence of several parties. For example in a three-car collision a plaintiff whose negligence amounts to one-third or more recovers nothing; in a four-car collision the plaintiff is barred if his negligence is only one-quarter of the total. (See Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company (1972) 18 Wayne L.Rev. 3, 50—51.)

We also consider significant the experience of the State of Wisconsin, which until recently was considered the leading exponent of the '50 percent' system. There that system led to numerous appeals on the narrow but crucial issue whether plaintiff's negligence was equal to defendant's. (See Prosser, Comparative Negligence, Supra, 41 Cal.L.Rev. 1, 23—25.) Numerous reversals have resulted on this point, leading to the development of arcane classifications of negligence according to quality and category. (See cases cited in Vincent v. Pabst Brewing Co., Supra, 47 Wis.2d 120, at p. 137, 177 N.W.2d 513 (dissenting opinion).) This finally led to a frontal attack on the system in the Vincent case, cited above, wherein the state supreme court was urged to replace the statutory '50 percent' rule by a judicially declared 'pure' comparative negligence rule. The majority of the court rejected this invitation, concluding that the Legislature had occupied the field, but three concurring justices and one dissenter indicated their willingness to accept it if the Legislature failed to act with reasonable dispatch. The dissenting opinion of Chief Justice Hallows, which has been cited above, stands as a persuasive testimonial in favor of the 'pure' system. We wholeheartedly embrace its reasoning. (See also, Hoffman v. Jones, Supra, 280 So.2d 431, 438—439.)

For all of the foregoing reasons we conclude that the 'all-or-nothing' rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of 'pure' comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to negligence. Pending future judicial or legislative developments, the trial courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. It is the rule in this state that determinations of this nature turn upon considerations of fairness and public policy. (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 800; Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850, 868; Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal.2d 450, 459; County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 680—681.) Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date

this decision becomes final in this court, but that it shall not be applicable to any case in which trial began before that date (other than the instant case)—except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

As suggested above, we have concluded that this is a case in which the litigant before the court should be given the benefit of the new rule announced. Here, unlike in Westbrook v. Mihsly, Supra, 2 Cal.3d 765, considerations of fairness and public policy do not dictate that a purely prospective operation be given to our decision.[23] To the contrary, sound principles of decision-making compel us to conclude that, in the light of the particular circumstances of the instant case,[24] the new rule here announced should be applied additionally to the case at bench so as to provide incentive in future cases for parties who may have occasion to raise 'issues involving renovation of unsound or outmoded legal doctrines.' (See Mishkin, Foreword, The Supreme Court 1964 Term (1965) 79 Harv. L. Rev. 56, 60—62.) We fully appreciate that there may be other litigants now in various stages of trial or appellate process who have also raised the issue here before us but who will nevertheless be foreclosed from benefitting from the new standard by the rule of limited retroactivity we have announced in the preceding paragraph. This consideration, however, does not lead us to alter that rule. 'Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.' (Stovall v. Denno (1967) 388 U.S. 293, 301; fn. omitted.)

[23] Indeed, as we have indicated in the preceding paragraph, such considerations have led us to permit application of the new rule to actions which have been commenced but have not yet been brought to trial.

[24] Nothing we say here today on this point is intended to overrule, in whole or in part, expressly or by implication, the case of Westbrook v. Mihaly, Supra, 2 Cal.3d 765, or any other case involving the prospective or retrospective operation of our decisions.

In view of the foregoing disposition of this case we have not found it necessary to discuss plaintiff's additional contention that the rule of contributory negligence is in violation of state and federal constitutional provisions guaranteeing equal protection of the laws.

The judgment is reversed.

MOSK, Justice (concurring and dissenting).

Although I concur in the judgment and agree with the substance of the majority opinion, I dissent from its cavalier treatment of the recurring problem of the manner of applying a new court-made rule.

In footnote 24 of the opinion denies that the court now 'is intending to overrule' the case of Westbrook v. Mihaly (1970) 2 Cal.3d 765. Whether or not the majority subjectively Intend to overrule Westbrook, the result and the text of the opinion indicate beyond any doubt that They have actually done so. Precedent is established not merely by what a court says; it is created primarily by what a court does. (Norris v. Moody (1890) 84 Cal. 143, 149; Childers v. Childers (1946) 74 Cal.App.2d 56, 61.)

Unfortunately the forthrightness of the majority opinion as a whole is sadly diminished by a curious reluctance to face up to reality by recognizing that this court is finally overruling Westbrook and several other cases on the subject of applying a new court-made rule to the parties at hand.

As recently as People v. Hitch (1974) 12 Cal.3d 641, 654, the majority of this court, while upholding the appellant's contentions, denied him relief on a theory that prospectively should prevail over retroactive application of a new rule. I pointed out in may dissent (Id. at p. 655) that 'there is a third, and preferable, alternative: applying the new rule to the aggrieved party responsible for bringing the issue to judicial attention, and thereafter prospectively.'

Up to now the majority never deigned to consider the third alternative, but persisted in their erroneous notion that the only choice was between total retroactivity and absolute prospectivity. This occurred in two other cases last year: see my concurring opinion in In re Stewart (1974) 10 Cal.3d 902, 907, and my dissenting opinion in In re Yurko (1974) 10 Cal.3d 857, 867.

In retrospect it is clear that Westbrook v. Mihaly, supra, was the point of departure in which the majority first strayed from the accepted doctrine that a prevailing party is to be awarded the fruits of his victory. In my concurring and dissenting opinion in that case (2 Cal.3d at p. 802) and in Hitch (12 Cal.3d at p. 656) I quoted from Stovall v. Denno (1967) 388 U.S. 293, to the effect that the benefits of a new rule should apply to the parties to the proceeding which results in the new rule. In the instant case, the majority now quote that same portion of Stovall, this time with approval (Ante, p. 876 of 119 Cal.Rptr., p. 1244 of 532 P.2d).

Also, in Westbrook v. Mihaly, 2 Cal.3d at p. 804, I noted that if a new rule is to apply prospectively only, 'it will tend to deter counsel from presenting 'issues involving renovation of unsound or outmoded legal doctrines,'' citing Mishkin's foreword to the article on the 1964 term of the Supreme Court in 79 Harvard Law Review 56. The majority now adopt the same point based upon the same quotation (Ante, p. 876).

The majority paint their conclusion herein with such broad-brush and standardless terms as 'considerations of fairness and public policy' and 'sound principles of decision-making,' without giving any clue why application of a new rule is fair to Nga Li, but somehow was unfair as applied over the past several years to Westbrook and to the several other litigants who helped us develop new rules of law only to be deprived of the benefits thereof. The most inexplicable previous result was Larez v. Shannon (1970) 2 Cal.3d 813, in which, it will be remembered, the plaintiffs prevailed completely on principle, but the majority went so far as to reverse a judgment in their favor.

Nevertheless it is comforting that the majority of the court have finally settled on the third of the three available alternatives in applying a new court-made rule. Despite the majority's gratuitous disclaimer, the bench and bar will understand that this court is now overruling, insofar as they are inconsistent, the following opinions: Westbrook v. Mihaly, supra, 2 Cal.3d 765; Alhambra City Sch. Dist. v. Mize (1970) 2 Cal.3d 806; Larez v. Shannon, supra, 2 Cal.3d 813; Foytik v. Aronson (1970) 2 Cal.3d 818; In re Yurko, supra, 10 Cal.3d 857; People v. Hitch, supra, 12 Cal.3d 641, 117 Cal.Rptr. 9.

CLARK, Justice (dissenting).

I dissent.

For over a century this court has consistently and unanimously held that Civil Code section 1714 codifies the defense of contributory negligence. Suddenly—after 103 years—the court declares section 1714 shall provide for comparative negligence instead. In my view, this action constitutes a gross departure from established judicial rules and role.

First, the majority's decision deviates from settled rules of statutory construction. A cardinal rule of construction is to effect the intent of the Legislature.[1] The majority concedes 'the intention of the

Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance.' (Ante, p. 870 of 119 Cal.Rptr., p. 1238.) Yet the majority refuses to honor this acknowledged intention—violating established principle.

[1] Tyrone v. Kelley (1973) 9 Cal.3d 1, 10—11; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 256; Mannheim v. Superior Court (1970) 3 Cal.3d 678, 686; Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal.3d 359, 366; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907, 918.

The majority decision also departs significantly from the recognized limitation upon judicial action—encroaching on the powers constitutionally entrusted to the Legislature. The power to enact and amend our statutes is vested exclusively in the Legislature. (Cal. Const., art. III, s 3; art. IV, s 1.) 'This court may not usurp the legislative function to change the statutory law which has been uniformly construed by a long line of judicial decisions.' (Estate of Calhoun (1955) 44 Cal.2d 378, 387, 282 P.2d 880, 886.) The majority's altering the meaning of section 1714, notwithstanding the original intent of the framers and the century-old judicial interpretation of the statute, represents no less than amendment by judicial fiat. Although the Legislature intended the courts to develop the working details of the defense of contributory negligence enacted in section 1714 (see generally, Commentary, Arvo Van Alstyne, the California Civil Code, 6 West Civ.Code (1954) pp. 1—43), no basis exists—either in history or in logic—to conclude the Legislature intended to authorize judicial repudiation of the basic defense itself at any point we might decide the doctrine no longer serves us.

I dispute the need for judicial—instead of legislative—action in this area. The majority is clearly correct in its observation that our society has changed significantly during the 103-year existence of section 1714. But this social change has been neither recent nor traumatic, and the criticisms leveled by the majority at the present operation of contributory negligence are not new. I cannot conclude our society's evolution has now rendered the normal legislative process inadequate.

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best. (See Schwartz, Comparative Negligence (1974) Appendix A, pp. 367—369 and s 21.3, fn. 40, pp. 341—342, and authorities cited therein.) This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration All but two of the many competing proposals—including models adopted by some of our sister states.[2]

[2] 'It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here.' (Ante, p. 874 of 119 Cal.Rptr.)

Contrary to the majority's assertions of judicial adequacy, the courts of other states—with near unanimity—have conceded their inability to determine the best system for replacing contributory negligence, concluding instead that the legislative branch is best able to resolve the issue.[3]

[3] See, e.g., Codling v. Paglia (1973) 32 N.Y.2d 330, 344—345; McGraw v. Corrin (Del.Supr.1973) 303 A.2d 641, 644; Bridges v. Union Railroad Company (1971) 26 Utah 2d 281; Parsonson v. Constr. Equipment Co. (1970) 386 Mich. 61 (concurring opinion); Krise v. Gillund (N.D.1971) 184 N.W.2d 405; Peterson v. Culp (1970) 255

Or. 269; Vincent v. Pabst Brewing Co. (1970) 47 Wis.2d 120; Maki v. Frelk (1968) 40 Ill.2d 193; compare Hoffman v. Jones (Fla.1973) 280 So.2d 431.

By abolishing this century old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

Supreme Court of the United States

John L. YATES, Petitioner
v.
UNITED STATES.

Decided Feb. 25, 2015.

Justice GINSBURG announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice BREYER, and Justice SOTOMAYOR join.

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating 18 U.S.C. § 1519, which provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

Yates was also indicted and convicted under § 2232(a), which provides:

> "DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.—Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both."

Yates does not contest his conviction for violating § 2232(a), but he maintains that fish are not trapped within the term "tangible object," as that term is used in § 1519.

Section 1519 was enacted as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes–Oxley, Congress trained its attention on corporate and accounting deception and coverups, we conclude that a matching construction of § 1519 is in order: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.

I

On August 23, 2007, the *Miss Katie,* a commercial fishing boat, was six days into an expedition in the Gulf of Mexico. Her crew numbered three, including Yates, the captain. Engaged in a routine offshore patrol

to inspect both recreational and commercial vessels, Officer John Jones of the Florida Fish and Wildlife Conservation Commission decided to board the *Miss Katie* to check on the vessel's compliance with fishing rules. Although the *Miss Katie* was far enough from the Florida coast to be in exclusively federal waters, she was nevertheless within Officer Jones's jurisdiction. Because he had been deputized as a federal agent by the National Marine Fisheries Service, Officer Jones had authority to enforce federal, as well as state, fishing laws.

Upon boarding the *Miss Katie,* Officer Jones noticed three red grouper that appeared to be undersized hanging from a hook on the deck. At the time, federal conservation regulations required immediate release of red grouper less than 20 inches long. 50 C.F.R. § 622.37(d)(2)(ii) (effective April 2, 2007). Violation of those regulations is a civil offense punishable by a fine or fishing license suspension. See 16 U.S.C. §§ 1857(1)(A), (G), 1858(a), (g).

Suspecting that other undersized fish might be on board, Officer Jones proceeded to inspect the ship's catch, setting aside and measuring only fish that appeared to him to be shorter than 20 inches. Officer Jones ultimately determined that 72 fish fell short of the 20–inch mark. A fellow officer recorded the length of each of the undersized fish on a catch measurement verification form. With few exceptions, the measured fish were between 19 and 20 inches; three were less than 19 inches; none were less than 18.75 inches. After separating the fish measuring below 20 inches from the rest of the catch by placing them in wooden crates, Officer Jones directed Yates to leave the fish, thus segregated, in the crates until the *Miss Katie* returned to port. Before departing, Officer Jones issued Yates a citation for possession of undersized fish.

Four days later, after the *Miss Katie* had docked in Cortez, Florida, Officer Jones measured the fish contained in the wooden crates. This time, however, the measured fish, although still less than 20 inches, slightly exceeded the lengths recorded on board. Jones surmised that the fish brought to port were not the same as those he had detected during his initial inspection. Under questioning, one of the crew members admitted that, at Yates's direction, he had thrown overboard the fish Officer Jones had measured at sea, and that he and Yates had replaced the tossed grouper with fish from the rest of the catch.

For reasons not disclosed in the record before us, more than 32 months passed before criminal charges were lodged against Yates. On May 5, 2010, he was indicted for destroying property to prevent a federal seizure, in violation of § 2232(a), and for destroying, concealing, and covering up undersized fish to impede a federal investigation, in violation of § 1519.[1] By the time of the indictment, the minimum legal length for Gulf red grouper had been lowered from 20 inches to 18 inches. See 50 C.F.R. § 622.37(d)(2)(iv) (effective May 18, 2009). No measured fish in Yates's catch fell below that limit. The record does not reveal what civil penalty, if any, Yates received for his possession of fish undersized under the 2007 regulation. See 16 U.S.C. § 1858(a).

[1] Yates was also charged with making a false statement to federal law enforcement officers, in violation of 18 U.S.C. § 1001(a)(2). That charge, on which Yates was acquitted, is not relevant to our analysis.

Yates was tried on the criminal charges in August 2011. At the end of the Government's case in chief, he moved for a judgment of acquittal on the § 1519 charge. Pointing to § 1519's title and its origin as a provision of the Sarbanes–Oxley Act, Yates argued that the section sets forth "a documents offense" and that its reference to "tangible object[s]" subsumes "computer hard drives, logbooks, [and] things of that nature," not fish. App. 91–92. Yates acknowledged that the Criminal Code contains "sections that would have been appropriate for the [G]overnment to pursue" if it wished to prosecute him for tampering with

evidence. App. 91. Section 2232(a), set out *supra,* at 1–2, fit that description. But § 1519, Yates insisted, did not.

The Government countered that a "tangible object" within § 1519's compass is "simply something other than a document or record." App. 93. The trial judge expressed misgivings about reading "tangible object" as broadly as the Government urged: "Isn't there a Latin phrase [about] construction of a statute.... The gist of it is ... you take a look at [a] line of words, and you interpret the words consistently. So if you're talking about documents, and records, tangible objects are tangible objects in the nature of a document or a record, as opposed to a fish." *Ibid.* The first-instance judge nonetheless followed controlling Eleventh Circuit precedent. While recognizing that § 1519 was passed as part of legislation targeting corporate fraud, the Court of Appeals had instructed that "the broad language of § 1519 is not limited to corporate fraud cases, and 'Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action.' " No. 2:10–cr–66–FtM–29SPC (MD Fla., Aug. 8, 2011), App. 116 (quoting *United States v. Hunt,* 526 F.3d 739, 744 (11th Cir. 2008)). Accordingly, the trial court read "tangible object" as a term "independent" of "record" or "document." App. 116. For violating § 1519 and § 2232(a), the court sentenced Yates to imprisonment for 30 days, followed by supervised release for three years. App. 118–120. For life, he will bear the stigma of having a federal felony conviction.

On appeal, the Eleventh Circuit found the text of § 1519 "plain." 733 F.3d 1059, 1064 (11th Cir. 2013). Because "tangible object" was "undefined" in the statute, the Court of Appeals gave the term its "ordinary or natural meaning," *i.e.,* its dictionary definition, "[h]aving or possessing physical form." *Ibid.* (quoting Black's Law Dictionary 1592 (9th ed. 2009)).

We granted certiorari, 572 U.S. 1087 (2014), and now reverse the Eleventh Circuit's judgment.

II

The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. Brief for United States 46. Prior law made it an offense to "intimidat[e], threate[n], or corruptly persuad[e] *another person* " to shred documents. § 1512(b) (emphasis added). Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself. See S.Rep. No. 107–146, p. 14 (2002) (describing § 1519 as "a new general anti shredding provision" and explaining that "certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself"). The new section also expanded prior law by including within the provision's reach "any matter within the jurisdiction of any department or agency of the United States." See *id.,* at 14–15.

In the Government's view, § 1519 extends beyond the principal evil motivating its passage. The words of § 1519, the Government argues, support reading the provision as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation.

Yates urges a contextual reading of § 1519, tying "tangible object" to the surrounding words, the placement of the provision within the Sarbanes–Oxley Act, and related provisions enacted at the same time, in particular § 1520 and § 1512(c)(1), see *infra,* at 1083, 1084 – 1085. Section 1519, he maintains, targets not all manner of evidence, but records, documents, and tangible objects used to preserve them,

e.g., computers, servers, and other media on which information is stored.

We agree with Yates and reject the Government's unrestrained reading. "Tangible object" in § 1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.

A

The ordinary meaning of an "object" that is "tangible," as stated in dictionary definitions, is "a discrete ... thing," Webster's Third New International Dictionary 1555 (2002), that "possess[es] physical form," Black's Law Dictionary 1683 (10th ed. 2014). From this premise, the Government concludes that "tangible object," as that term appears in § 1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). See also *Deal v. United States,* 508 U.S. 129, 132 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. See, *e.g., FAA v. Cooper,* 566 U.S. 284, 292-293 (2012) ("actual damages" has different meanings in different statutes); *Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 313–314 (2006) ("located" has different meanings in different provisions of the National Bank Act); *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 595–597 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of Title 26 U.S.C.); *Robinson,* 519 U.S., at 342–344 ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 807–808 (1986) ("arising under" has different meanings in U.S. Const., Art. III, § 2, and 28 U.S.C. § 1331); *District of Columbia v. Carter,* 409 U.S. 418, 420–421 (1973) ("State or Territory" has different meanings in 42 U.S.C. § 1982 and § 1983); *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433–437 (1932) ("trade or commerce" has different meanings in different sections of the Sherman Act). As the Court observed in *Atlantic Cleaners & Dyers,* 286 U.S., at 433:

> "Most words have different shades of meaning and consequently may be variously construed.... Where the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."[2]

[2] The dissent assiduously ignores all this, *post,* at 1096, in insisting that Congress wrote § 1519 to cover, along with shredded corporate documents, red grouper slightly smaller than the legal limit.

In short, although dictionary definitions of the words "tangible" and "object" bear consideration, they are

not dispositive of the meaning of "tangible object" in § 1519.

Supporting a reading of "tangible object," as used in § 1519, in accord with dictionary definitions, the Government points to the appearance of that term in Federal Rule of Criminal Procedure 16. That Rule requires the prosecution to grant a defendant's request to inspect "tangible objects" within the Government's control that have utility for the defense. See Fed. Rule Crim. Proc. 16(a)(1)(E).

Rule 16's reference to "tangible objects" has been interpreted to include any physical evidence. See 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 20.3(g), pp. 405–406, and n. 120 (3d ed. 2007). Rule 16 is a discovery rule designed to protect defendants by compelling the prosecution to turn over to the defense evidence material to the charges at issue. In that context, a comprehensive construction of "tangible objects" is fitting. In contrast, § 1519 is a penal provision that refers to "tangible object" not in relation to a request for information relevant to a specific court proceeding, but rather in relation to federal investigations or proceedings of every kind, including those not yet begun.[3] See *Commissioner v. National Carbide Corp.,* 167 F.2d 304, 306 (2d Cir. 1948) (Hand, J.) ("words are chameleons, which reflect the color of their environment"). Just as the context of Rule 16 supports giving "tangible object" a meaning as broad as its dictionary definition, the context of § 1519 tugs strongly in favor of a narrower reading.

[3] For the same reason, we do not think the meaning of "tangible objects" (or "tangible things," see Fed. Rule Civ. Proc. 26(b)) in other discovery prescriptions cited by the Government leads to the conclusion that "tangible object" in § 1519 encompasses any and all physical evidence existing on land or in the sea.

B

Familiar interpretive guides aid our construction of the words "tangible object" as they appear in § 1519.

We note first § 1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. Neither does the title of the section of the Sarbanes–Oxley Act in which § 1519 was placed, § 802: "Criminal penalties for altering documents." 116 Stat. 800. Furthermore, § 1520, the only other provision passed as part of § 802, is titled "Destruction of corporate audit records" and addresses only that specific subset of records and documents. While these headings are not commanding, they supply cues that Congress did not intend "tangible object" in § 1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. See *Almendarez–Torres v. United States,* 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

Section 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. See § 1516 (audits of recipients of federal funds); § 1517 (federal examinations of financial institutions); § 1518 (criminal investigations of federal health care offenses). See also S. Rep. No. 107–146, at 7 (observing that § 1517 and § 1518 "apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud").

But Congress did not direct codification of the Sarbanes–Oxley Act's other additions to Chapter 73 adjacent to these specialized provisions. Instead, Congress directed placement of those additions within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials: Section 806, "Civil Action to protect against retaliation in fraud cases," was codified as § 1514A and inserted between the pre-existing § 1514, which addresses civil actions to restrain harassment of victims and witnesses in criminal cases, and § 1515, which defines terms used in § 1512 and § 1513. Section 1102, "Tampering with a record or otherwise impeding an official proceeding," was codified as § 1512(c) and inserted within the pre-existing § 1512, which addresses tampering with a victim, witness, or informant to impede any official proceeding. Section 1107, "Retaliation against informants," was codified as § 1513(e) and inserted within the pre-existing § 1513, which addresses retaliation against a victim, witness, or informant in any official proceeding. Congress thus ranked § 1519, not among the broad proscriptions, but together with specialized provisions expressly aimed at corporate fraud and financial audits. This placement accords with the view that Congress' conception of § 1519's coverage was considerably more limited than the Government's.[4]

[4] The dissent contends that nothing can be drawn from the placement of § 1519 because, before and after Sarbanes–Oxley, "all of Chapter 73 was ordered chronologically." *Post,* at 1095. The argument might have some force if the factual premise were correct. In Sarbanes–Oxley, Congress directed insertion of § 1514A *before* § 1518, then the last section in Chapter 73. If, as the dissent argues, Congress adopted § 1519 to fill out § 1512, *post,* at 6–7, it would have made more sense for Congress to codify the substance of § 1519 within § 1512 or in a new § 1512A, rather than placing § 1519 among specialized provisions. Notably, in Sarbanes–Oxley, Congress added § 1512(c)(1), "a broad ban on evidence-spoliation," *post,* at 1095, n. 2, to § 1512, even though § 1512's preexisting title and provisions all related to witness-tampering.

The contemporaneous passage of § 1512(c)(1), which was contained in a section of the Sarbanes–Oxley Act discrete from the section embracing § 1519 and § 1520, is also instructive. Section 1512(c)(1) provides:

> "(c) Whoever corruptly—
>
> "(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . . . .
>
> "shall be fined under this title or imprisoned not more than 20 years, or both."

The legislative history reveals that § 1512(c)(1) was drafted and proposed after § 1519. See 148 Cong. Rec. 12518, 13088–13089 (2002). The Government argues, and Yates does not dispute, that § 1512(c)(1)'s reference to "other object" includes any and every physical object. But if § 1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well, for § 1519 applies to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ... or in relation to or contemplation of any such matter," not just to "an official proceeding."[5]

[5] Despite this sweeping "in relation to" language, the dissent remarkably suggests that § 1519 does not "ordinarily operate in th[e] context [of] federal court[s]," for those courts are not "'department[s] or agenc[ies].' " *Post,* at 1095. That suggestion, which, as one would expect, lacks the Government's endorsement, does not withstand examination. The Senate Committee Report on § 1519, on which the dissent elsewhere relies, see *post,* at 1093, explained that an obstructive act is within § 1519's scope if "done 'in contemplation' of or in relation to a matter or investigation." S. Rep. No. 107–146, at 15. The

> Report further informed that § 1519 "is ... meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title." *Ibid.* If any doubt remained about the multiplicity of contexts in which § 1519 was designed to apply, the Report added, "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." *Ibid.*

The Government acknowledges that, under its reading, § 1519 and § 1512(c)(1) "significantly overlap." Brief for United States 49. Nowhere does the Government explain what independent function § 1512(c)(1) would serve if the Government is right about the sweeping scope of § 1519. We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act.[6] See *Marx v. General Revenue Corp.,* 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

[6] Furthermore, if "tangible object" in § 1519 is read to include any physical object, § 1519 would prohibit all of the conduct proscribed by § 2232(a), which imposes a maximum penalty of five years in prison for destroying or removing "property" to prevent its seizure by the Government. See *supra,* at 1078 – 1079.

The words immediately surrounding "tangible object" in § 1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. As explained in *Gustafson v. Alloyd Co.,* 513 U.S. 561 (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Id., at 575 (internal quotation marks omitted). See also *United States v. Williams,* 553 U.S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated"). In *Gustafson,* we interpreted the word "communication" in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." 513 U.S., at 575–576. And we did so even though the list began with the word "any."

The *noscitur a sociis* canon operates in a similar manner here. " Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.,* objects used to record or preserve information. See United States Sentencing Commission, Guidelines Manual § 2J1.2, comment., n. 1 (Nov. 2014) (" 'Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.").

This moderate interpretation of "tangible object" accords with the list of actions § 1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, *falsifies,* or *makes a false entry in* any record, document, or tangible object" with the requisite obstructive intent. (Emphasis added.) The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See, *e.g.,* Black's Law Dictionary 720 (10th ed. 2014) (defining "falsify" as "[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)"). It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive. Furthermore, Congress did not include on § 1512(c)(1)'s list of prohibited actions "falsifies" or "makes a false entry in." See § 1512(c)(1) (making it unlawful to "alte[r], destro [y], mutilat[e], or concea[l] a record,

document, or other object" with the requisite obstructive intent). That contemporaneous omission also suggests that Congress intended "tangible object" in § 1519 to have a narrower scope than "other object" in § 1512(c)(1).[7]

[7] The dissent contends that "record, document, or tangible object" in § 1519 should be construed in conformity with "record, document, or other object" in § 1512(c)(1) because both provisions address "the same basic problem." *Post,* at 1096 – 1097. But why should that be so when Congress prohibited in § 1519 additional actions, specific to paper and electronic documents and records, actions it did not prohibit in § 1512(c)(1)? When Congress passed Sarbanes–Oxley in 2002, courts had already interpreted the phrase "alter, destroy, mutilate, or conceal an object" in § 1512(b)(2)(B) to apply to all types of physical evidence. See, *e.g., United States v. Applewhaite,* 195 F.3d 679, 688 (3d Cir. 1999) (affirming conviction under § 1512(b)(2)(B) for persuading another person to paint over blood spatter). Congress' use of a formulation in § 1519 that did not track the one used in § 1512(b)(2)(B) (and repeated in § 1512(c)(1)) suggests that Congress designed § 1519 to be interpreted apart from § 1512, not in lockstep with it.

A canon related to *noscitur a sociis, ejusdem generis,* counsels: "[W] here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384 (2003) (internal quotation marks omitted). In *Begay v. United States,* 553 U.S. 137, 142–143 (2008), for example, we relied on this principle to determine what crimes were covered by the statutory phrase "any crime ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii). The enumeration of specific crimes, we explained, indicates that the "otherwise involves" provision covers "only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.' " 553 U.S., at 142. Had Congress intended the latter "all encompassing" meaning, we observed, "it is hard to see why it would have needed to include the examples at all." *Ibid.* See also *CSX Transp., Inc. v. Alabama Dept. of Revenue,* 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."). Just so here. Had Congress intended "tangible object" in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage.

Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes–Oxley Act and § 1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping.

The Government argues, however, that our inquiry would be incomplete if we failed to consider the origins of the phrase "record, document, or tangible object." Congress drew that phrase, the Government says, from a 1962 Model Penal Code (MPC) provision, and reform proposals based on that provision. The MPC provision and proposals prompted by it would have imposed liability on anyone who "alters, destroys, mutilates, conceals, or removes a record, document or thing." See ALI, MPC § 241.7(1), p. 175 (1962). Those proscriptions were understood to refer to all physical evidence. See MPC § 241.7, Comment 3, at 179 (1980) (provision "applies to any physical object"). Accordingly, the Government reasons, and the dissent exuberantly agrees, *post,* at 4–5, Congress must have intended § 1519 to apply to the universe of physical evidence.

The inference is unwarranted. True, the 1962 MPC provision prohibited tampering with any kind of

physical evidence. But unlike § 1519, the MPC provision did not prohibit actions that specifically relate to records, documents, and objects used to record or preserve information. The MPC provision also ranked the offense as a misdemeanor and limited liability to instances in which the actor "believ[es] that an official proceeding or investigation is pending or about to be instituted." MPC § 241.7(1), at 175. Yates would have had scant reason to anticipate a felony prosecution, and certainly not one instituted at a time when even the smallest of the fish he caught came within the legal limit. See *supra,* at 1080; cf. *Bond v. United States,* 572 U.S. 844, 860 (2014) (rejecting "boundless reading" of a statutory term given "deeply serious consequences" that reading would entail). A proposed federal offense in line with the MPC provision, advanced by a federal commission in 1971, was similarly qualified. See Final Report of the National Commission on Reform of Federal Criminal Laws § 1323, pp. 116–117 (1971).

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in § 1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," cf. *post,* at 1098, concerning Yates's small fish as the subject of a federal felony prosecution.

C

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in § 1519, we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States,* 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States,* 401 U.S. 808, 812 (1971)). That interpretative principle is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20–year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil. See *Liparota v. United States,* 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). In determining the meaning of "tangible object" in § 1519, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Cleveland,* 531 U.S., at 25 (quoting *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 222 (1952)). See also *Jones v. United States,* 529 U.S. 848, 858–859 (2000) (rule of lenity "reinforces" the conclusion that arson of an owner-occupied residence is not subject to federal prosecution under 18 U.S.C. § 844(i) because such a residence does not qualify as property "used in" commerce or commerce-affecting activity).[8]

[8] The dissent cites *United States v. McRae,* 702 F.3d 806, 834–838 (5th Cir. 2012), *United States v. Maury,* 695 F.3d 227, 243–244 (3rd Cir. 2012), and *United States v. Natal,* 2014 U.S. Dist. LEXIS 108852, *24–*26 (Conn., Aug. 7, 2014), as cases that would not be covered by § 1519 as we read it. *Post,* at 1100 – 1101. Those cases supply no cause for concern that persons who commit "major" obstructive acts, *post,* at 1100, will go unpunished. The defendant in *McRae,* a police officer who seized a car containing a corpse and then set it on fire, was also convicted for that conduct under 18 U.S.C. § 844(h) and sentenced to a term of 120 months' imprisonment for that offense. See 702 F.3d, at 817–818, 839–840. The defendant in *Natal,* who repainted a van to cover up evidence of a fatal arson, was also convicted of three counts of violating 18 U.S.C. § 3 and sentenced to concurrent terms of 174 months' imprisonment. See Judgment in *United States*

v. Morales, No. 3:12–cr–164 (DConn., Jan. 12, 2015). And the defendant in *Maury,* a company convicted under § 1519 of concealing evidence that a cement mixer's safety lock was disabled when a worker's fingers were amputated, was also convicted of numerous other violations, including three counts of violating 18 U.S.C. § 1505 for concealing evidence of other worker safety violations. See 695 F.3d, at 244–245. See also *United States v. Atlantic States Cast Iron Pipe Co.,* 2007 WL 2282514, at *70 (DNJ, Aug. 2, 2007) (setting forth charges against the company). For those violations, the company was fined millions of dollars and ordered to operate under the supervision of a court-appointed monitor. See 695 F.3d, at 246.

* * *

For the reasons stated, we resist reading § 1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that a "tangible object" within § 1519's compass is one used to record or preserve information. The judgment of the U.S. Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice ALITO, concurring in the judgment.

This case can and should be resolved on narrow grounds. And though the question is close, traditional tools of statutory construction confirm that John Yates has the better of the argument. Three features of 18 U.S.C. § 1519 stand out to me: the statute's list of nouns, its list of verbs, and its title. Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so.

Start with the nouns. Section 1519 refers to "any record, document, or tangible object." The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a "similar" meaning. See, *e.g., Gustafson v. Alloyd Co.,* 513 U.S. 561, 576 (1995). A related canon, *ejusdem generis* teaches that general words following a list of specific words should usually be read in light of those specific words to mean something "similar." See, *e.g., Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 163 (2012). Applying these canons to § 1519's list of nouns, the term "tangible object" should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are "objects" that are " tangible." But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a "record" or "document," said "crocodile"?

This reading, of course, has its shortcomings. For instance, this is an imperfect *ejusdem generis* case because "record" and "document" are themselves quite general. And there is a risk that "tangible object" may be made superfluous—what is similar to a "record" or "document" but yet is not one? An e-mail, however, could be such a thing. See United States Sentencing Commission, Guidelines Manual § 2J1.2 and comment. (Nov. 2003) (reading "records, documents, or tangible objects" to "includ[e]" what is found on "magnetic, optical, digital, other electronic, or other storage mediums or devices"). An e-mail, after all, might not be a "document" if, as was "traditionally" so, a document was a "piece of paper with information on it," not "information stored on a computer, electronic storage device, or any other medium." Black's Law Dictionary 587–588 (10th ed. 2014). E-mails might also not be "records" if records are limited to "minutes" or other formal writings "designed to memorialize [past] events." *Id.,* at 1465. A hard drive, however, is tangible and can contain files that are precisely akin to even these narrow definitions. Both "record" and "document" can be read more expansively, but adding "tangible object" to

§ 1519 would ensure beyond question that electronic files are included. To be sure, "tangible object" presumably can capture more than just e-mails; Congress enacts " catchall[s]" for "known unknowns." *Republic of Iraq v. Beaty,* 556 U.S. 848, 860 (2009). But where *noscitur a sociis* and *ejusdem generis* apply, "known unknowns" should be similar to known knowns, *i.e.,* here, records and documents. This is especially true because reading "tangible object" too broadly could render "record" and " document" superfluous.

Next, consider § 1519's list of verbs: "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." Although many of those verbs could apply to nouns as far-flung as salamanders, satellites, or sand dunes, the last phrase in the list—"makes a false entry in"—makes no sense outside of filekeeping. How does one make a false entry in a fish? "Alters" and especially "falsifies" are also closely associated with filekeeping. Not one of the verbs, moreover, *cannot* be applied to filekeeping—certainly not in the way that "makes a false entry in" is always inconsistent with the aquatic.

Again, the Government is not without a response. One can imagine Congress trying to write a law so broadly that not every verb lines up with every noun. But failure to "line up" may suggest that something has gone awry in one's interpretation of a text. Where, as here, each of a statute's verbs applies to a certain category of nouns, there is some reason to think that Congress had that category in mind. Categories, of course, are often underinclusive or overinclusive—§ 1519, for instance, applies to a bomb-threatening letter but not a bomb. But this does not mean that categories are not useful or that Congress does not enact them. See, *e.g., Vance v. Bradley,* 440 U.S. 93, 108–109 (1979). Here, focusing on the verbs, the category of nouns appears to be filekeeping. This observation is not dispositive, but neither is it nothing. The Government also contends that § 1519's verbs cut both ways because it is unnatural to apply "falsifies" to tangible objects, and that is certainly true. One does not falsify the outside casing of a hard drive, but one could falsify or alter data physically recorded on that hard drive.

Finally, my analysis is influenced by § 1519's title: "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." (Emphasis added.) This too points toward filekeeping, not fish. Titles can be useful devices to resolve " 'doubt about the meaning of a statute.' " *Porter v. Nussle,* 534 U.S. 516, 527–528 (2002) (quoting *Almendarez–Torres v. United States,* 523 U.S. 224, 234 (1998)); see also *Lawson v. FMR LLC,* 571 U.S. 429, 465-466 (2014) (SOTOMAYOR, J., dissenting). The title is especially valuable here because it reinforces what the text's nouns and verbs independently suggest—that no matter how other statutes might be read, this particular one does not cover every noun in the universe with tangible form.

Titles, of course, are also not dispositive. Here, if the list of nouns did not already suggest that "tangible object" should mean something similar to records or documents, especially when read in conjunction with § 1519's peculiar list of verbs with their focus on filekeeping, then the title would not be enough on its own. In conjunction with those other two textual features, however, the Government's argument, though colorable, becomes too implausible to accept. See, *e.g., Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384–385 (2003) (focusing on the "product of [two] canons of construction" which was "confirmed" by other interpretative evidence); cf. *Al–Adahi v. Obama,* 613 F.3d 1102, 1105–1106 (D.C. Cir. 2010) (aggregating evidence).

Justice KAGAN, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

A criminal law, 18 U.S.C. § 1519, prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation. This case raises the question whether the term "tangible

object" means the same thing in § 1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear. Throughout the U.S. Code and many States' laws, it invariably covers physical objects of all kinds. And in § 1519, context confirms what bare text says: All the words surrounding "tangible object" show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting § 1519: to punish those who alter or destroy physical evidence—*any* physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets "tangible object" to cover "only objects one can use to record or preserve information." *Ante,* at 1081. The concurring opinion similarly, if more vaguely, contends that "tangible object" should refer to "something similar to records or documents"—and shouldn't include colonial farmhouses, crocodiles, or fish. *Ante,* at 1089 (ALITO, J., concurring in judgment). In my view, conventional tools of statutory construction all lead to a more conventional result: A "tangible object" is an object that's tangible. I would apply the statute that Congress enacted and affirm the judgment below.

I

While the plurality starts its analysis with § 1519's heading, see *ante,* at 1083 ("We note first § 1519's caption"), I would begin with § 1519's text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. See, *e.g., Schindler Elevator Corp. v. United States ex rel. Kirk,* 563 U.S. 401, 407 (2011). As the plurality must acknowledge, the ordinary meaning of "tangible object" is "a discrete thing that possesses physical form." *Ante,* at 1081 (punctuation and citation omitted). A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960). So the ordinary meaning of the term "tangible object" in § 1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books as construed by courts. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term "tangible object" or its first cousin "tangible thing"—some in association with documents, others not. See, *e.g.,* 7 U.S.C. § 8302(2) (referring to "any material or tangible object that could harbor a pest or disease"); 15 U.S.C. § 57b–1(c) (authorizing investigative demands for "documentary material or tangible things"); 18 U.S.C. § 668(a)(1)(D) (defining "museum" as entity that owns "tangible objects that are exhibited to the public"); 28 U.S.C. § 2507(b) (allowing discovery of "relevant facts, books, papers, documents or tangible things").[1] To my knowledge, no court has ever read any such provision to exclude things that don't record or preserve data; rather, all courts have adhered to the statutory language's ordinary (*i.e.,* expansive) meaning. For example, courts have understood the phrases "tangible objects" and "tangible things" in the Federal Rules of Criminal and Civil Procedure to cover everything from guns to drugs to machinery to ... animals. See, *e.g., United States v. Obiukwu,* 17 F.3d 816, 819 (6th Cir. 1994) (*per curiam*) (handgun); *United States v. Acarino,* 270 F.Supp. 526, 527–528 (E.D.N.Y.1967) (heroin); *In re Newman,* 782 F.2d 971, 972–975 (Fed. Cir.1986) (energy generation system); *Martin v. Reynolds Metals Corp.,* 297 F.2d 49, 56–57 (9th Cir. 1961) (cattle). No surprise, then, that—until today—courts have uniformly applied the term "tangible object" in § 1519 in the same way. See, *e.g., United States v. McRae,* 702 F.3d 806, 834–838 (5th Cir. 2012) (corpse); *United States v. Maury,* 695 F.3d 227, 243–244 (3rd Cir. 2012) (cement mixer).

[1] From Alabama and Alaska through Wisconsin and Wyoming (and trust me—in all that come between), States similarly use the terms "tangible objects" and "tangible things" in statutes and rules of all sorts. See, *e.g.,* Ala.Code § 34–17–1(3) (2010) (defining "landscape architecture" to include the design of certain "tangible objects and features"); Alaska Rule Civ. Proc. 34(a)(1) (2014) (allowing litigants to "inspect, copy,

test, or sample any tangible things" that constitute or contain discoverable material); Wis. Stat. § 804.09(1) (2014) (requiring the production of "designated tangible things" in civil proceedings); Wyo. Rule Crim. Proc. 41(h) (2014) (defining "property" for purposes of a search-and-seizure statute to include "documents, books, papers and any other tangible objects").

That is not necessarily the end of the matter; I agree with the plurality (really, who doesn't?) that context matters in interpreting statutes. We do not "construe the meaning of statutory terms in a vacuum." *Tyler v. Cain,* 533 U.S. 656, 662 (2001). Rather, we interpret particular words "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). And sometimes that means, as the plurality says, that the dictionary definition of a disputed term cannot control. See, *e.g., Bloate v. United States,* 559 U.S. 196, 205, n. 9 (2010). But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words "tangible object" provides only further evidence that Congress said what it meant and meant what it said.case

Begin with the way the surrounding words in § 1519 reinforce the breadth of the term at issue. Section 1519 refers to "any" tangible object, thus indicating (in line with *that* word's plain meaning) a tangible object "of whatever kind." Webster's Third New International Dictionary 97 (2002). This Court has time and again recognized that "any" has "an expansive meaning," bringing within a statute's reach *all* types of the item (here, "tangible object") to which the law refers. *Department of Housing and Urban Development v. Rucker,* 535 U.S. 125, 131 (2002); see, *e.g., Republic of Iraq v. Beaty,* 556 U.S. 848, 856 (2009); *Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 219–220 (2008). And the adjacent laundry list of verbs in § 1519 ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry") further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as "tangible object" is meant to—that § 1519 covers the whole world of evidence-tampering, in all its prodigious variety. See *United States v. Rodgers,* 466 U.S. 475, 480 (1984) (rejecting a "narrow, technical definition" of a statutory term when it "clashes strongly" with "sweeping" language in the same sentence).

Still more, "tangible object" appears as part of a three-noun phrase (including also "records" and "documents") common to evidence-tampering laws and always understood to embrace things of all kinds. The Model Penal Code's evidence-tampering section, drafted more than 50 years ago, similarly prohibits a person from "alter[ing], destroy[ing], conceal[ing] or remov[ing] any *record, document or thing* " in an effort to thwart an official investigation or proceeding. ALI, Model Penal Code § 241.7(1), p. 175 (1962) (emphasis added). The Code's commentary emphasizes that the offense described in that provision is "not limited to conduct that [alters] a written instrument." *Id.,* § 241.7, Comment 3, at 179. Rather, the language extends to "any physical object." *Ibid.* Consistent with that statement—and, of course, with ordinary meaning—courts in the more than 15 States that have laws based on the Model Code's tampering provision apply them to all tangible objects, including drugs, guns, vehicles and ... yes, animals. See, *e.g., State v. Majors,* 318 S.W.3d 850, 859–861 (Tenn.2010) (cocaine); *Puckett v. State,* 328 Ark. 355, 357–360 (1997) (gun); *State v. Bruno,* 236 Conn. 514, 519–520, 673 A.2d 1117, 1122–1123 (1996) (bicycle, skeleton, blood stains); *State v. Crites,* 2007 Mont. Dist. LEXIS 615, *5–*7 (Dec. 21, 2007) (deer antlers). Not a one has limited the phrase's scope to objects that record or preserve information.

The words "record, document, or tangible object" in § 1519 also track language in 18 U.S.C. § 1512, the federal witness-tampering law covering (as even the plurality accepts, see *ante,* at 1084) physical evidence in all its forms. Section 1512, both in its original version (preceding § 1519) and today, repeatedly uses the phrase "record, document, or other object"—most notably, in a provision prohibiting the use of force or threat to induce another person to withhold any of those materials from an official proceeding. § 4(a) of the Victim and Witness Protection Act of 1982, 96 Stat. 1249, as amended, 18 U.S.C. § 1512(b)(2). That language, which itself likely derived from the Model Penal Code, encompasses no less the bloody knife

than the incriminating letter, as all courts have for decades agreed. See, *e.g., United States v. Kellington,* 217 F.3d 1084, 1088 (9th Cir. 2000) (boat); *United States v. Applewhaite,* 195 F.3d 679, 688 (3rd Cir. 1999) (stone wall). And typically "only the most compelling evidence" will persuade this Court that Congress intended "nearly identical language" in provisions dealing with related subjects to bear different meanings. *Communications Workers v. Beck,* 487 U.S. 735, 754 (1988); see A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012). Context thus again confirms what text indicates.

And legislative history, for those who care about it, puts extra icing on a cake already frosted. Section 1519, as the plurality notes, see *ante,* at 1079, 1081, was enacted after the Enron Corporation's collapse, as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745. But the provision began its life in a separate bill, and the drafters emphasized that Enron was "only a case study exposing the shortcomings in our current laws" relating to both "corporate and criminal" fraud. S.Rep. No. 107–146, pp. 2, 11 (2002). The primary "loophole[ ]" Congress identified, see *id.,* at 14, arose from limits in the part of § 1512 just described: That provision, as uniformly construed, prohibited a person from inducing another to destroy "record[s], document[s], or other object[s]"—of every type—but not from doing so himself. § 1512(b)(2); see *supra,* at 1093. Congress (as even the plurality agrees, see *ante,* at 1081) enacted § 1519 to close that yawning gap. But § 1519 could fully achieve that goal only if it covered all the records, documents, and objects § 1512 did, as well as all the means of tampering with them. And so § 1519 was written to do exactly that—"to apply broadly to any acts to destroy or fabricate physical evidence," as long as performed with the requisite intent. S.Rep. No. 107–146, at 14. "When a person destroys evidence," the drafters explained, "overly technical legal distinctions should neither hinder nor prevent prosecution." *Id.,* at 7. Ah well: Congress, meet today's Court, which here invents just such a distinction with just such an effect. See *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 343 (1963) ("[C]reat[ing] a large loophole in a statute designed to close a loophole" is "illogical and disrespectful of ... congressional purpose").

As Congress recognized in using a broad term, giving immunity to those who destroy non-documentary evidence has no sensible basis in penal policy. A person who hides a murder victim's body is no less culpable than one who burns the victim's diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason. Congress thus treated both offenders in the same way. It understood, in enacting § 1519, that destroying evidence is destroying evidence, whether or not that evidence takes documentary form.

II

A

The plurality searches far and wide for anything—*anything*—to support its interpretation of § 1519. But its fishing expedition comes up empty.

The plurality's analysis starts with § 1519's title: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." See *ante,* at 1083; see also *ante,* at 1090 (opinion of ALITO, J.). That's already a sign something is amiss. I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms. Instead, we have followed "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Trainmen v. Baltimore & Ohio R. Co.,* 331 U.S. 519, 528–529 (1947).

The reason for that "wise rule" is easy to see: A title is, almost necessarily, an abridgment. Attempting to mention every term in a statute "would often be ungainly as well as useless"; accordingly, "matters in the text ... are frequently unreflected in the headings." *Id.,* at 528. Just last year, this Court observed that two

titles in a nearby section of Sarbanes–Oxley serve as "but a short-hand reference to the general subject matter" of the provision at issue, "not meant to take the place of the detailed provisions of the text." *Lawson v. FMR LLC,* 571 U.S. 429, 446 (2014) (quoting *Trainmen,* 331 U.S., at 528). The "under-inclusiveness" of the headings, we stated, was "apparent." *Lawson,* 571 U.S., at 446. So too for § 1519's title, which refers to "destruction, alteration, or falsification" but *not* to mutilation, concealment, or covering up, and likewise mentions "records" but *not* other documents or objects. Presumably, the plurality would not refuse to apply § 1519 when a person only conceals evidence rather than destroying, altering, or falsifying it; instead, the plurality would say that a title is just a title, which cannot "undo or limit" more specific statutory text. *Id.,* at 447 (quoting *Trainmen,* 331 U.S., at 529). The same holds true when the evidence in question is not a "record" but something else whose destruction, alteration, etc., is intended to obstruct justice.

The plurality next tries to divine meaning from § 1519's "position within Chapter 73 of Title 18." *Ante,* at 1083. But that move is yet odder than the last. As far as I can tell, this Court has never once suggested that the section number assigned to a law bears upon its meaning. Cf. Scalia, *supra,* at xi-xvi (listing more than 50 interpretive principles and canons without mentioning the plurality's new number-in-the-Code theory). And even on its own terms, the plurality's argument is hard to fathom. The plurality claims that if § 1519 applied to objects generally, Congress would not have placed it "after the pre-existing § 1516, § 1517, and § 1518" because those are "specialized provisions." *Ante,* at 1084. But search me if I can find a better place for a broad ban on evidence-tampering. The plurality seems to agree that the law properly goes in Chapter 73—the criminal code's chapter on "obstruction of justice." But the provision does not logically fit into any of that chapter's pre-existing sections. And with the first 18 numbers of the chapter already taken (starting with § 1501 and continuing through § 1518), the law naturally took the 19th place. That is standard operating procedure. Prior to the Sarbanes–Oxley Act of 2002, all of Chapter 73 was ordered chronologically: Section 1518 was later enacted than § 1517, which was later enacted than § 1516, which was ... well, you get the idea. And after Sarbanes–Oxley, Congress has continued in the same vein. Section 1519 is thus right where you would expect it (as is the contemporaneously passed § 1520)—between § 1518 (added in 1996) and § 1521 (added in 2008).[2]

[2] The lonesome exception to Chapter 73's chronological order is § 1514A, added in Sarbanes–Oxley to create a civil action to protect whistleblowers. Congress decided to place that provision right after the only other section in Chapter 73 to authorize a civil action (that one to protect victims and witnesses). The plurality, seizing on the § 1514 example, says it likewise "would have made more sense for Congress to codify the substance of § 1519 within § 1512 or in a new § 1512A." *Ante,* at 1084, n. 4. But § 1512 is titled "Tampering with a witness, victim, or an informant," and its provisions almost all protect witnesses from intimidation and harassment. It makes perfect sense that Congress wanted a broad ban on evidence-spoliation to stand on its own rather than as part of—or an appendage to—a witness-tampering provision.

The plurality's third argument, relying on the surplusage canon, at least invokes a known tool of statutory construction—but it too comes to nothing. Says the plurality: If read naturally, § 1519 "would render superfluous" § 1512(c)(1), which Congress passed "as part of the same Act." *Ante,* at 1085. But that is not so: Although the two provisions significantly overlap, each applies to conduct the other does not. The key difference between the two is that § 1519 protects the integrity of "matter [s] within the jurisdiction of any [federal] department or agency" whereas § 1512(c)(1) safeguards "official proceeding[s]" as defined in § 1515(a)(1)(A). Section 1519's language often applies more broadly than § 1512(c)(1)'s, as the plurality notes. For example, an FBI investigation counts as a matter within a federal department's jurisdiction, but falls outside the statutory definition of "official proceeding" as construed by courts. See, *e.g., United States v. Gabriel,* 125 F.3d 89, 105, n. 13 (2d Cir. 1997). But conversely, § 1512(c)(1) sometimes reaches more widely than § 1519. For example, because an "official proceeding" includes any "proceeding before

a judge or court of the United States," § 1512(c)(1) prohibits tampering with evidence in federal litigation between private parties. See § 1515(a)(1)(A); *United States v. Burge,* 711 F.3d 803, 808–810 (7th Cir. 2013); *United States v. Reich,* 479 F.3d 179, 185–187 (2d Cir. 2007) (SOTOMAYOR, J.). By contrast, § 1519 wouldn't ordinarily operate in that context because a federal court isn't a "department or agency." See *Hubbard v. United States,* 514 U.S. 695, 715 (1995).[3] So the surplusage canon doesn't come into play.[4] Overlap—even significant overlap—abounds in the criminal law. See *Loughrin v. United States,* 573 U.S. 351, 358, n. 4 (2014). This Court has never thought that of such ordinary stuff surplusage is made. See *ibid.*; *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253 (1992).

[3] The plurality's objection to this statement is difficult to understand. It cannot take issue with *Hubbard* 's holding that "a federal court is neither a 'department' nor an 'agency' " in a statute referring, just as § 1519 does, to "any matter within the jurisdiction of any department or agency of the United States." 514 U.S., at 698. So the plurality suggests that the phrase "in relation to ... any such matter" in § 1519 somehow changes *Hubbard* 's result. See *ante,* at 1084 – 1085, and n. 5. But that phrase still demands that evidence-tampering relate to a "matter within the jurisdiction of any department or agency"—excluding courts, as *Hubbard* commands. That is why the federal government, as far as I can tell, has never once brought a prosecution under § 1519 for evidence-tampering in litigation between private parties. It instead uses § 1512(c)(1) for that purpose.

[4] Section 1512(c)(1) also applies more broadly than § 1519 in proceedings relating to insurance regulation. The term "official proceeding" in § 1512(c)(1) is defined to include "proceeding[s] involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency." § 1515(a)(1)(D). But § 1519 wouldn't usually apply in that context because state, not federal, agencies handle most insurance regulation.

And the legislative history to which the plurality appeals, see *ante,* at 1081, only cuts against it because those materials show that lawmakers knew that § 1519 and § 1512(c)(1) share much common ground. Minority Leader Lott introduced the amendment that included § 1512(c)(1) (along with other criminal and corporate fraud provisions) late in the legislative process, explaining that he did so at the specific request of the President. See 148 Cong. Rec. 12509, 12512 (2002) (remarks of Sen. Lott). Not only Lott but several other Senators noted the overlap between the President's package and provisions already in the bill, most notably § 1519. See *id.,* at 12512 (remarks of Sen. Lott); *id.,* at 12513 (remarks of Sen. Biden); *id.,* at 12517 (remarks of Sens. Hatch and Gramm). The presence of both § 1519 and § 1512(c)(1) in the final Act may have reflected belt-and-suspenders caution: If § 1519 contained some flaw, § 1512(c)(1) would serve as a backstop. Or the addition of § 1512(c)(1) may have derived solely from legislators' wish "to satisfy audiences other than courts"—that is, the President and his Justice Department. Gluck & Bressman, Statutory Interpretation from the Inside, 65 Stan. L.Rev. 901, 935 (2013) (emphasis deleted). Whichever the case, Congress's consciousness of overlap between the two provisions removes any conceivable reason to cast aside § 1519's ordinary meaning in service of preventing some statutory repetition.

Indeed, the inclusion of § 1512(c)(1) in Sarbanes–Oxley creates a far worse problem for the plurality's construction of § 1519 than for mine. Section 1512(c)(1) criminalizes the destruction of any "record, document, or other object"; § 1519 of any "record, document, or tangible object." On the plurality's view, one "object" is really an object, whereas the other is only an object that preserves or stores information. But "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act," passed at the same time, "are intended to have the same meaning." *Sorenson v. Secretary of Treasury,* 475 U.S. 851, 860 (1986) (internal quotation marks omitted). And that is especially true when the different provisions pertain to the same subject. See *supra,* at 1083. The plurality doesn't—really, can't—explain why it instead interprets the same words used in two provisions of the same Act addressing

the same basic problem to mean fundamentally different things.

Getting nowhere with surplusage, the plurality switches canons, hoping that *noscitur a sociis* and *ejusdem generis* will save it. See *ante,* at 1085 – 1087; see also *ante,* at 1089 (opinion of ALITO, J.). The first of those related canons advises that words grouped in a list be given similar meanings. The second counsels that a general term following specific words embraces only things of a similar kind. According to the plurality, those Latin maxims change the English meaning of "tangible object" to only things, like records and documents, "used to record or preserve information." *Ante,* at 1085.[5] But understood as this Court always has, the canons have no such transformative effect on the workaday language Congress chose.

[5] The plurality seeks support for this argument in the Sentencing Commission's construction of the phrase "records, documents, or tangible objects," *ante,* at 1086, but to no avail. The plurality cites a note in the Commission's Manual clarifying that this phrase, as used in the Sentencing Guidelines, "includes" various electronic information, communications, and storage devices. United States Sentencing Commission, Guidelines Manual § 2J1.2, comment., n. 1 (Nov. 2014). But "includes" (following its ordinary definition) "is not exhaustive," as the Commission's commentary makes explicit. Id., § 1B1.1, comment., n. 2. Otherwise, the Commission's construction wouldn't encompass *paper* documents. All the note does is to make plain that "records, documents, or tangible objects" embraces stuff relating to the digital (as well as the material) world.

As an initial matter, this Court uses *noscitur a sociis* and *ejusdem generis* to resolve ambiguity, not create it. Those principles are "useful rule[s] of construction where words are of obscure or doubtful meaning." *Russell Motor Car Co. v. United States,* 261 U.S. 514, 520 (1923). But when words have a clear definition, and all other contextual clues support that meaning, the canons cannot properly defeat Congress's decision to draft broad legislation. See, *e.g., Ali,* 552 U.S., at 227 (rejecting the invocation of these canons as an "attempt to create ambiguity where the statute's text and structure suggest none").

Anyway, assigning "tangible object" its ordinary meaning comports with *noscitur a sociis* and *ejusdem generis* when applied, as they should be, with attention to § 1519's subject and purpose. Those canons require identifying a common trait that links all the words in a statutory phrase. See, *e.g., Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 289, n. 7 (2010); *Ali,* 552 U.S., at 224–226. In responding to that demand, the plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice. See *supra,* at 1094. For purposes of § 1519, records, documents, and (all) tangible objects are therefore alike.

Indeed, even the plurality can't fully credit its *noscitur /ejusdem* argument. The same reasoning would apply to *every* law placing the word "object" (or "thing") after "record" and "document." But as noted earlier, such statutes are common: The phrase appears (among other places) in many state laws based on the Model Penal Code, as well as in multiple provisions of § 1512. See *supra,* at 1092 – 1093. The plurality accepts that in those laws "object" means object; its argument about superfluity positively *depends* on giving § 1512(c)(1) that broader reading. See *ante,* at 1085, 1087. What, then, is the difference here? The plurality proposes that some of those statutes describe less serious offenses than § 1519. See *ante,* at 1087. How and why that distinction affects application of the *noscitur a sociis* and *ejusdem generis* canons

is left obscure: Count it as one more of the plurality's never-before-propounded, not-readily-explained interpretive theories. See *supra,* at 1094, 1094 – 1095, 1096 – 1097. But in any event, that rationale cannot support the plurality's willingness to give "object" its natural meaning in § 1512, which (like § 1519) sets out felonies with penalties of up to 20 years. See §§ 1512(a)(3)(C), (b), (c). The canons, in the plurality's interpretive world, apparently switch on and off whenever convenient.

And the plurality's invocation of § 1519's verbs does nothing to buttress its canon-based argument. See *ante,* at 1085 – 1086; *ante,* at 1089 – 1090 (opinion of ALITO, J.). The plurality observes that § 1519 prohibits "falsif[ying]" or "mak[ing] a false entry in" a tangible object, and no one can do those things to, say, a murder weapon (or a fish). *Ante,* at 1085. But of course someone can alter, destroy, mutilate, conceal, or cover up such a tangible object, and § 1519 prohibits those actions too. The Court has never before suggested that all the verbs in a statute need to match up with all the nouns. See *Robers v. United States,* 572 U.S. 639, 643-644, (2014) ("[T]he law does not require legislators to write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed"). And for good reason. It is exactly when Congress sets out to draft a statute broadly—to include every imaginable variation on a theme—that such mismatches will arise. To respond by narrowing the law, as the plurality does, is thus to flout both what Congress wrote and what Congress wanted.

Finally, when all else fails, the plurality invokes the rule of lenity. See *ante,* at 1087. But even in its most robust form, that rule only kicks in when, "after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime." *Abramski v. United States,* 573 U.S. 169, 264 (2014) (SCALIA, J., dissenting) (quoting *Moskal v. United States,* 498 U.S. 103 (1990)). No such doubt lingers here. The plurality points to the breadth of § 1519, see *ante,* at 1087, as though breadth were equivalent to ambiguity. It is not. Section 1519 *is* very broad. It is also very clear. Every traditional tool of statutory interpretation points in the same direction, toward "object" meaning object. Lenity offers no proper refuge from that straightforward (even though capacious) construction.[6]

[6] As part of its lenity argument, the plurality asserts that Yates did not have "fair warning" that his conduct amounted to a felony. *Ante,* at 1088; see *ante,* at 1087 (stating that "Yates would have had scant reason to anticipate a felony prosecution" when throwing fish overboard). But even under the plurality's view, the dumping of fish is potentially a federal felony—just under § 1512(c)(1), rather than § 1519. See *ante,* at 1084 – 1085. In any event, the plurality itself acknowledges that the ordinary meaning of § 1519 covers Yates's conduct, see *ante,* at 1081: That provision, no less than § 1512(c)(1), announces its broad scope in the clearest possible terms. And when an ordinary citizen seeks notice of a statute's scope, he is more likely to focus on the plain text than (as the plurality would have it) on the section number, the superfluity principle, and the *noscitur* and *ejusdem* canons.

B

The concurring opinion is a shorter, vaguer version of the plurality's. It relies primarily on the *noscitur a sociis* and *ejusdem generis* canons, tries to bolster them with § 1519's "list of verbs," and concludes with the section's title. See *supra,* at 1094, 1097 – 1098, 1098 (addressing each of those arguments). (Notably, even the concurrence puts no stock in the plurality's section-number and superfluity claims.) From those familiar materials, the concurrence arrives at the following definition: " 'tangible object' should mean something similar to records or documents." *Ante,* at 1090 (opinion of ALITO, J.). In amplifying that purported guidance, the concurrence suggests applying the term "tangible object" in keeping with what "a neighbor, when asked to identify something similar to record or document," might answer. *Ante,* at 1089. "[W]ho wouldn't raise an eyebrow," the concurrence wonders, if the neighbor said "crocodile"? *Ibid*

. Courts sometimes say, when explaining the Latin maxims, that the "words of a statute should be interpreted consistent with their neighbors." See, *e.g., United States v. Locke,* 529 U.S. 89, 105 (2000). The concurrence takes that expression literally.

But § 1519's meaning should not hinge on the odd game of Mad Libs the concurrence proposes. No one reading § 1519 needs to fill in a blank after the words "records" and "documents." That is because Congress, quite helpfully, already did so—adding the term "tangible object." The issue in this case is what that term means. So if the concurrence wishes to ask its neighbor a question, I'd recommend a more pertinent one: Do you think a fish (or, if the concurrence prefers, a crocodile) is a "tangible object"? As to that query, "who wouldn't raise an eyebrow" if the neighbor said "no"?

In insisting on its different question, the concurrence neglects the proper function of catchall phrases like "or tangible object." The reason Congress uses such terms is precisely to reach things that, in the concurrence's words, "do[ ] not spring to mind"—to my mind, to my neighbor's, or (most important) to Congress's. *Ante,* at 1089 (opinion of ALITO, J.). As this Court recently explained: "[T]he whole value of a generally phrased residual [term] is that it serves as a catchall for matters not specifically contemplated—known unknowns." *Beaty,* 556 U.S., at 860. Congress realizes that in a game of free association with "record" and "document," it will never think of all the other things—including crocodiles and fish—whose destruction or alteration can (less frequently but just as effectively) thwart law enforcement. Cf. *United States v. Stubbs,* 11 F.3d 632, 637–638 (6th Cir. 1993) (dead crocodiles used as evidence to support smuggling conviction). And so Congress adds the general term "or tangible object"—again, exactly because such things "do[ ] not spring to mind."[7]

[7] The concurrence contends that when the *noscitur* and *ejusdem* canons are in play, " 'known unknowns' should be similar to known knowns, *i.e.,* here, records and documents." *Ante,* at 1089. But as noted above, records and documents *are* similar to crocodiles and fish as far as § 1519 is concerned: All are potentially useful as evidence in an investigation. See *supra,* at 1097. The concurrence never explains why *that* similarity isn't the relevant one in a statute aimed at evidence-tampering.

The concurrence suggests that the term "tangible object" serves not as a catchall for physical evidence but to "ensure beyond question" that e-mails and other electronic files fall within § 1519's compass. *Ante,* at 1089. But that claim is eyebrow-raising in its own right. Would a Congress wishing to make certain that § 1519 applies to e-mails add the phrase "tangible object" (as opposed, say, to "electronic communications")? Would a judge or jury member predictably find that "tangible object" encompasses something as virtual as e-mail (as compared, say, with something as real as a fish)? If not (and the answer is not), then that term cannot function as a failsafe for e-mails.

The concurrence acknowledges that no one of its arguments can carry the day; rather, it takes the Latin canons plus § 1519's verbs plus § 1519's title to "tip the case" for Yates. *Ante,* at 1089. But the sum total of three mistaken arguments is ... three mistaken arguments. They do not get better in the combining. And so the concurrence ends up right where the plurality does, except that the concurrence, eschewing the rule of lenity, has nothing to fall back on.

III

If none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it? The plurality offers a clue when it emphasizes the disproportionate penalties § 1519 imposes if the law is read broadly. See *ante,* at 1087 – 1088. Section 1519, the plurality objects, would then "expose[ ] individuals to 20–year prison sentences for tampering with *any* physical object that *might* have

evidentiary value in *any* federal investigation into *any* offense." *Ante,* at 1088. That brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code.

Now as to this statute, I think the plurality somewhat—though only somewhat—exaggerates the matter. The plurality omits from its description of § 1519 the requirement that a person act "knowingly" and with "the intent to impede, obstruct, or influence" federal law enforcement. And in highlighting § 1519's maximum penalty, the plurality glosses over the absence of any prescribed minimum. (Let's not forget that Yates's sentence was not 20 years, but 30 days.) Congress presumably enacts laws with high maximums and no minimums when it thinks the prohibited conduct may run the gamut from major to minor. That is assuredly true of acts obstructing justice. Compare this case with the following, all of which properly come within, but now fall outside, § 1519: *McRae,* 702 F.3d, at 834–838 (burning human body to thwart murder investigation); *Maury,* 695 F.3d, at 243–244 (altering cement mixer to impede inquiry into amputation of employee's fingers); *United States v. Natal,* 2014 U.S. Dist. LEXIS 108852, *24–*26 (D.Conn., Aug. 7, 2014) (repainting van to cover up evidence of fatal arson). Most district judges, as Congress knows, will recognize differences between such cases and prosecutions like this one, and will try to make the punishment fit the crime. Still and all, I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *Rodgers,* 466 U.S., at 484. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

I respectfully dissent.

United States Court of Appeals, Ninth Circuit

Patricia HART, Plaintiff–Appellant,
v.
Larry G. MASSANARI, Acting Commissioner of Social Security Administration, Defendant–Appellee.

Filed Sept. 24, 2001

KOZINSKI, Circuit Judge.

Appellant's opening brief cites *Rice v. Chater,* No. 95–35604, 1996 WL 583605 (9th Cir. Oct.9, 1996). *Rice* is an unpublished disposition, not reported in the Federal Reporter except as a one-line entry in a long table of cases. *See* Decisions Without Published Opinions, 98 F.3d 1345, 1346 tbl. (9th Cir.1996). The full text of the disposition can be obtained from our clerk's office, and is available on Westlaw® and LEXIS®. However, it is marked with the following notice: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36–3." Our local rules are to the same effect: "Unpublished dispositions and orders of this Court are not binding precedent ... [and generally] may not be cited to or by the courts of this circuit ...." 9th Cir. R. 36–3.

We ordered counsel to show cause as to why he should not be disciplined for violating Ninth Circuit Rule 36–3. Counsel responds by arguing that Rule 36–3 may be unconstitutional. He relies on the Eighth Circuit's opinion in *Anastasoff v. United States,* 223 F.3d 898, *vacated as moot on reh'g en banc,* 235 F.3d 1054 (8th Cir.2000). *Anastasoff,* while vacated, continues to have persuasive force. *See, e.g., Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir.2001) (Smith, J., dissenting from denial of reh'g en banc).[1] It may seduce members of our bar into violating our Rule 36–3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest.

[1] *See also* Coleen M. Barger, *Anastasoff, Unpublished Opinions, and "No–Citation" Rules,* 3 J.App. Prac. & Process 169, 169–70 (2001). Barger notes that "[t]he chief judge of the District of Massachusetts seems determined to force the issue in the First Circuit," citing 1st Cir. R. 36(b)(2)(F) ("Unpublished opinions may be cited only in related cases ...."), "as he has begun to routinely insert the following footnote in his opinions whenever he cites unpublished opinions to support his reasoning":

> For the propriety of citing unpublished decisions, see *Anastasoff v. United States,* 223 F.3d 898, 899–905 (8th Cir.) (R. Arnold, J.) (holding that unpublished opinions have precedential effect), *vacated as moot,* No. 99–3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000); *Giese v. Pierce Chem. Co.,* 43 F. Supp.2d 98, 103 (D.Mass.1999) (relying on unpublished opinions' persuasive authority), and Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. App. Prac. & Process 219 (1999).

See, e.g., Suboh v. City of Revere, 141 F.Supp.2d 124, 144 n. 18 (D.Mass.2001) (Young, C.J.).

I

A. *Anastasoff* held that Eighth Circuit Rule 28A(i), which provides that unpublished dispositions are not precedential—and hence not binding on future panels of that court[2]—violates Article III of the Constitution. *See* 223 F.3d at 899. According to *Anastasoff,* exercise of the "judicial Power" precludes federal courts from making rulings that are not binding in future cases. Or, to put it differently, federal judges are not merely required to follow the law, they are also required to *make* law in every case. To do otherwise, *Anastasoff* argues, would invite judicial tyranny by freeing courts from the doctrine of precedent: " 'A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the

settled course of antecedent principles.' " *Id.* at 904 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1833)).[3]

[2] Our rule operates somewhat differently from that of the Eighth Circuit, though it is in essential respects the same. While Eighth Circuit Rule 28A(i) says that "[u]npublished decisions are not precedent," we say that unpublished dispositions are "not binding precedent." Our rule, unlike that of the Eighth Circuit, prohibits citation of an unpublished disposition to any of the courts of our circuit. The Eighth Circuit's rule allows citation in some circumstances, but provides that the authority is persuasive rather than binding. *See* 8th Cir. R. 28A(i) ("Parties may ... cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."). The difference is not material to the rationale of *Anastasoff* because both rules free later panels of the court, as well as lower courts within the circuit, to disregard earlier rulings that are designated as nonprecedential.

For a comprehensive table of nonpublication and noncitation rules across all circuits and states, see Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions,* 3 J.App. Prac. & Process 251, 253–85 tbl. 1 (2001).

[3] In the passage cited by *Anastasoff,* Justice Story argued only that the judicial decisions of the Supreme Court were "conclusive and binding," and that inferior courts were not free to disregard the "decisions of the highest tribunal." He said nothing to suggest that the principle of binding authority constrained the "judicial Power," as *Anastasoff* does; rather, he recognized that the decisions of the Supreme Court were binding upon the states because they were the "supreme law of the land." Story, *supra,* §§ 376–78.

We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether. Rather, it is an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.

The only constitutional provision on which *Anastasoff* relies is that portion of Article III that vests the "judicial Power" of the United States in the federal courts. U.S. Const. art. III, § 1, cl. 1. *Anastasoff* may be the first case in the history of the Republic to hold that the phrase "judicial Power" encompasses a specific command that limits the power of the federal courts. There are, of course, other provisions of Article III that have received judicial enforcement, such as the requirement that the courts rule only in "Cases" or "Controversies," *see, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559 (1992), and that the pay of federal judges not be diminished during their good behavior. *See, e.g., United States v. Hatter,* 532 U.S. 557, ——— – ——— (2001). The judicial power clause, by contrast, has never before been thought to encompass a constitutional limitation on how courts conduct their business.

There are many practices that are common or even universal in the federal courts. Some are set by statute, such as the courts' basic organization. *See, e.g.,* 28 U.S.C. § 43 (creating a court of appeals for each circuit); 28 U.S.C. § 127 (dividing Virginia into two judicial districts); 28 U.S.C. § 2101 (setting time for direct appeals to the Supreme Court and for applications to the Supreme Court for writs of certiorari). *See generally* David McGowan, *Judicial Writing and the Ethics of the Judicial Office,* 14 Geo. J. Legal Ethics 509, 509–10 (2001). Others are the result of tradition, some dating from the days of the common law, others of more recent origin. Among them are the practices of issuing written opinions that speak for the court rather

than for individual judges, adherence to the adversarial (rather than inquisitorial) model of developing cases, limits on the exercise of equitable relief, hearing appeals with panels of three or more judges and countless others that are so much a part of the way we do business that few would think to question them. While well established, it is unclear that any of these practices have a constitutional foundation; indeed, Hart (no relation so far as we know), in his famous Dialogue, concluded that Congress could abolish the inferior federal courts altogether. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L.Rev. 1362, 1363–64 (1953). While the greater power does not always include the lesser, the Dialogue does suggest that much of what the federal courts do could be modified or eliminated without offending the Constitution.

Anastasoff focused on one aspect of the way federal courts do business—the way they issue opinions—and held that they are subject to a constitutional limitation derived from the Framers' conception of what it means to exercise the judicial power. Given that no other aspect of the way courts exercise their power has ever been held subject to this limitation,[4] we question whether the "judicial Power" clause contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution. The more plausible view is that when the federal courts rule on cases or controversies assigned to them by Congress, comply with due process, accord trial by jury where commanded by the Seventh Amendment and generally comply with the specific constitutional commands applicable to judicial proceedings, they have ipso facto exercised the judicial power of the United States. In other words, the term "judicial Power" in Article III is more likely descriptive than prescriptive.[5]

[4] To be sure, exercise of the judicial power is subject to a number of explicit constraints, such as the requirements of due process, trial by jury, the availability of counsel in criminal cases, the ex post facto clause and the prohibition against bills of attainder—to name just a few.

[5] Because the matter arises so seldom, there is little authority on this point, but the authority that does exist supports the view that the text of the judicial power clause is merely descriptive. For example, *United States v. Ferreira,* 54 U.S. 40 (1851), considered whether decisions of district courts as to whether certain Spanish citizens were entitled to compensation pursuant to a treaty between Spain and the United States were an exercise of the judicial power. If the district judges found the claimants entitled to compensation, they were to recommend that the Secretary of the Treasury make such payments, and the latter could (but was not required to) pay the claim. In concluding that such recommendations did not constitute an exercise of the judicial power (and hence were not reviewable by the Supreme Court), the opinion noted the ways in which the procedures for establishing these claims differed from "the ordinary forms of a court of justice":

> For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

See also Missouri v. Jenkins, 515 U.S. 70, 130–33 (1995) (Thomas, J., concurring) (listing various functional limitations on the exercise of the judicial power, including federalism, separation of powers and the prohibition against deciding political questions); *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S.

787, 815–18 (1987) (Scalia, J., concurring) (discussing the functional limitation of separation of powers on the exercise of the judicial power).

If we nevertheless were to accept *Anastasoff* 's premise that the phrase "judicial Power" contains limitations separate from those contained elsewhere in the Constitution, we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold cast in the eighteenth century. The law has changed in many respects since the time of the Framing, some superficial, others quite fundamental. For example, as Professor William Nelson has convincingly demonstrated, colonial juries "usually possessed the power to find both law and fact in the cases in which they sat," and were not bound to follow the instructions given to them by judges. *See* William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 16–17 (2000). Today, of course, we would consider it unfair—probably unconstitutional—to allow juries to make up the law as they go along.

Another example: At the time of the Framing, and for some time thereafter, the practice that prevailed both in the United States and England was for judges of appellate courts to express separate opinions, rather than speak with a single (or at least majority) voice. The practice changed around the turn of the nineteenth century, under the leadership of Chief Justice Marshall. *See* George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–15, in* 2 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 382–89 (Paul A. Freund ed., 1981).

And yet another example: At the time of the Framing, and for some time thereafter, it was considered entirely appropriate for a judge to participate in the appeal of his own decision; indeed, before the creation of the Circuit Courts of Appeals, appeals from district court decisions were often taken to a panel consisting of a Supreme Court Justice riding circuit, and the district judge from whom the decision was taken. Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333; *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3504 (2d ed.1984). Today, of course, it is widely recognized that a judge may not hear the appeal from his own decision. There are doubtless many more such examples.[6]

[6] The three examples we have given, though apparently disparate, actually bear on the question of what weight was given to precedent at the time of the Framing. In a regime where juries have power to decide the law, the concept of "binding" precedent has a very different, and much more diluted, meaning than in the current regime where jury verdicts are routinely reversed if they are not supported by the evidence in light of the applicable law. Similarly, binding precedent means something different altogether when a court speaks with seven or nine voices than with a single voice. Nine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court. Finally, during the time when appeals were conducted by two-judge panels consisting of the circuit justice flanked by the district judge whose ruling was being appealed produced remarkably few—if any—written rulings. The precedential value of rulings from such panels was, for obvious reasons, not particularly valuable guidance in future cases. *Anastasoff* 's view that the judicial process underwent such fundamental changes, yet the process of producing precedential opinions remained essentially unchanged, strikes us as inherently doubtful. *Anastasoff* 's historical analysis has been called into question even by academics who generally agree with the result. *See, e.g.,* Polly J. Price, *Precedent and Judicial Power After the Founding,* 42 B.C. L. Rev. 81, 84, 90–93 (2000); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No–Citation" Rules,* 3 J.App. Prac. & Process 287, 288 & n. 5 (2001).

One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change

significantly. *See* note 6 *supra.* This is a particularly dangerous practice when the constitutional rule in question is not explicitly written into the Constitution, but rather is discovered for the first time in a vague, two-centuries-old provision. The risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status, is manifest. *Compare* Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. App. Prac. & Process 219 (1999) (suggesting that all opinions be published and given precedential value), *with Anastasoff,* 223 F.3d 898 (holding that the Eighth Circuit's rule barring citation to unpublished opinions violates Article III). Thus, in order to follow the path forged by *Anastasoff,* we would have to be convinced that the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it, even though they spelled out many other limitations in considerable detail. Specifically, to adopt *Anastasoff* 's position, we would have to be satisfied that the Framers had a very rigid conception of precedent, namely that all judicial decisions necessarily served as binding authority on later courts.

This is, in fact, a much more rigid view of precedent than we hold today. As we explain below, most decisions of the federal courts are not viewed as binding precedent. No trial court decisions are; almost four-fifths of the merits decisions of courts of appeals are not. *See* p. 1177 *infra.*[7] To be sure, *Anastasoff* challenges the latter practice. We find it significant, however, that the practice has been in place for a long time, yet no case prior to *Anastasoff* has challenged its constitutional legitimacy. The overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.

[7] Rules limiting the precedential effect of unpublished decisions exist in every federal circuit and all but four states (Connecticut, Delaware, New York and North Dakota). *See* Serfass & Cranford, note 2 *supra,* at 260–61 tbl. 1, 273–74 tbl. 1. *But see Eaton v. Chahal,* 146 Misc.2d 977, 553 N.Y.S.2d 642, 646 (N.Y.Sup.Ct.1990) ("[U]nreported decisions issued by judges of coordinate jurisdiction ... are not binding precedent upon this court....") The near-universal adoption of the practice illustrates not only that the practice is consistent with the prevailing conception of the judicial power, but also that it reflects sound judicial policy.

To accept *Anastasoff* 's argument, we would have to conclude that the generation of the Framers had a much stronger view of precedent than we do. In fact, as we explain below, our concept of precedent today is far stricter than that which prevailed at the time of the Framing. The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.

B. Modern federal courts are the successors of the English courts that developed the common law, but they are in many ways quite different, including how they understand the concept of precedent. Common law judges did not make law as we understand that concept; rather, they "found" the law with the help of earlier cases that had considered similar matters. An opinion was evidence of what the law is, but it was not an independent source of law. *See* Theodore F.T. Plucknett, *A Concise History of the Common Law* 343–44 (5th ed.1956).[8] The law was seen as something that had an existence independent of what judges said: "a miraculous something made by nobody ... and merely declared from time to time by the judges." 2 John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* 655 (4th ed. 1873) (emphasis omitted). Opinions were merely judges' efforts to ascertain the law, much like scientific experiments were efforts to ascertain natural laws. If an eighteenth-century judge believed that a prior case was wrongly decided, he could say that the prior judge had erred in his attempt to discern the law. *See Bole v. Horton,* 124 Eng. Rep. 1113, 1124 (C.P.1673). Neither judges nor lawyers understood precedent to be binding in *Anastasoff* 's strict sense.[9]

[8] As Hale described it, judicial decisions "do not make a Law properly so-called," but "they have a great

Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, [and] are a greater Evidence [of a law] than the Opinion of any private Persons, as such, whatsoever." Sir Matthew Hale, *The History of the Common Law of England* 68 (London, Nutt & Gosling 1739). In Lord Mansfield's view, "[t]he reason and spirit of cases make law; not the letter of particular precedents." *Fisher v. Prince,* 97 Eng. Rep. 876, 876 (K.B.1762).

9 As Holdsworth put it:

> The general rule is clear. Decided cases which lay down a rule of law are authoritative and must be followed. But in very many of the statements of this general rule there are reservations of different kinds.... The fundamental principle, upon which all these reservations ultimately rest, is the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is. They are not, as Hale said, "law properly so called," but only very strong evidence of the law. They are evidence, as Coke said, of the existence of those usages which go to make up the common law; and, conversely, the fact that no case can be produced to prove the existence of an alleged usage is evidence that there is no such usage. This principle is the natural, though undesigned, result of the unofficial character of the reports; and it is clear that its adoption gives the courts power to mould as they please the conditions in which they will accept a decided case or a series of decided cases as authoritative. If the cases are only evidence of what the law is the courts must decide what weight is to be attached to this evidence in different sets of circumstances. *The manner in which they have decided this question has left them many means of escape from the necessity of literal obedience to the general rule that decided cases must always be followed.* They have allowed many exceptions to, and modifications of, this rule if, in their opinion, a literal obedience to it would produce either technical departures from established principles, or substantial inconveniences which would be contrary to public policy.

Sir William Holdsworth, 12 *A History of English Law* 150–51 (1938) (footnotes omitted) (emphasis added).

One impediment to establishing a system of strict binding precedent was the absence at common law of a distinct hierarchy of courts. *See* Plucknett, *supra,* at 350.[10] Only towards the end of the nineteenth century, after England had reorganized its courts, was the position of the House of Lords at the head of its judicial hierarchy confirmed. Before that, there was no single high court that could definitively say what the law was. Thus, as late as the middle of the nineteenth century, an English judge might ignore decisions of the House of Lords,[11] and the Exchequer and Queen's Bench held different views on the same point as late as 1842.[12] *See id.* at 350. Common law judges looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority.[13] Eighteenth-century judges did not feel bound to follow most decisions that might lead to inconvenient results, and judges would even blame reporters for cases they disliked. *See* Plucknett, *supra,* at 349.

10 As one commentator has noted:

> [T]wo conditions had to be satisfied before the doctrine of *stare decisis* could be established. (1) There had to exist reliable reports of cases. It is obvious that if cases are to be binding, there should be precise records of what they lay down. (2) There had also to be a settled judicial hierarchy. Equally obvious is it that until this was settled it could not be known which decisions were binding. Not until roughly the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine [of stare decisis] emerges.

R.W.M. Dias, *Jurisprudence* 30–31 (2d ed.1964).

[11] One reason that House of Lords decisions commanded little respect was that as late as 1844, judicial deliberations could be conducted by lay peers, who brought far less training and experience to bear on legal issues than did the judges of the Exchequer Chamber. Dias, note 10 *supra,* at 32–33.

[12] The three common law courts of first instance—the King's (or Queen's) Bench, Common Pleas and Exchequer—had overlapping jurisdiction in many common classes of cases. *See* Plucknett, *supra,* at 210.

[13] The absence of an appellate hierarchy that could definitively settle legal issues was a continuing problem until the nineteenth century. The need for such definitive resolution nevertheless existed and the common law judges invented a substitute: the Exchequer Chamber. When a particularly vexing legal issue arose that was common to two or more of the courts, all the judges would meet, sometimes including the Lord Chancellor, the barons of the Exchequer, the members of the Council and the serjeants. *See* Plucknett, *supra,* at 151 (the Council consisted of the King's closest advisers); *id.* at 224 (serjeants were, essentially, lawyers known for wearing the coif, "a close-fitting cap of white silk or linen fastened under the chin; hence the term 'order of the coif.' ")

The Exchequer Chamber debated particular legal issues and came up with a definitive ruling, which was then announced in the court where the case raising the issue originated. *Id.* at 162–63. The Exchequer Chamber was not a separate court; it was referred to by that name because these meetings were held in the court of the Exchequer, which "had ample office accommodation" to allow all the judges to meet in one place. Plucknett, *supra,* at 162 n. 7. The Exchequer Chamber might best be viewed as a super-en banc court including all of England's judicial officers.

Unlike other decisions at common law, decisions reached by the Exchequer Chamber were considered binding precedent and, according to Plucknett, this is the first time we find "the principle that a single case may be precedent." *Id.* at 348. The Exchequer Chamber is significant for our analysis because it clearly suggests common law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive; only the few decisions agreed-to by all English judges sitting together were afforded the status that the *Anastasoff* court would now afford to every decision of a three-judge court of appeals as a matter of constitutional imperative.

The idea that judges declared rather than made the law remained firmly entrenched in English jurisprudence until the early nineteenth century. David M. Walker, *The Oxford Companion to Law* 977 (1980). Blackstone, who wrote his Commentaries only two decades before the Constitutional Convention and was greatly respected and followed by the generation of the Framers, noted that "the 'law,' and the 'opinion of the judge' are not ... one and the same thing; since it sometimes may happen that the judge may mistake the law"; in such cases, the precedent simply "was not law." 1 William Blackstone, *Commentaries* *70–71 (1765).

For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone. Because published opinions were relatively few, lawyers and judges relied on commentators' synthesis of decisions rather than the verbatim text of opinions.[14]

[14] In the first century of American jurisprudence, Blackstone's "Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." Daniel J. Boorstin, *The Mysterious Science of the Law* 3 (1941).

Case reporters were entrepreneurs who scribbled down jury charges as they were delivered by judges, then printed and sold them. Or, reporters might cobble together case reports from secondhand sources

and notes found in estates, sometimes years after the cases were decided. *See* Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance,* 75 Cal. L.Rev. 15, 18–19 (1987). For example, *Heydon's Case* was decided in 1584, but Lord Coke did not publish his account of it until 1602. *See* Allen Dillard Boyer, ''*Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review,* 39 B.C. L.Rev. 43, 79 (1997). Not surprisingly, case reports often contradicted each other in describing the reasoning, and even the names, of particular cases. *See* Berring, *supra,* at 18.[15] The value of case reports turned not on the accuracy of the report but on the acuity of their authors. *See id.* at 18–19.[16]

[15] For example, "*Clerk v. Day* was reported in four different books, and in not one of them correctly—not even as to name.... Arbitrary spelling of the names of cases is a bibliographical irritation, and sometimes a difficulty. *Fetter v. Beal* ... is a pretty good disguise for *Fitter v. Veal* ...." Percy H. Winfield, *The Chief Sources of English Legal History* 185 n. 3 (1925) (citations omitted).

[16] As Holdsworth wrote:

> [I]n the eighteenth century, because the reports were made by private reporters, the reports of decided cases possessed, as we have seen, very different degrees of authority. It was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed. We have seen that Lord Mansfield, when he was pressed by a case which laid down a rule with which he did not like, was rather too apt to take this line. It is no doubt a line which it became less possible to take as the reports improved in quality, and as reporting became more standardized and more stereotyped. But within limits this censorship of reports is both legitimate and necessary.... Thus in the case of *Chillingworth v. Esche* [1924] 1 Ch. at pp. 112–113 Warrington L.J. said, "there are one or two points raised by Mr. Micklem with which I think I ought to deal. He relies on *Moeser v. Wisker* ((1871) L.R. 6 C.P. 120). In my opinion that is a case which never ought to have been reported. It was an *ex parte* application. The judges seized on a single fact, and decided on that fact. The purchaser in that case had no opportunity of stating his view."

Holdsworth, note 9 *supra,* at 154 & 154 n. 3 (footnotes omitted).

Coke's intellectual reputation made him the most valued, and the most famous, of the private reporters. His reports were not verbatim transcriptions of what the judges actually said, but vehicles for Coke's own jurisprudential and political agenda. *See* Boyer, *supra,* at 80 ("In the name of judicial reason, Coke was willing to rewrite the law.... In 1602, his chief way of shaping the law was in the way he reported it."). Like other reporters, Coke often distorted the language and meaning of prior decisions that were inconsistent with what he considered the correct legal principle. *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone,* 45 Emory L.J. 437, 447 (1996). "There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question." Plucknett, *supra,* at 281.[17] Contrary to *Anastasoff* 's view, it was emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected. Rather, case reporters routinely suppressed or altered cases they considered wrongly decided. Indeed, sorting out the decisions that deserved reporting from those that did not became one of their primary functions.[18]

[17] Coke was not alone in this practice:

> [B]arristers have sometimes exercised some kind of censorship over the cases which they have reported.... For instance ... Atlay, The Victorian Chancellors ii 138, says, "Campbell was no mere stenographer; he exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice's reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of 'bad Ellenborough law'."

Holdsworth, note 9 *supra,* at 158 & 158 n. 1.

18 As one commentator has noted:

> It would appear also that from about 1785 judges were beginning to favour particular reporters chosen for each court and to prefer citation from them and no other.... The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter.

Dias, note 10 *supra,* at 33.

A survey of the legal landscape as it might have been viewed by the generation of the Framers casts serious doubt on the proposition—so readily accepted by *Anastasoff*—that the Framers viewed precedent in the rigid form that we view it today. Indeed, it is unclear that the Framers would have considered our view of precedent desirable.[19] The common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance. Thus, "when Lord Mansfield incorporated the custom of merchants into the common law, it was a living flexible custom, responding to the growth and change of mercantile habits." Plucknett, *supra,* at 350. Embodying that custom into a binding decision raised the danger of ossifying the custom: "[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it." *Id.* It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm.[20]

19 As another commentator has noted:

> The Framers were familiar with the idea of precedent. But ... [t]he whole idea of just what precedent entailed was unclear. The relative uncertainty over precedent in 1789 also reflects the fact that "many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication."

Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 Colum. L. Rev. 723, 770 n. 267 (1988) (citations omitted). *See also* Melissa H. Weresh, *The Unpublished, Non–Precedential Decision: An Uncomfortable Legality?,* 3 J. App. Prac. & Process 175, 186 (2001) ("Stare decisis and the American common law system have never required the publication of all decisions."

20 Far from being the strict and uncontroverted doctrine that *Anastasoff* attempts to portray, the concept of precedent at the time of the Framers was the subject of lively debate. Adherence to the common law was not "inevitable and unopposed." Robert H. Jackson, *The Supreme Court in the American System of Government* 29 (1955). "[T]he parameters of judicial power were highly contested in the late colonial and early Republic periods.... [N]o one knew the exact role that judges would have in the new experiment in

government that formed the United States." R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States,* 3 J. App. Prac. & Process 355, 375, 383 (2001). Therefore, "lawyers, judges and legal commentators contested the question of just what body of law judges should use to decide cases in the early Republic." *Id.* at 358.

On one side of the debate was Blackstone himself. "Far from providing support for Judge Arnold's claim that the colonial judiciary was bound by common law precedent, Blackstone's thesis was just the opposite": that American courts were not bound by English precedent. *Id.* at 357 (footnotes omitted). St. George Tucker, a prominent nineteenth-century American scholar, disagreed. *Id.* at 358.

Amidst this disagreement, American judges not only routinely picked and chose which English precedents to follow, but also felt free to ignore their *own* decisions. *Id.* at 359, 360–63 (discussing *Fitch v. Brainerd,* 2 Day 163 (Conn.1805) (available at 1805 WL 203), in which the Connecticut Supreme Court declared, without explanation, that its prior decision adopting an English precedent authored by Lord Mansfield, "was not law.") Such cavalier treatment of precedent—the *Fitch* court did not acknowledge the precedent as binding and distinguish or reject it, but simply declared it "was not law"—illustrates that precedent at the time of the Framers was a far more fluid concept than it is today, and certainly more so than the strict form advocated by *Anastasoff.*

The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries. Lawyers began to believe that judges made, not found, the law. This coincided with monumental improvements in the collection and reporting of case authorities. As the concept of law changed and a more comprehensive reporting system began to take hold, it became possible for judicial decisions to serve as binding authority.[21]

[21] As Plucknett notes, "[t]he nineteenth century produced the changes which were necessary for the establishment of the rigid and symmetrical theory [of case precedent] as it exists today." Plucknett, *supra,* at 350. Among the changes he points to was the establishment of a strict appellate hierarchy and the standardization of case law reporting. *Id.*

Early American reporters resembled their English ancestors—disorganized and meager[22]—but the character of the reporting process began to change, after the Constitution was adopted, with the emergence of official reporters in the late eighteenth century and the early nineteenth century. *See* Berring, *supra,* at 20–21. And, later in the nineteenth century, the West Company began to publish standardized case reporters, which were both accurate and comprehensive, making "it possible to publish in written form all of the decisions of courts." *Id.* at 21. Case reports grew thicker, and the weight of precedent began to increase—weight, that is, in terms of volume.

[22] The first volumes of the United States Reports reveal the idiosyncratic and sometimes unreliable character of the early reporters. The first volume contains not a single decision of the United States Supreme Court. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy,* 83 Mich. L. Rev. 1291, 1296 (1985). The reporter, Alexander James Dallas, began his career by publishing decisions of the Pennsylvania and Delaware courts, but not until 1806 were Pennsylvania judges required to reduce their opinions to writing (and then only at the parties' request). Dallas's first volume therefore contains only brief descriptions of the earliest decisions, based on notes preserved by judges and lawyers. *See id.* at 1295–98. And, while his second volume does contain decisions of the United States Supreme Court, Dallas could not always rely on a written opinion as the basis of his report because the Court did not invariably reduce its opinions to writing:

Not a single formal manuscript opinion is known to have survived from the Court's first decade; and few,

> if any, may ever have existed for Dallas to draw upon. Nor may it be confidently assumed that in all instances Dallas was present in court to take down what the Justices said, or that he was able afterwards to consult any notes they may have kept of the opinions they announced.... Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.
>
> *Id.* at 1305 (footnotes omitted).

> At that time, the Supreme Court had no official reporter and cases were never printed. *United States v. Yale Todd,* decided by the Supreme Court in 1784, is a typical example. Because "[t]here was no official reporter at that time, [the] case has not been printed." *United States v. Ferreira,* 54 U.S. (13 How.) 40, 52 (1851). So said Chief Justice Taney in a note added following *Ferreira,* describing *Yale Todd.* "[A]s the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in *Yale Todd's case* is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise." *Id.*

The more cases were reported, the harder became the task of searching for relevant decisions. At common law, circuit-riding judges often decided cases without referring to any reporters at all, *see Fentum v. Pocock,* 5 Taunt. 192, 195, 128 Eng. Rep. 660, 662 (C.P.1813) (Mansfield, C.J.) ("It [was] utterly impossible for any Judge, whatever his learning and abilities may be, to decide at once rightly upon every point which [came] before him at Nisi Prius ...."), and reporters simply left out decisions they considered wrong or those that merely repeated what had come before. Sir Francis Bacon recommended that cases "merely of iteration and repetition" be omitted from the case reports altogether, and Coke warned judges against reporting all of their decisions for fear of weighing down the law. *See* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals,* 85 Cal. L. Rev. 541, 545 & n. 8 (1997). Indeed, the English opinion-reporting system has never published, and does not today publish, every opinion of English appellate courts, even though the total number of opinions issued each year in both the English Court of Appeal and House of Lords combined is little more than 1000—less than a quarter of the number of dispositions issued annually by the Ninth Circuit in recent years, *see* note 37 *infra.* Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 107, 150 (1990); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment,* 28 U. Mich. J.L. Ref. 119, 136 (1995).[23]

[23] In 1986, only 39% of the 884 opinions of the English Court of Appeal were reported. Martineau, *Appellate Justice, supra,* at 107, 150. "Although technically a judgment need not be reported to be cited as precedent [in England] ... the reality is that unless a judgment is reported it is not likely to be used as precedent." *Id.* at 104. Nevertheless, "[t]here does not appear to be among the judges and the bar any current dissatisfaction with the system except that some believe too many, not too few, judgments are reported." *Id.* at 107.

II

Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue. This consideration will not be limited to courts at the same or higher level, or even to courts within the same system of sovereignty. Federal courts of appeals will cite decisions of district courts, even those in other circuits; the Supreme Court may cite the decisions of the inferior courts, *see, e.g., City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 491 (1989) (citing *Associated Gen. Contractors of Cal. v. City & County of San Francisco,* 813 F.2d 922, 929 (9th Cir.1987)), or those of the state courts, *see, e.g., Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189 (2001) (citing *J & K Painting Co. v. Bradshaw,* 45 Cal.App.4th 1394, 1402, 53 Cal.Rptr.2d 496

(Cal.Ct.App.1996)). It is not unusual to cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue before us. *See, e.g., Mozes v. Mozes,* 239 F.3d 1067, 1071 (9th Cir.2001). The process even extends to non-case authorities, such as treatises and law review articles. *See id.* at 1071 & n. 7.

Citing a precedent is, of course, not the same as following it; "respectfully disagree" within five words of "learned colleagues" is almost a cliche. After carefully considering and digesting the views of other courts and commentators—often giving conflicting guidance on a novel legal issue—courts will then proceed to follow one line of authority or another, or sometimes strike out in a completely different direction. While we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.

But precedent also serves a very different function in the federal courts today, one related to the horizontal and vertical organization of those courts. *See* John Harrison, *The Power of Congress Over The Rules of Precedent,* 50 Duke L.J. 503 (2000). A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court.[24] Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

[24] The same practice is followed in the state courts as well. *See, e.g., Auto Equity Sales, Inc. v. Superior Court of Santa Clara County,* 57 Cal.2d 450 (Cal.1962) ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.").

In determining whether it is bound by an earlier decision, a court considers not merely the "reason and spirit of cases" but also "the letter of particular precedents." *Fisher v. Prince,* 97 Eng. Rep. 876, 876 (K.B.1762). This includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence.[25] Thus, when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced.[26]

[25] For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), a majority held that the rule announced in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) (plaintiff must show "actual malice" to obtain punitive damages for false and defamatory statements), applies only to statements involving matters of public concern. Relying on the language and context of *Gertz,* the Court rejected the dissenters' claim that the *Gertz* rule applied to all defamatory statements, and instead concluded that *Gertz* left it an open question whether the rule applied to statements not of public concern. *Compare Dun & Bradstreet,* 472 U.S. at 757 n. 4 ("The dissent states that '[a]t several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases.' Given the context of *Gertz,* however, the Court could have made 'perfectly clear' only that these restrictions applied in cases involving *public speech.*" (citations omitted)), *with id.* at 785 n. 11 ("Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting [an alternative] approach. It would have been incongruous for the Court to go on to circumscribe the

protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern." (citation omitted)).

[26] This is consistent with the practice in our court—and all other collegial courts of which we are aware—in which the judges who join an opinion authored by another judge make substantive suggestions, often conditioning their votes on reaching agreement on mutually acceptable language.

Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. *See, e.g., Ortega v. United States,* 861 F.2d 600, 603 & n. 4 (9th Cir.1988) ("This case is squarely controlled by the Supreme Court's recent decision.... [We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity."). The same is true as to circuit authority, although it usually covers a much smaller geographic area.[27] Circuit law, a concept wholly unknown at the time of the Framing, *see* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent,* 4 Green Bag 2d 17, 22 (2000), binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.

[27] The exception is the Federal Circuit, which has a geographic area precisely the same as the Supreme Court, but much narrower subject-matter jurisdiction. *See* 28 U.S.C. § 1295(a).

Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.[28] As *Anastasoff* itself states, a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court. *Anastasoff,* 223 F.3d at 904; *see also Santamaria v. Horsley,* 110 F.3d 1352, 1355 (9th Cir.1997) ("It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel."), *rev'd,* 133 F.3d 1242 (9th Cir.) (en banc), *amended by* 138 F.3d 1280 (9th Cir.), *cert. denied,* 525 U.S. 823–24 (1998); *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 425–26 (5th Cir.1987) (A "purpose of institutional orderliness [is served] by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be."). Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed. Whether done by the Supreme Court or the court of appeals through its "unwieldy" and time-consuming en banc procedures, Richard A. Posner, *The Federal Courts: Crisis and Reform* 101 (1985),[29] overruling such authority requires a substantial amount of courts' time and attention—two commodities already in very short supply.

[28] Or, unless Congress changes the law. *See, e.g., Van Tran v. Lindsey,* 212 F.3d 1143, 1149 (9th Cir.) (earlier caselaw established that mixed questions in habeas petitions were reviewed de novo, but under the Anti–Terrorism and Effective Death Penalty Act of 1996, the standard of review is governed by 28 U.S.C. § 2254(d)), *cert. denied,* 531 U.S. 944 (2000).

[29] An impressive array of judges and academics have noted the rigors of en banc procedures. *See* Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing,* 3 J. App. Prac. & Process 29, 37 (2001) ("[O]n many days, I confess, I find myself wishing that there were no such thing [as en banc rehearing]."); Pamela Ann Rymer, *How Big Is Too Big?,* 15 J.L. & Pol. 383, 392 (1999) ("expensive and time consuming"); Joseph T. Sneed, *The Judging Cycle: Federal Circuit Court Style,* 57 Ohio St. L.J. 939, 942 (1996) ("time consuming and complex"); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit,* 47 Stan. L.Rev. 387,

393 (1995) ("enormously time-consuming and expensive"); Deanell Reece Tacha, *The "C" Word: On Collegiality,* 56 Ohio St. L.J. 585, 590 (1995) ("time-consuming and expensive"); Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?,* 69 Judicature 7, 7 (1985) ("the most time consuming and inefficient device in the appellate judiciary's repertoire"); J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* 217 (1981) ("most circuit judges regard en bancs as a 'damned nuisance' ").

Because they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels: "[W]e do not take cases en banc merely because of disagreement with a panel's decision, or rather a piece of a decision.... We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a 'runaway' panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges...." *EEOC v. Ind. Bell Tel. Co.,* 256 F.3d 516, 86 Fair Empl. Prac. Cas. (BNA) 1, 2001 WL 717685, at *11 (7th Cir.2001) (en banc) (Posner, J., concurring). *See also* Fed. R.App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."); Arnold, *supra,* at 36 ("Petitions for rehearing are generally denied unless something of unusual importance—such as a life—is at stake, or a real and significant error was made by the original panel, or there is conflict within the circuit on a point of law.") It is therefore very important that three-judge panel opinions be decided correctly and that they state their holdings in a way that is easily understood and applied in future cases.

Controlling authority has much in common with persuasive authority. Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Courts occasionally must reconcile seemingly inconsistent precedents and determine whether the current case is closer to one or the other of the earlier opinions. *See, e.g., Mont. Chamber of Commerce v. Argenbright,* 226 F.3d 1049, 1057 (9th Cir.2000).

But there are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do. This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of "percolation" within the lower courts. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study,* 59 N.Y.U. L.Rev. 681, 716 (1984). Indeed, the Supreme Court sometimes chooses not to grant certiorari on an issue, even though it might deserve definitive resolution, so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem. *See McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

The various rules pertaining to the development and application of binding authority do not reflect the

developments of the English common law. They reflect, rather, the organization and structure of the federal courts and certain policy judgments about the effective administration of justice. *See Payne v. Tennessee,* 501 U.S. 808, 828 (1991) (stare decisis is a "principle of policy," and "not an inexorable command"); *see, e.g., Textile Mills Secs. Corp. v. Comm'r,* 314 U.S. 326, 334–35 (1941) (en banc rehearing "makes for more effective judicial administration"). Circuit boundaries are set by statute and can be changed by statute. When that happens, and a new circuit is created, it starts without any circuit law and must make an affirmative decision whether to create its circuit law from scratch or to adopt the law of another circuit—generally the circuit from which it was carved—as its own. *Compare Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all decisions issued by the former Fifth Circuit before its split into the Fifth and Eleventh Circuits), *and South Corp. v. United States,* 690 F.2d 1368, 1370–71 (Fed.Cir.1982) (en banc) (adopting as binding precedent all decisions of the Federal Circuit's predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals), *with Estate of McMorris v. Comm'r,* 243 F.3d 1254, 1258 (10th Cir.2001) ("[W]e have never held that the decisions of our predecessor circuit [the former Eighth Circuit] are controlling in this court."). The decision whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command.

How binding authority is overruled is another question that was resolved by trial and error with due regard to principles of sound judicial administration. Early in the last century, when the courts of appeals first grew beyond three judges, the question arose whether the courts could sit en banc to rehear cases already decided by a three-judge panel. The lower courts disagreed, but in *Textile Mills Securities Corporation v. Commissioner,* the Supreme Court sustained the authority of the courts of appeals to sit en banc. *Textile Mills Secs. Corp. v. Comm'r,* 314 U.S. 326, 335 (1943) ("Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases."). En banc rehearing would give all active judges an opportunity to hear a case "[w]here ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court." *Comm'r v. Textile Mills Secs. Corp.,* 117 F.2d 62, 70 (3d Cir.1940), *aff'd*, 314 U.S. 326 (1943). Congress codified the *Textile Mills* decision just five years later in 28 U.S.C. § 46(c), leaving the courts of appeals "free to devise [their] own administrative machinery to provide the means whereby a majority may order such a hearing." *W. Pac. R.R. v. W. Pac. R.R.,* 345 U.S. 247, 250 (1953).

That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district, or even within a circuit, would bind all similarly situated district judges, but it does not. The very existence of the binding authority principle is not inevitable. The federal courts could operate, though much less efficiently, if judges of inferior courts had discretion to consider the opinions of higher courts, but "respectfully disagree" with them for good and sufficient reasons.[30]

[30] Some state court systems apply the binding authority principle differently than do the federal courts. In California, for example, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district. Judicial Council of California, *Report of the Appellate Process Task Force* 59 (2000); Jon B. Eisenberg, Ellis J. Horvitz & Justice Howard B. Wiener, *California Practice Guide: Civil Appeals and Writs* § 14:193 (2000) ("A court of appeal decision must be followed by *all* superior and municipal courts, regardless of which appellate district rendered the opinion.") However, court of appeal panels are not bound by the opinions of other panels, even those within the same district. *In re Marriage*

of Shaban, 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863, 870–71 (2001) ("[B]ecause there is no 'horizontal stare decisis' within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court ... is not absolutely binding on a different panel of the appellate court." (citations omitted)). *See also Report of the Appellate Process Task Force, supra,* at 60–61; Eisenberg, Horvitz & Wiener, *supra,* § 14:193.1 ("In contrast, a decision by one court of appeal is *not* binding on other courts of appeal.")

California's management of precedent differs from that of the federal courts in another important respect: The California Supreme Court may "depublish" a court of appeal opinion—i.e., strip a published decision of its precedential effect. *See* Cal. R. Ct. 976(c)(2); Steven B. Katz, *California's Curious Practice of "Pocket Review",* 3 J.App. Prac. & Process 385 (2001). California's depublication practice shows that it is possible to adopt more aggressive methods of managing precedent than those used by the federal courts.

III

While we agree with *Anastasoff* that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today. It may be true, as *Anastasoff* notes, that "judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum," 223 F.3d at 903, but precedents brought to the attention of the court in that fashion obviously could not serve as the kind of rigid constraint that binding authority provides today. Unlike our practice today, a single case was not sufficient to establish a particular rule of law, and case reporters often filtered out cases that they considered wrong, or inconsistent with their view of how the law *should* develop. *See* pp. 1166–67 *supra.* The concept of binding case precedent, though it was known at common law, *see* note 13 *supra,* was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.

Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today. The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. *See* note 21 *supra.* As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.

While many consider the principle of binding authority indispensable—perhaps even inevitable—it is important to note that it is not an unalloyed good. While bringing to the law important values such as predictability and consistency, it also (for the very same reason) deprives the law of flexibility and adaptability. *See Planned Parenthood v. Casey,* 505 U.S. 833, 868 (1992) ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.").[31] A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided. Appellate courts often tolerate errors in their caselaw because the rigors of the en banc process make it impossible to correct all errors. *See* note 29 *supra.*

[31] It also forces judges in certain instances to act in ways they may consider to be contrary to the Constitution. Some have argued that the duty of judges to follow the Constitution stands on a higher footing than the

> rule requiring adherence to precedent, and judges should not follow precedent when they believe that to do so would violate the Constitution. *See* Gary Lawson, *The Constitutional Case Against Precedent,* 17 Harv. J. L. & Pub. Pol'y 23, 27–28 (1994).

A system of strict binding precedent also suffers from the defect that it gives undue weight to the first case to raise a particular issue. This is especially true in the circuit courts, where the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue.

The question raised by *Anastasoff* is whether one particular aspect of the binding authority principle—the decision of which rulings of an appellate court are binding—is a matter of judicial policy or constitutional imperative. We believe *Anastasoff* erred in holding that, as a constitutional matter, courts of appeals may not decide which of their opinions will be deemed binding on themselves and the courts below them. For the reasons explained, the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy. Were it otherwise, it would cast doubt on the federal court practice of limiting the binding effect of appellate decisions to the courts of a particular circuit. Circuit boundaries —and the very system of circuit courts—are a matter of judicial administration, not constitutional law. If, as *Anastasoff* suggests, the Constitution dictates that every "declaration of law ... must be applied in subsequent cases to similarly situated parties," 223 F.3d at 900, then the Second Circuit would have no authority to disagree with a ruling of the Eighth Circuit that is directly on point, and the first circuit to rule on a legal issue would then bind not only itself and the courts within its own circuit, but all inferior federal courts.

Another consequence of *Anastasoff* 's reasoning would be to cast doubt on the authority of courts of appeals to adopt a body of circuit law on a wholesale basis, as did the Eleventh Circuit in *Bonner,* and the Federal Circuit in *South Corp. See* p. 1173 *supra.* Circuits could, of course, adopt individual cases from other circuits as binding in a case raising a particular legal issue. *See, e.g., Charles v. Lundgren & Assocs., P.C.,* 119 F.3d 739, 742 (9th Cir.) ("Because we have the benefit of the Seventh Circuit's cogent analysis, we will not replow plowed ground. Instead, we adopt the reasoning of the Seventh Circuit ....") *cert. denied,* 522 U.S. 1028 (1997). But adopting a whole body of law, encompassing countless rules on matters wholly unrelated to the issues raised in a particular case, is a very different matter. If binding authority were a constitutional imperative, it could only be created through individual case adjudication, not by a decision unconstrained by the facts before the court or its prior caselaw.

Nor is it clear, under the reasoning of *Anastasoff,* how courts could limit the binding effect of their rulings to appellate decisions. Under *Anastasoff* 's reasoning, district court opinions should bind district courts, at least in the same district, or even nationwide. After all, the Constitution vests the same "judicial Power" in all federal courts, so *Anastasoff* 's conclusion that judicial decisions must have precedential effect would apply equally to the thousands of unpublished decisions of the district courts.

No doubt the most serious implication of *Anastasoff* 's constitutional rule is that it would preclude appellate courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them. Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.

In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to

those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. *See* Fred A. Bernstein, *How to Write it Right,* Cal. Lawyer, at 42 (June 2000). Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.[32]

[32] Opinion writing is a "reflective art," an absolute necessity of which is "fully adequate time to contemplate, think, write and re-write." Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand,* 33 S.D. L.Rev. 371, 379, 384 (1988). Judge Markey rightly mourns the age when a judge could, as Judge Hand did, talk at length about each case, "with his feet on the desk and hands behind his head," and "having reached his decision, ... wr[i]te the entire opinion in longhand." *Id.* at 380. Today, "[t]here simply isn't time" to engage in such "reflective personal craftsmanship." *Id.* at 379–80.

It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.[33] The Supreme Court certainly does not. Rather, it uses its discretionary review authority to limit its merits docket to a handful of opinions per justice, from the approximately 9000 cases that seek review every Term.[34] While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end: They select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished dispositions or judgment orders. In our circuit, published dispositions make up approximately 16 percent of decided cases; in other circuits, the percentage ranges from 10 to 44, the national average being 20 percent. Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 44 tbl. S–3 (2000).

[33] As Judge Posner has noted:

> Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.

Richard A. Posner, *The Federal Courts: Challenge and Reform* 168–69 (1996).

[34] The United States Supreme Court decided seventy-seven cases in October Term 1999, which represents less than nine opinions per justice. *Statistics for the Supreme Court's October Term 1999,* 69 U.S.L.W. 3076 (BNA 2000). By comparison, in 1999, each active judge in our court heard an average of 450 cases and had writing responsibility for an average of twenty opinions and 130 unpublished dispositions. *See infra* note

37.

That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented.[35] What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases. As the Federal Judicial Center recognized, "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, *Standards for Publication of Judicial Opinions* 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.

[35] Sufficient restrictions on judicial decisionmaking exist to allay fears of irresponsible and unaccountable practices such as "burying" inconvenient decisions through nonpublication. In *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish,* 3 J. App. Prac. & Process 325 (2001), Professor Stephen L. Wasby concludes, after "extended observation of the ... Ninth Circuit," *id.* at 331, that formal publication guidelines and judges' enforcement of them through their interactions with each other, keep judges honest in deciding whether or not to publish. *See also* Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment, supra,* at 132 ("American appellate systems ... have many built-in protections to prevent against [judicial] irresponsibility without mandatory publication of opinions.")

Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions.[36] This new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.[37]

[36] *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions,* 60 Ohio St. L.J. 177, 196 ("[I]t will not save us any time if [unpublished opinions] are being cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent.").

[37] Recent figures tell a striking story. In 1999, our court decided some 4500 cases on the merits, about 700 by opinion and 3800 by unpublished disposition. Each active judge heard an average of 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each judge had to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions

circulated by other judges with whom he sat. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions,* Cal. Law., June 2000, at 44; *see also Report of the Federal Courts Study Committee* 109 (Apr. 2, 1990) (noting the federal appellate courts' "crisis of volume").

Increasing the number of opinions by a factor of five, as *Anastasoff* suggests, doesn't seem to us a sensible idea, even if we had the resources to do so. Adding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict. Judges have a responsibility to keep the body of law "cohesive and understandable, and not muddy[ ] the water with a needless torrent of published opinions." Martin, note 36 *supra,* at 192. Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. Worse still, publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea. As lawyers well know, even small differences in language can have significantly different implications when read in light of future fact patterns, so differences in phrasing that seem trivial when written can later take on a substantive significance.

The risk that this may happen vastly increases if judges are required to write many more precedential opinions than they do now, leaving much less time to devote to each.[38] Because conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review, *see Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478–79 (9th Cir.1987) (en banc) (conflict in panel opinions must be resolved by en banc court), *cert. denied,* 485 U.S. 989 (1988), an increase in intracircuit conflicts would leave much less time for us to devote to normal panel opinions. Maintaining a coherent, consistent and intelligible body of caselaw is not served by writing more opinions; it is served by taking the time to make the precedential opinions we do write as lucid and consistent as humanly possible.[39]

[38] Concerned that judges spend too little time writing (as opposed to editing) precedential opinions, commentators have suggested that judges should do the preliminary drafting of all published opinions. *See, e.g.,* David McGowan, *Judicial Writing and the Ethics of the Judicial Office,* 14 Geo. J. Legal Ethics 509, 514, 555–56 (2001). Adoption of such proposals would, however, "produce fewer published opinions [and] more unpublished dispositions." *Id.* at 593. By preventing judges from determining which of their opinions will be citable as precedent, *Anastasoff* would have precisely the opposite effect, forcing judges to spread their resources more thinly, resulting in even less judicial involvement in precedential opinions.

[39] *Anastasoff* suggests that the appointment of more judges would enable courts to write binding opinions in every case. *See* 223 F.3d at 904. We take no position as to whether there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year. But adding more judges, and more binding precedents, creates its own set of problems by significantly increasing the possibility of conflict within the same circuit as each judge will have an increased body of binding caselaw to consider and reconcile.

That problem, in turn, could be ameliorated by increasing the number of circuits, but that would increase the number of inter-circuit conflicts, moving the problem up the chain of command to the Supreme Court,

> which likewise does not have the capacity to significantly increase the number of opinions it issues each year. *See Wisniewski v. United States,* 353 U.S. 901, 901–02 (1957) (per curiam) (noting the problems of intra-circuit consistency raised by the growing number of circuit judgeships). In the end, we do not believe that more law makes for better law.

IV

Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision. The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not.[40] Without clearer guidance than that offered in *Anastasoff,* we see no constitutional basis for abdicating this important aspect of our judicial responsibility.

[40] This is hardly a novel view:

> [C]ertain types of cases do not deserve to be authorities. One type, already alluded to, is that in which there is no discoverable *ratio decidendi.* Others are cases turning purely on fact, those involving the exercise of discretion, and those which judges themselves do not think worthy of being precedents.

Dias, note 10 *supra,* at 55 (footnotes omitted) (citing *R. v. Stokesley* (Yorkshire) Justices, Ex parte Bartram [1956] 1 All E.R. 563 at 565).

Contrary to counsel's contention, then, we conclude that Rule 36–3 is constitutional. We also find that counsel violated the rule. Nevertheless, we are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.

The order to show cause is **DISCHARGED.**

Supreme Court of the United States

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., Petitioners,
v.
Robert P. CASEY, et al., etc.

Decided June 29, 1992.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V–A, V–C, and VI, an opinion with respect to Part V–E, in which Justice STEVENS joins, and an opinion with respect to Parts IV, V–B, and V–D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade,* 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae,* the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe.* See Brief for Respondents 104–117; Brief for United States as *Amicus Curiae* 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons.Stat. §§ 3203–3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra,* at 2833. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3–day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F. Supp. 1323 (E.D. Pa.1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. 947 F.2d 682 (3d Cir. 1991). We granted certiorari. 502 U.S. 1056, (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F.2d, at 687–698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling

Roe v. Wade. Tr. of Oral Arg. 5–6. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post,* at 2855, 2867. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe,* principles of institutional integrity, and the rule of *stare decisis,* we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas,* 123 U.S. 623, 660–661 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney v. California,* 274 U.S. 357, 373 (1927) (concurring opinion). "[T]he guaranties of due process, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.' " *Poe v. Ullman,* 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California,* 110 U.S. 516, 532 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, *e.g., Duncan v. Louisiana,* 391 U.S. 145, 147–148 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See *Adamson v. California,*

332 U.S. 46, 68–92 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.,* 491 U.S. 110, 127–128, n. 6 (1989) (opinion of SCALIA, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in *Turner v. Safley,* 482 U.S. 78, 94–99 (1987); in *Carey v. Population Services International,* 431 U.S. 678, 684–686 (1977); in *Griswold v. Connecticut,* 381 U.S. 479, 481–482 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, *id.,* at 486–488 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), *id.,* at 500–502 (Harlan, J., concurring in judgment) (same), *id.,* at 502–507 (WHITE, J., concurring in judgment) (same); in *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535 (1925); and in *Meyer v. Nebraska,* 262 U.S. 390, 399–403, (1923).

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman, supra,* 367 U.S., at 543 (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe v. Ullman,* but the Court adopted his position four Terms later in *Griswold v. Connecticut, supra.* In *Griswold,* we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See *Eisenstadt v. Baird,* 405 U.S. 438 (1972). Constitutional protection was extended to the sale and distribution of contraceptives in *Carey v. Population Services International, supra.* It is settled now, as it was when the Court heard arguments in *Roe v. Wade,* that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, see *Carey v. Population Services International, supra; Moore v. East Cleveland,* 431 U.S. 494 (1977); *Eisenstadt v. Baird, supra; Loving v. Virginia, supra; Griswold v. Connecticut, supra; Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); *Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra,* as well as bodily integrity, see, *e.g., Washington v. Harper,* 494 U.S. 210, 221–222 (1990); *Winston v. Lee,* 470 U.S. 753 (1985); *Rochin v. California,* 342 U.S. 165 (1952).

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in

interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Poe v. Ullman,* 367 U.S., at 542 (opinion dissenting from dismissal on jurisdictional grounds).

See also *Rochin v. California, supra,* 342 U.S., at 171–172 (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943); *Texas v. Johnson,* 491 U.S. 397 (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International,* 431 U.S., at 685. Our cases recognize "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra,* 405 U.S., at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define

one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold, Eisenstadt,* and *Carey.* The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. *Roe* was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting prenatal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in *Roe* itself and in decisions following it.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis.* We turn now to that doctrine.

III

A

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405–411 (1932) (Brandeis, J., dissenting). See also *Payne v. Tennessee,* 501 U.S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham,* 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g., United States v. Title Ins. & Trust Co.,* 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union,* 491 U.S. 164, 173–174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g., Burnet, supra,* 285 U.S., at 412 (Brandeis, J., dissenting).

So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

1

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546 (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see *Payne v. Tennessee, supra,* 501 U.S., at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe.*

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe* 's holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis.* This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, *e.g.,* R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

3

No evolution of legal principle has left *Roe'*s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut,* 381 U.S. 479 (1965). See *Roe,* 410 U.S., at 152–153. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, *e.g., Carey v. Population Services International,* 431 U.S. 678 (1977); *Moore v. East Cleveland,* 431 U.S. 494 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 278 (1990); cf., *e.g., Riggins v. Nevada,* 504 U.S. 127, 135 (1992); *Washington v. Harper,* 494 U.S. 210 (1990); see also,

e.g., Rochin v. California, 342 U.S. 165 (1952); *Jacobson v. Massachusetts,* 197 U.S. 11, 24–30 (1905).

Finally, one could classify *Roe* as *sui generis.* If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (*Akron I*), and by a majority of five in 1986, see *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see *id.,* at 518 (REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 529 (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe.* See *Webster,* 492 U.S., at 521 (REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 525–526 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 537, 553 (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.,* at 561–563 (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); *Griswold, supra; Loving v. Virginia,* 388 U.S. 1 (1967); and *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." *Poe v. Ullman,* 367 U.S., at 543 (Harlan, J., dissenting). As we described in *Carey v. Population Services International, supra,* the liberty which encompasses those decisions

> "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.' " 431 U.S., at 684–685 (citations omitted).

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe,* the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. *E.g., Arnold v. Board of Education of Escambia County, Ala.,* 880 F.2d 305, 311 (11th Cir. 1989) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery v. County of Burke,* 660 F.2d 111, 115 (4th Cir. 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also *In re Quinlan,* 70 N.J. 10, 355 A.2d 647 (relying on *Roe* in finding a right to terminate medical treatment, cert. denied *sub nom. Garger v. New Jersey,* 429 U.S. 922 (1976)). In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

4

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I, supra,* 462 U.S., at 429, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe,* 410 U.S., at 160, with *Webster, supra,* 492 U.S., at 515–516 (opinion of REHNQUIST, C.J.); see *Akron I,* 462 U.S., at 457, and n. 5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe* 's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe,* at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe* 's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe* 's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe* 's central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe* 's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

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Justice STEVENS, concurring in part and dissenting in part.

The portions of the Court's opinion that I have joined are more important than those with which I disagree. I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement.

I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits.[1] The central holding of *Roe v. Wade,* 410 U.S. 113 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 101 (1976) (STEVENS, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut,* 381 U.S. 479 (1965). See also *Carey v. Population Services International,* 431 U.S. 678, 687, 702 (1977) (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

[1] It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years,

> 15 Justices have confronted the basic issue presented in *Roe v. Wade,* 410 U.S. 113 (1973). Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Justices BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four—all of whom happen to be on the Court today—have reached the opposite conclusion.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe*'s postviability analysis. Specifically, I accept the proposition that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S., at 163–164; see *ante,* at 2821.

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Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, III, V–A, V–C, and VI of the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER, *ante.*

Three years ago, in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. *Id.,* at 557 (BLACKMUN, J., dissenting). See *id.,* at 499 (plurality opinion of REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 532 (SCALIA, J., concurring in part and concurring in judgment). All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. See, *e.g., Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 524 (1990) (BLACKMUN, J., dissenting). But now, just when so many expected the darkness to fall, the flame has grown bright.

I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster.* And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

Make no mistake, the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'CONNOR and KENNEDY postponed reconsideration of *Roe v. Wade,* 410 U.S. 113 (1973), the authors of the joint opinion today join Justice STEVENS and me in concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Ante,* at 2804. In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages." *Ante,* at 2803.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante,* at 2808. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," *ante,* at 2805—a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted. See *ante,* at 2805. Included within this realm of liberty is " 'the right of the *individual,* married or single, to be free from

unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' " *Ante,* at 2807, quoting *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972) (emphasis in original). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are *central* to the liberty protected by the Fourteenth Amendment." *Ante,* at 2807 (emphasis added). Finally, the Court today recognizes that in the case of abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Ante,* at 2807.

The Court's reaffirmation of *Roe*'s central holding is also based on the force of *stare decisis*. "[N]o erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." *Ante,* at 2812. Indeed, the Court acknowledges that *Roe*'s limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question." *Ante,* at 2809. In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning—"[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Ante,* at 2812. The Court understands that, having "call[ed] the contending sides ... to end their national division by accepting a common mandate rooted in the Constitution," *ante,* at 2815, a decision to overrule *Roe* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Ante,* at 2814. What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

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III

At long last, THE CHIEF JUSTICE and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Post,* at 2855. If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE's opinion.

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Nor does THE CHIEF JUSTICE give any serious consideration to the doctrine of *stare decisis.*

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In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and Justice SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join,

concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on *stare decisis,* retains the outer shell of *Roe v. Wade,* 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.

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II

The joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." *Ante,* at 2817. Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe. Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante,* at 2817–2818; see *Roe v. Wade, supra,* 410 U.S., at 162–164. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante,* at 2818.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe,* such as *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante,* at 2822–2824.

In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact. "*Stare decisis* is not ... a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depar[t] from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S., at 557; see *United States v. Scott,* 437 U.S. 82, 101 (1978) (" '[I]n cases involving the Federal Constitution, ... [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function' " (quoting *Burnet v. Coronado Oil & Gas Co., supra,* 285 U.S., at 406–408 (Brandeis, J., dissenting))); *Smith v. Allwright,* 321 U.S. 649, 665 (1944). Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the

question. See, *e.g., West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943); *Erie R. Co. v. Tompkins,* 304 U.S. 64, 74–78 (1938).

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe.* Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante,* at 2810–2811. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante,* at 2817–2818. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "[c]onsiderations in favor of *stare decisis* are at their acme." *Payne v. Tennessee,* 501 U.S., at 828. But, as the joint opinion apparently agrees, *ante,* at 2809, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe,* and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe,* as "reproductive planning could take virtually immediate account of" this action. *Ante,* at 2809.

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante,* at 2809. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe,* rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante,* at 2809.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante,* at 2809. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the

past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see *Plessy v. Ferguson,* 163 U.S. 537 (1896), or that "liberty" under the Due Process Clause protected "freedom of contract," see *Adkins v. Children's Hospital of District of Columbia,* 261 U.S. 525 (1923); *Lochner v. New York,* 198 U.S. 45 (1905). The "separate but equal" doctrine lasted 58 years after *Plessy,* and *Lochner*'s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See *Brown v. Board of Education,* 347 U.S. 483 (1954) (rejecting the "separate but equal" doctrine); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital, supra,* in upholding Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect the "legitimacy" of this Court. *Ante,* at 2812–2816. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante,* at 2814, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolve[s] the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante,* at 2815. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. *Ante,* at 2815. This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See *Payne v. Tennessee, supra,* at 828–830, and n. 1 (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe. Ante,* at 2812–2814 (discussing *Lochner v. New York, supra,* and *Plessy v. Ferguson, supra*). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its

error, apparently in violation of the joint opinion's "legitimacy" principle. See *West Coast Hotel Co. v. Parrish, supra; Brown v. Board of Education, supra.* One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe.* There is no reason to think that either *Plessy* or *Lochner* produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe,* so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the decision at all costs lest it *seem* to be retreating under fire. Public protests should not alter the normal application of *stare decisis,* lest perfectly lawful protest activity be penalized by the Court itself.

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The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

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Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

[Omitted]

Supreme Court of the United States

John Geddes LAWRENCE and Tyron Garner, Petitioners,
v.
TEXAS.

Decided June 26, 2003.

Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
>
> "(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, § 3a. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a–110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S.W.3d 349 (2001). The majority opinion indicates that the Court of Appeals

considered our decision in *Bowers v. Hardwick,* 478 U.S. 186 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari, 537 U.S. 1044 (2002), to consider three questions:

> 1. Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.
>
> 2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
>
> 3. Whether *Bowers v. Hardwick, supra,* should be overruled. See Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers.*

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. Nebraska,* 262 U.S. 390 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut,* 381 U.S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.,* at 485.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.,* at 454; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.,* at 453.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade,* 410

U.S. 113 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l,* 431 U.S. 678 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey,* as well as the holding and rationale in *Roe,* confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick.*

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U.S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); *id.,* at 214 (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.,* at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.,* at 192. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers.* Brief for Cato Institute as *Amicus Curiae* 16–17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15–21; Brief for Professors of History et al. as *Amici Curiae* 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e.g., King v. Wiseman,* 92 Eng. Rep. 774, 775 (K.B.1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e.g.,* 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47–50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra,* at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e.g.,* F.

Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," *Bowers,* 478 U.S., at 192. American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14–15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State,* 715 P.2d 1105 (Okla.Crim.App.1986) (sodomy law invalidated as applied to different-sex couples). Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g., Jegley v. Picado,* 349 Ark. 600 (2002); *Gryczan v. State,* 283 Mont. 433 (1997); *Campbell v. Sundquist,* 926 S.W.2d 250 (Tenn.App.1996); *Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky.1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. § 201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850 (1992).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao–Christian moral and ethical standards." 478 U.S., at 196. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge,

Hardwick and Historiography, 1999 U. Ill. L.Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis,* 523 U.S. 833, 857 (1998) (KENNEDY, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277–280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15–16.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U.S., at 192–193. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. *Id.,* at 197–198, n. 2 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo–Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales,* 869 S.W.2d 941, 943.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.,* at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans,* 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id.,* at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.,* at 634.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith v. Doe,* 538 U.S. 84 (2003); *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1,

123 (2003). We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing Idaho Code §§ 18–8301 to 18–8326 (Cum.Supp.2002); La.Code Crim. Proc. Ann. §§ 15:540–15:549 West 2003); Miss.Code Ann. §§ 45–33–21 to 45–33–57 (Lexis 2003); S.C.Code Ann. §§ 23–3–400 to 23–3–490 (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer.* When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado,* 349 Ark. 600 (2002); *Powell v. State,* 270 Ga. 327, 510 S.E.2d 18, 24 (1998); *Gryczan v. State,* 283 Mont. 433 (1997); *Campbell v. Sundquist,* 926 S.W.2d 250 (Tenn.App.1996); *Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky.1992).

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom.* See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee,* 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' " (quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940))). In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U.S., at 855–856; see also *id.,* at 844 ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers,* however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in Bowers Justice STEVENS came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." 478 U.S., at 216 (footnotes and citations omitted).

Justice STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

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

It is so ordered.

Justice O'CONNOR, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick,* 478 U.S. 186 (1986). I joined *Bowers,* and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. § 21.06 (2003). Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439

(1985); see also *Plyler v. Doe,* 457 U.S. 202, 216 (1982). Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, supra,* at 440; see also *Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973); *Romer v. Evans,* 517 U.S. 620, 632–633 (1996); *Nordlinger v. Hahn,* 505 U.S. 1, 11–12 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne v. Cleburne Living Center, supra,* at 440; see also *Fitzgerald v. Racing Assn. of Central Iowa, ante,* 539 U.S. 103 (2003); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955). We have consistently held, however, that some objectives, such as "a bare ... desire to harm a politically unpopular group," are not legitimate state interests. *Department of Agriculture v. Moreno, supra,* at 534. See also *Cleburne v. Cleburne Living Center, supra,* at 446–447; *Romer v. Evans, supra,* at 632. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno,* for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to "'discriminate against hippies.' " 413 U.S., at 534. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. *Id.,* at 535–538. In *Eisenstadt v. Baird,* 405 U.S. 438, 447–455 (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center, supra,* we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans,* we disallowed a state statute that "impos[ed] a broad and undifferentiated disability on a single named group"—specifically, homosexuals. 517 U.S., at 632.

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. See *State v. Morales,* 869 S.W.2d 941, 943 (Tex.1994) (noting in 1994 that § 21.06 "has not been, and in all probability will not be, enforced against private consensual conduct between adults"). This case shows, however, that prosecutions under § 21.06 *do* occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, *e.g.,* Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. See, *e.g.,* Idaho Code § 18–8304 (Cum.Supp.2002); La. Stat. Ann. § 15:542 (West Cum.Supp.2003); Miss. Code Ann. § 45–33–25 (West 2003); S.C. Code Ann.

§ 23–3–430 (West Cum.Supp.2002); cf. *ante,* at 2482.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." *State v. Morales,* 826 S.W.2d 201, 203 (Tex.App.1992).

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers,* we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. 478 U.S., at 196. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Id.,* at 188, n. 2. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers:* whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, *e.g., Department of Agriculture v. Moreno,* 413 U.S., at 534; *Romer v. Evans,* 517 U.S., at 634–635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.,* at 633. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." *Id.,* at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.,* at 634.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.,* at 641 (SCALIA, J., dissenting) (internal quotation marks omitted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 2482.

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "homosexual" "impute[s] the commission of a crime." *Plumley v. Landmark Chevrolet, Inc.,* 122 F.3d 308, 310 (5th Cir. 1997) (applying Texas law); see also *Head v. Newton,* 596 S.W.2d 209, 210 (Tex.App.1980). The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State v. Morales,* 826 S.W.2d, at 202–203 ("[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer v. Evans,* we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U.S., at 633. The same is true here. The Equal Protection Clause " 'neither knows nor tolerates classes among citizens.' " *Id.,* at 623 (quoting *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with" the Equal Protection Clause. *Plyler v. Doe,* 457 U.S., at 239 (Powell, J., concurring).

Whether a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 112–113 (1949) (concurring opinion).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

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

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 844 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade,* 410 U.S. 113 (1973). The Court's response today, to those who have engaged in a 17–year crusade to overrule *Bowers v. Hardwick,* 478 U.S. 186(1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. *Ante,* at 2484 (overruling *Bowers* to the extent it sustained Georgia's antisodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," *ante,* at 2477, and "fundamental decisions," *ibid*., nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers,* the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U.S., at 191, 106. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante,* at 2476.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick.* I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey.* There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it:

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* [,] ... its decision has a dimension that the resolution of the normal case does not carry.... [T]o overrule under fire in the absence of the most compelling reason ... would subvert the Court's legitimacy beyond any serious question." 505 U.S., at 866–867.

Today, however, the widespread opposition to *Bowers,* a decision resolving an issue as "intensely divisive" as the issue in *Roe,* is offered as a reason in favor of *overruling* it. See *ante,* at 2482–2483. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven 'unworkable,' " *Casey, supra,* at 855.

Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if:* (1) its foundations have been "ero[ded]" by subsequent decisions, *ante,* at 2482; (2) it has been subject to "substantial and continuing" criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante,* at 2483. The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least

the same degree as *Bowers.*

(1) A preliminary digressive observation with regard to the first factor: The Court's claim that *Planned Parenthood v. Casey, supra,* "casts some doubt" upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante,* at 2480. As far as its holding is concerned, *Casey* provided a *less* expansive right to abortion than did *Roe, which was already on the books when* Bowers *was decided.* And if the Court is referring not to the holding of *Casey,* but to the dictum of its famed sweet-mystery-of-life passage, *ante,* at 2481 (" 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life' "): That "casts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.

I do not quarrel with the Court's claim that *Romer v. Evans,* 517 U.S. 620 (1996), "eroded" the "foundations" of *Bowers*' rational-basis holding. See *Romer, supra,* at 640–643 (SCALIA, J., dissenting). But *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997), which held that *only* fundamental rights which are " 'deeply rooted in this Nation's history and tradition' " qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey,* of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition.

(2) *Bowers*, the Court says, has been subject to "substantial and continuing [criticism], disapproving of its reasoning in all respects, not just as to its historical assumptions." *Ante,* at 2483. Exactly what those nonhistorical criticisms are, and whether the Court even agrees with them, are left unsaid, although the Court does cite two books. See *ibid.* (citing C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992)).[1] Of course, *Roe* too (and by extension *Casey*) had been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today. See Fried, *supra,* at 75 ("Roe was a prime example of twisted judging"); Posner, *supra,* at 337 ("[The Court's] opinion in *Roe* (3)27 fails to measure up to professional expectations regarding judicial opinions"); Posner, Judicial Opinion Writing, 62 U. Chi. L.Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an "embarrassing performanc[e]").

[1] This last-cited critic of *Bowers* actually writes: "*[Bowers]* is correct nevertheless that the right to engage in homosexual acts is not deeply rooted in America's history and tradition." Posner, Sex and Reason, at 343.

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers,* only the third factor. "[T]here has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding ...." *Ante,* at 2483. It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, *e.g., Williams v. Pryor,* 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality ... indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel,* 148 F.3d 812, 814 (7th Cir. 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality ... rather than confined to preventing demonstrable harms"); *Holmes v. California Army National Guard,* 124 F.3d 1126, 1136 (9th Cir. 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those

who engage in homosexual conduct); *Owens v. State,* 352 Md. 663, 683, 724 A.2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman v. Henry,* 928 S.W.2d 464, 469–473 (Tex.1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.* (plurality opinion); see also *id.,* at 575 (SCALIA, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante,* at 2480 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S., at 196.[2]

[2] While the Court does not overrule *Bowers* ' holding that homosexual sodomy is not a "fundamental right," it is worth noting that the "societal reliance" upon that aspect of the decision has been substantial as well. See 10 U.S.C. § 654(b)(1) ("A member of the armed forces shall be separated from the armed forces ... if ... the member has engaged in ... a homosexual act or acts"); *Marcum v. McWhorter,* 308 F.3d 635, 640–642 (6th Cir. 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); *Mullins v. Oregon,* 57 F.3d 789, 793–794 (9th Cir. 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interes[t]" in the adoption of her grandchildren); *Doe v. Wigginton,* 21 F.3d 733, 739–740 (6th Cir. 1994) (relying on *Bowers* in rejecting a prisoner's claimed "fundamental right" to on-demand HIV testing); *Schowengerdt v. United States,* 944 F.2d 483, 490 (9th Cir. 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); *Charles v. Baesler,* 910 F.2d 1349, 1353 (6th Cir. 1990) (relying on *Bowers* in rejecting fire department captain's claimed "fundamental" interest in a promotion); *Henne v. Wright,* 904 F.2d 1208, 1214–1215 (8th Cir. 1990) (relying on *Bowers* in rejecting a claim that state law restricting surnames that could be given to children at birth implicates a "fundamental right"); *Walls v. Petersburg,* 895 F.2d 188, 193 (4th Cir. 1990) (relying on *Bowers* in rejecting substantive-due-process challenge to a police department questionnaire that asked prospective employees about homosexual activity); *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563, 570–571 (9th Cir. 1990) (relying on *Bowers* ' holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department's policy of conducting expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearances).

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe,* which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State. *Casey,* however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S., at 856. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired).

Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey.* It has thereby exposed *Casey*'*s* extraordinary deference to precedent for the result-oriented expedient that it is.

II

Having decided that it need not adhere to *stare decisis,* the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. § 21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante,* at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante,* at 2481 (" ' These matters ... are central to the liberty protected by the Fourteenth Amendment' "); *ante,* at 2484 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," *so long as "due process of law" is provided:*

> "No state shall ... deprive any person of life, liberty, or property, *without due process of law*." Amdt. 14 (emphasis added).

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg,* 521 U.S., at 721. We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are " 'deeply rooted in this Nation's history and tradition,' " *ibid.* See *Reno v. Flores,* 507 U.S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States v. Salerno,* 481 U.S. 739, 751 (1987) (same). See also *Michael H. v. Gerald D.,* 491 U.S. 110, 122 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' ... but also that it be an interest traditionally protected by our society"); *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (Fourteenth Amendment protects "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men" (emphasis added)).[3] All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

[3] The Court is quite right that " '[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,' " *ante,* at 2480. An asserted "fundamental liberty interest" must not only be " 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997), but it must *also* be " 'implicit in the concept of ordered liberty,' " so that " 'neither liberty nor justice would exist if [it] were sacrificed,' " *ibid.* Moreover, liberty interests unsupported by history and tradition, though not deserving of "heightened scrutiny," are *still* protected from state laws that are not rationally related to any legitimate state interest. *Id.,* at 722. As I proceed to discuss, it is this

latter principle that the Court applies in the present case.

Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right" under the Due Process Clause, 478 U.S., at 191–194. Noting that "[p]roscriptions against that conduct have ancient roots," *id.,* at 192, that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," *ibid.,* and that many States had retained their bans on sodomy, *id.,* at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not " 'deeply rooted in this Nation's history and tradition,' " *id.,* at 192.

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is " 'deeply rooted in this Nation's history and tradition,' " the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary, see *id.,* at 196. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Ante,* at 2484.

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers'* conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. *Ante,* at 2477. The Court points to *Griswold v. Connecticut,* 381 U.S. 479, 481–482 (1965). But that case *expressly disclaimed* any reliance on the doctrine of "substantive due process," and grounded the so-called "right to privacy" in penumbras of constitutional provisions *other than* the Due Process Clause. *Eisenstadt v. Baird,* 405 U.S. 438 (1972), likewise had nothing to do with "substantive due process"; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well-known dictum relating to the "right to privacy," but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a "substantive due process" right.

Roe v. Wade recognized that the right to abort an unborn child was a "fundamental right" protected by the Due Process Clause. 410 U.S., at 155. The *Roe* Court, however, made no attempt to establish that this right was " 'deeply rooted in this Nation's history and tradition' "; instead, it based its conclusion that "the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" on its own normative judgment that antiabortion laws were undesirable. See *id.,* at 153. We have since rejected *Roe*'*s* holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U.S., at 876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *id.,* at 951–953 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part)—and thus, by logical implication, *Roe*'*s* holding that the right to abort an unborn child is a "fundamental right." See 505 U.S., at 843–912 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) (not once describing abortion as a "fundamental right" or a "fundamental liberty interest").

After discussing the history of antisodomy laws, *ante,* at 2478–2480, the Court proclaims that, "it should

be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," *ante,* at 2478. This observation in no way casts into doubt the "definitive [historical] conclusio[n]," *ibid.,* on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples:

> "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws.* In fact, until 1961, all 50 States outlawed *sodomy,* and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U.S., at 192–194 (citations and footnotes omitted; emphasis added).

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." *Ante,* at 2478. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition." The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers actually* relied.

Next the Court makes the claim, again unsupported by any citations, that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Ante,* at 2479. The key qualifier here is "acting in private"—since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were "infrequen[t]," *ibid.*). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. See W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999) (hereinafter Gaylaw). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983). *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex.*" *Ante,* at 2480 (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child

pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize " 'consensual sexual relations conducted in private,' " *ante,* at 2480, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." Gaylaw 159.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante,* at 2483, but rather rejected the claimed right to sodomy on the ground that such a right was not " 'deeply rooted in *this Nation's* history and tradition,' " 478 U.S., at 193–194 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.,* at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida,* 537 U.S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra,* at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante,* at 2484 (emphasis added). The Court embraces instead Justice STEVENS' declaration in his *Bowers* dissent, that " 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,' " *ante,* at 2483. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'CONNOR, *ante*, at 2484 (opinion concurring in judgment), embraces: On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the

opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia,* 388 U.S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving,* however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." *Id.,* at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis,* 426 U.S. 229, 241–242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 U.S., at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O'CONNOR argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

> "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." *Ante,* at 2486–2487.

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law *does* deny equal protection to "homosexuals as a class," that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

Justice O'CONNOR simply decrees application of "a more searching form of rational basis review" to the Texas statute. *Ante,* at 2485. The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer v. Evans,* 517 U.S., at 635; *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 448–450 (1985); *Department of Agriculture v. Moreno,* 413 U.S. 528, 534–538 (1973). Nor does Justice O'CONNOR explain precisely what her "more searching form" of rational-basis review consists of. It must at least mean, however, that laws exhibiting "a desire to harm a politically unpopular group," *ante,* at 2485, are invalid *even though* there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'CONNOR seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. *Ante,* at 2488. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'CONNOR has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

* * *

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer, supra,* at 653.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 2482. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non–Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H.R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is *mandated* by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the Armed Forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," *ante,* at 2484; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong

enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto,* 2003 WL 34950 (Ontario Ct.A pp.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante,* at 2484. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage,* procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante,* at 2482 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante,* at 2484; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante,* at 2478; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.?* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice THOMAS, dissenting.

I join Justice SCALIA's dissenting opinion. I write separately to note that the law before the Court today "is ... uncommonly silly." *Griswold v. Connecticut,* 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.' " *Id.,* at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," *ibid.,* or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante,* at 2475.

Supreme Court of the United States

Stephen KIMBLE et al., Petitioners
v.
MARVEL ENTERTAINMENT, LLC, successor to Marvel Enterprises, Inc.

Decided June 22, 2015.

Justice KAGAN delivered the opinion of the Court.

In *Brulotte v. Thys Co.,* 379 U.S. 29 (1964), this Court held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis,* we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as "a spider person" by shooting webs—really, pressurized foam string—"from the palm of [the] hand." U.S. Patent No. 5,072,856, Abstract (filed May 25, 1990).[1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider–Man, among other comic-book characters. Seeking to sell or license his patent, Kimble met with the president of Marvel's corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the " Web Blaster"—a toy that, like Kimble's patented invention, enables would-be action heroes to mimic Spider–Man through the use of a polyester glove and a canister of foam.

[1] Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we refer only to Kimble.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble's patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel's future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider–Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte,* the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent's expiration. See 379 U.S., at 32. So the decision's effect was to sunset the settlement's royalty clause.[2] On making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision ... unenforceable after the expiration of the Kimble patent." 692 F.Supp.2d 1156, 1161 (D.Ariz.2010). The Court of Appeals for the Ninth Circuit affirmed, though making clear that it was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, "is counterintuitive and its rationale is arguably unconvincing." 727 F.3d 856, 857 (9th Cir. 2013).

[2] In *Brulotte,* the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See 379 U.S., at 29–30. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

We granted certiorari, 574 U.S. ——— (2014), to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.[3] For reasons of *stare decisis,* we demur.

[3] See, *e.g., Scheiber v. Dolby Labs., Inc.,* 293 F.3d 1014, 1017–1018 (7th Cir. 2002) (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized.... However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non–Injunctive Remedies, 97 Mich. L.Rev. 985, 1027 (1999) ("Our analysis ... suggests that *Brulotte* should be overruled").

II

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See 35 U.S.C. § 154(a)(1). But a patent typically expires 20 years from the day the application for it was filed. See § 154(a)(2). And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 230 (1964).

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have struck down state statutes with that consequence. See, *e.g., id.,* at 230–233; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 152, 167–168 (1989); *Compco Corp. v. Day–Brite Lighting, Inc.,* 376 U.S. 234, 237–238 (1964). By virtue of federal law, we reasoned, "an article on which the patent has expired," like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears,* 376 U.S., at 231. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co. v. Marcalus Mfg. Co.,* 326 U.S. 249 (1945), for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive ... the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id.,* at 256. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id.,* at 255–256; see also, *e.g., Edward Katzinger Co. v. Chicago Metallic Mfg. Co.,* 329 U.S. 394, 400–401 (1947) (ruling that *Scott Paper* applies to licensees); *Lear, Inc. v. Adkins,* 395 U.S. 653, 668–675 (1969) (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8–1 vote) held the agreement unenforceable—"unlawful *per se* "—to the extent it provided for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." 379 U.S., at 30, 32. To arrive at that conclusion, the Court began with the statutory provision setting the length of a patent term. See *id.,* at 30 (quoting the then-current version of § 154). Emphasizing that a patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper* : Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." 379 U.S., at 31 (quoting 326 U.S., at 256). In the *Brulotte* Court's view, contracts to pay royalties for such use

continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. 379 U.S., at 33. And in so doing, those agreements conflict with patent law's policy of establishing a "post-expiration ... public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e.g.,* 3 R. Milgrim & E. Bensen, Milgrim on Licensing § 18.05, p. 18–9 (2013). As to either goal, *Brulotte* may pose an obstacle.

Yet parties can often find ways around *Brulotte,* enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are royalties for using an invention after it has moved into the public domain. See 379 U.S., at 31; *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 136 (1969). A licensee could agree, for example, to pay the licensor a sum equal to 10% of sales during the 20–year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte,* royalties may run until the latest-running patent covered in the parties' agreement expires. See 379 U.S., at 30. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e.g.,* 3 Milgrim on Licensing § 18.07, at 18–16 to 18–17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be able to curtail competition. See Brief for Petitioners 47–48; *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 44 (2006) ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 3.2e, p. 3–12.1 (2d ed., Supp. 2014) (Hovenkamp)).

III

Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community,* 572 U.S. ——, —— (2014). Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827–828 (1991). It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. ——, —— (2014).

What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte,* interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e.g., Patterson v. McLean Credit Union,* 491 U.S. 164, 172–173 (1989). That is true, contrary to the dissent's view, see *post,* at 2417 – 2418 (opinion of ALITO, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e.g., Bilski v. Kappos,* 561 U.S. 593, 601–602 (2010). Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton,* 573 U.S., at ——. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees. *Brulotte* has governed licensing agreements for more than half a century. See *Watson v. United States,* 552 U.S. 74, 82–83 (2007) (stating that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (35 U.S.C. § 154) on which *Brulotte* rested. See, *e.g.,* Uruguay Round Agreements Act, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte* 's *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e.g.,* S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices ... unless such practices ... violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., § 201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements). And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E.g., Payne,* 501 U.S., at 828; *Khan,* 522 U.S., at 20. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32–33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations § 3.13, p. 3–13, and n. 2 (2014) (noting that it is not "necessary to specify the term ... of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements ... actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reasonable possibility that parties have structured their business transactions in light of *Brulotte,* we have one more reason to let it stand.

As against this superpowered form of *stare decisis,* we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte* 's statutory and doctrinal underpinnings have not eroded over time. When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson,* 491 U.S., at 173 (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: Section 154 now, as then, draws a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention after its patent's expiration. See *supra,* at 2406 – 2407. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra,* at 2406 – 2407. *Brulotte,* then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Compare, *e.g., Alleyne v. United States,* 570 U.S. ——, —— – – —— (2013) (SOTOMAYOR, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law.[4]

[4] The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i.e.,* contracts conditioning a licensee's right to use a patent on the purchase of an unpatented product. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (adding the market power requirement in the patent misuse context); *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 41–43 (2006) (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte* 's legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." 379 U.S., at 32. And even if that analogy played some real role in *Brulotte,* the development of tying law would not undercut

the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra,* at 2410 (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte,* and so further supports adhering to *stare decisis*.

And second, nothing about *Brulotte* has proved unworkable. See, *e.g., Patterson,* 491 U.S., at 173 (identifying unworkability as another "traditional justification" for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte* 's ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ antitrust law's rule of reason to identify and invalidate those post-expiration royalty clauses with anti-competitive consequences. See *supra,* at 2408 – 2409. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces notoriously high litigation costs and unpredictable results. *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 343 (1982). For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post,* at 2415 – 2417.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte,* but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id.,* at 36–40. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra,* at 2407. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12–13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38–39. In light of those realities, Kimble concludes, "the *Brulotte per se* rule makes little sense." *Id.,* at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.,* at 13–18 (citing numerous treatises and articles critiquing *Brulotte*).

Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55–56 (citing, *e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007); *Illinois Tool Works,* 547 U.S. 28. But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming Kimble accurately characterizes *Brulotte* 's basis, does the decision's economic mistake suffice to overcome *stare decisis* ? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e.g., Khan,* 522 U.S., at 20–21. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 731–732 (1988). We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See *Leegin,* 551 U.S., at 899–900. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See *Business Electronics Corp.,* 485 U.S., at 731. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." *Halliburton,* 573 U.S., at ——.

But *Brulotte* is a patent rather than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See *supra,* at 2409. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See *supra,* at 2408 – 2409. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Compare, *e.g., Halliburton,* 573 U.S., at —— (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36–40. That claim, even if itself dead-right, fails to clear *stare decisis* 's high bar.

And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra,* the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See *Brulotte,* 379 U.S., at 30–32; *supra,* at 2406 – 2408. Or more specifically put, the Court held, as it had in *Scott Paper,* that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See *Brulotte,* 379 U.S., at 31–32 (a licensee's obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so

"runs counter to the policy and purpose of the patent laws" (quoting *Scott Paper,* 326 U.S., at 256)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp § 3.2d, at 3–10.

Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]", and its detachment from "economic reality." Brief for Petitioners 27–28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte,* he contends, "discourages technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra,* at 2407. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." *Id.,* at 33.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral and risk-spreading alike. See *supra,* at 2408. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." *Halliburton,* 573 U.S., at ——. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, considering concerns of just the kind Kimble raises. See *supra,* at 2410. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

V

What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider–Man," p. 13 (1962) ("[I]n this world, with great power there must also come—great responsibility"). Finding many reasons for staying the *stare decisis* course and no "special justification" for departing from it, we decline Kimble's invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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

The Court employs *stare decisis,* normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte v. Thys Co.,* 379 U.S. 29 (1964), held that parties cannot enter into a patent licensing agreement that provides for royalty payments to continue after the term of the patent expires. That decision was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an economic theory—and one that has been debunked. The decision interferes with the ability of parties to negotiate licensing agreements that reflect the true value of a patent, and it disrupts contractual expectations. *Stare decisis* does not require us to retain this baseless and damaging precedent.

I

A

The Patent Act provides that a patent grants certain exclusive rights to the patentee and "his heirs or assigns" for a term of 20 years. 35 U.S.C. §§ 154(a)(1) and (2). The Act says nothing whatsoever about post-expiration royalties. In *Brulotte,* however, the Court held that such royalties are *per se* unlawful. The Court made little pretense of finding support for this holding in the language of the Act. Instead, the Court reasoned that allowing post-expiration royalties would subject "the free market visualized for the post-expiration period ... to monopoly influences that have no proper place there." 379 U.S., at 32–33. Invoking antitrust concepts, the decision suggested that such arrangements are "an effort to enlarge the monopoly of the patent by t[y]ing the sale or use of the patented article to the purchase or use of unpatented ones." *Id.,* at 33.

Whatever the merits of this economic argument, it does not represent a serious attempt to interpret the Patent Act. A licensing agreement that provides for the payment of royalties after a patent's term expires does not enlarge the patentee's monopoly or extend the term of the patent. It simply gives the licensor a contractual right. Thus, nothing in the text of the Act even arguably forbids licensing agreements that provide for post-expiration royalties.

Brulotte was thus a bald act of policymaking. It was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.

B

Not only was *Brulotte* based on policymaking, it was based on a policy that is difficult to defend. Indeed, in the intervening 50 years, its reasoning has been soundly refuted. See, *e.g.,* 10 P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1782c.3, pp. 554–556 (3d ed. 2011); See & Caprio, The Trouble with *Brulotte* : The Patent Royalty Term and Patent

Monopoly Extension, 1990 Utah L. Rev. 813, 846–851; *Scheiber v. Dolby Labs., Inc.,* 293 F.3d 1014, 1017 (7th Cir. 2002); Brief for Petitioners 23–25, and n. 11 (collecting sources); *ante,* at 2406, n. 3.

Brulotte misperceived the purpose and effect of post-expiration royalties. The decision rested on the view that post-expiration royalties extend the patent term by means of an anti-competitive tying arrangement. As the Court understood such an arrangement, the patent holder leverages its monopoly power during the patent term to require payments after the term ends, when the invention would otherwise be available for free public use. But agreements to pay licensing fees after a patent expires do not "enlarge the monopoly of the patent." 379 U.S., at 33. Instead, "[o]nce the patent term expires, the power to exclude is gone," and all that is left "is a problem about optimal contract design." Easterbrook, Contract and Copyright, 42 Hous. L. Rev. 953, 955 (2005).

The economics are simple: Extending a royalty term allows the parties to spread the licensing fees over a longer period of time, which naturally has the effect of reducing the fees during the patent term. See *ante,* at 2407. Restricting royalty payments to the patent term, as *Brulotte* requires, compresses payment into a shorter period of higher fees. The Patent Act does not prefer one approach over the other.

There are, however, good reasons why parties sometimes prefer post-expiration royalties over upfront fees, and why such arrangements have pro-competitive effects. Patent holders and licensees are often unsure whether a patented idea will yield significant economic value, and it often takes years to monetize an innovation. In those circumstances, deferred royalty agreements are economically efficient. They encourage innovators, like universities, hospitals, and other institutions, to invest in research that might not yield marketable products until decades down the line. See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 8–12. And they allow producers to hedge their bets and develop more products by spreading licensing fees over longer periods. See *ibid*. By prohibiting these arrangements, *Brulotte* erects an obstacle to efficient patent use. In patent law and other areas, we have abandoned *per se* rules with similarly disruptive effects. See, *e.g., Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28 (2006); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007).

The majority downplays this harm by insisting that "parties can often find ways around *Brulotte*." *Ante,* at 2408. But the need to avoid *Brulotte* is an economic inefficiency in itself. Parties are not always aware of the prohibition—as this case amply demonstrates. And the suggested alternatives do not provide the same benefits as post-expiration royalty agreements. For instance, although an agreement to amortize payments for sales during the patent term would "bring down early outlays," the Court admits that such an agreement might not reflect the parties' risk preferences. *Ante,* at 2408. Moreover, such an arrangement would not necessarily yield the same amount of total royalties, particularly for an invention or a medical breakthrough that takes decades to develop into a marketable product. The sort of agreements that *Brulotte* prohibits would allow licensees to spread their costs, while *also* allowing patent holders to capitalize on slow-developing inventions.

C

On top of that, *Brulotte* most often functions to upset the parties' expectations.

This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." *Ante,* at 2406. Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte,* they might have agreed to higher payments during the patent term. Instead, both sides expected the royalty payments to continue until Marvel stopped selling toys that fit

the terms of the agreement. But that is not what happened. When Marvel discovered *Brulotte,* it used that decision to nullify a key part of the agreement. The parties' contractual expectations were shattered, and petitioners' rights were extinguished.

The Court's suggestion that some parties have come to rely on *Brulotte* is fanciful. The Court believes that there is a "reasonable possibility that parties have structured their business transactions in light of *Brulotte*." *Ante,* at 2410. Its only support for this conclusion is Marvel's self-serving and unsupported assertion that some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule. To its credit, the Court stops short of endorsing this unlikely prediction, saying only that "uncertainty on this score cuts in Marvel's direction." *Ante,* at 2410.

But there is no real uncertainty. "[W]e do not know" if Marvel's assertion is correct because Marvel has provided no evidence to support it. *Ibid.* And there are reasons to believe that, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties expected. See, *e.g.,* 27 R. Lord, Williston on Contracts § 70:124 (4th ed. 2003). What we know for sure, however, is that *Brulotte* has upended the parties' expectations here and in many other cases. See, *e.g., Scheiber,* 293 F.3d, at 1016; *Boggild v. Kenner Products,* 853 F.2d 465, 466–467 (6th Cir. 1988); *Pitney Bowes, Inc. v. Mestre,* 701 F.2d 1365, 1367, 1373 (11th Cir. 1983). These confirmed problems with retaining *Brulotte* clearly outweigh Marvel's hypothetical fears.

II

In the end, *Brulotte* 's only virtue is that we decided it. But that does not render it invincible. *Stare decisis* is important to the rule of law, but so are correct judicial decisions. Adherence to prior decisions " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Pearson v. Callahan,* 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)). But *stare decisis* is not an "inexorable command." *Payne, supra,* at 828; *Washington v. W.C. Dawson & Co.,* 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting). "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule ..., and experience has pointed up the precedent's shortcomings." *Pearson, supra,* at 233.

Our traditional approach to *stare decisis* does not require us to retain *Brulotte* 's *per se* rule. *Brulotte* 's holding had no basis in the law. Its reasoning has been thoroughly disproved. It poses economic barriers that stifle innovation. And it unsettles contractual expectations.

It is not decisive that Congress could have altered *Brulotte*'s rule. In general, we are especially reluctant to overturn decisions interpreting statutes because those decisions can be undone by Congress. See, *e.g., John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 139 (2008); *Patterson v. McLean Credit Union,* 491 U.S. 164, 172–173 (1989). The Court calls this a "superpowered form of *stare decisis*" that renders statutory interpretation decisions nearly impervious to challenge. *Ante,*at 2410. I think this goes a bit too far.

As an initial matter, we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error." *Girouard v. United States,* 328 U.S. 61, 69–70 (1946). On the contrary, we have recognized that it is appropriate for us to correct rules of this sort. See, *e.g., Leegin,* 551 U.S., at 899–900;

State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997).

The Court says that it might agree if *Brulotte* were an antitrust precedent because *stare decisis* has "less-than-usual force in cases involving the Sherman Act." *Ante,* at 2412. But this distinction is unwarranted. We have been more willing to reexamine antitrust precedents because they have attributes of common-law decisions. I see no reason why the same approach should not apply where the precedent at issue, while purporting to apply a statute, is actually based on policy concerns. Indeed, we should be even more willing to reconsider such a precedent because the role implicitly assigned to the federal courts under the Sherman Act has no parallel in Patent Act cases.

Even taking the Court on its own terms, *Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power. See 379 U.S., at 32–33. And it expressly characterized post-expiration royalties as anti-competitive tying arrangements. See *id.,* at 33. It makes no sense to afford greater *stare decisis* protection to *Brulotte* 's thinly veiled antitrust reasoning than to our Sherman Act decisions.

The Court also places too much weight on Congress' failure to overturn *Brulotte*. We have long cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard, supra,* at 69. Even where Congress has considered, but not adopted, legislation that would abrogate a judicial ruling, it cannot be inferred that Congress' failure to act shows that it approves the ruling. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994). " '[S]everal equally tenable inferences may be drawn from such inaction.' " *Ibid*. (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.,* 496 U.S. 633, 650 (1990)).

Passing legislation is no easy task. A federal statute must withstand the "finely wrought" procedure of bicameralism and presentment. *INS v. Chadha,* 462 U.S. 919, 951 (1983)*; Clinton v. City of New York,* 524 U.S. 417, 440 (1998); see U.S. Const., Art. I, § 7. Within that onerous process, there are additional practical hurdles. A law must be taken up for discussion and not passed over in favor of more pressing matters, and Senate rules require 60 votes to end debate on most legislation. And even if the House and Senate agree on a general policy, the details of the measure usually must be hammered out in a conference committee and repassed by both Houses.

* * *

A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte*. Even the Court does not defend the decision on the merits. I would reconsider and overrule our obvious mistake. For these reasons, I respectfully dissent.

Selections from

Supreme Court of the United States.

Rose Mary KNICK, PETITIONER
v.
TOWNSHIP OF SCOTT, PENNSYLVANIA, et al.

Decided June 21, 2019

Chief Justice ROBERTS delivered the opinion of the Court.

* * * *

IV

The next question is whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error. The doctrine of *stare decisis* reflects a judgment "that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). The doctrine "is at its weakest when we interpret the Constitution," as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings. *Agostini*, 521 U.S. at 235.

We have identified several factors to consider in deciding whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, ... and reliance on the decision." *Janus* v. *State*, *County*, *and Municipal Employees*, 585 U.S. ——, ——– – ———(2018). All of these factors counsel in favor of overruling *Williamson County*.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence. See *supra*, at 2173 – 2174. Its key conclusion, which it drew from unnecessary language in *Monsanto*—that a property owner does not have a ripe federal takings claim until he has unsuccessfully pursued an initial state law claim for just compensation—ignored *Jacobs* and many subsequent decisions holding that a property owner acquires a Fifth Amendment right to compensation at the time of a taking. This contradiction was on stark display just two years later in *First English*.

The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators. See *San Remo*, 545 U.S. at 348 (Rehnquist, C.J., joined by O'Connor, Kennedy, and THOMAS, JJ., concurring in judgment); *Arrigoni Enterprises*, *LLC* v. *Durham*, 578 U.S. ——— (2016) (THOMAS, J., joined by Kennedy, J., dissenting from denial of certiorari); Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630 (2015); McConnell, *Horne* and the Normalization of Takings Litigation: A Response to Professor Echeverria, 43 Env. L. Rep. 10749, 10751 (2013); Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1264 (2004); Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 989 (1986). Even the academic defenders of the state-litigation requirement base it on federalism concerns (although they do not reconcile those concerns with the settled construction of § 1983) rather than the reasoning of the opinion itself. See Echeverria, *Horne* v. *Department of Agriculture*: An Invitation To Reexamine "Ripeness" Doctrine in Takings Litigation, 43 Env. L. Rep. 10735, 10744 (2013);

Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006).

Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a "prudential" ripeness rule. See *Horne v. Department of Agriculture*, 569 U.S. 513, 525–526 (2013); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733–734 (1997). No party defends that approach here. See Brief for Respondents 37; Brief for United States as *Amicus Curiae* 19–20. Respondents have taken a new tack, adopting a § 1983–specific theory at which *Williamson County* did not even hint. See n. 6, *supra*. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*. See *Janus*, 585 U.S., at ——.

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under § 1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that § 1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

The dissent argues that our constitutional holding in *Williamson County* should enjoy the "enhanced" form of *stare decisis* we usually reserve for statutory decisions, because Congress could have eliminated the *San Remo* preclusion trap by amending the full faith and credit statute. *Post*, at 2189 (quoting *Kimble* v. *Marvel Entertainment, LLC*, 578 U.S. ——, ——). But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation.

Finally, there are no reliance interests on the state-litigation requirement. We have recognized that the force of *stare decisis* is "reduced" when rules that do not "serve as a guide to lawful behavior" are at issue. *United States v. Gaudin*, 515 U.S. 506, 521(1995); see *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (SOTOMAYOR, J., concurring). Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed. For the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedure Act. 5 U.S.C. § 706(2)(B). Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act.

In light of all the foregoing, the dissent cannot, with respect, fairly maintain its extreme assertions regarding our application of the principle of *stare decisis*.

* * *

Justice THOMAS, concurring.

[Omitted]

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

Today, the Court formally overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). But its decision . . . transgresses all usual principles of *stare decisis*. I respectfully dissent.

* * * *

IV

Everything said above aside, *Williamson County* should stay on the books because of *stare decisis*. Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis*, of course, is "not an inexorable command." *Id.*, at 828. But it is not enough that five Justices believe a precedent wrong. Reversing course demands a "special justification—over and above the belief that the precedent was wrongly decided." *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. ——, —— (2015) (internal quotation marks omitted). The majority offers no reason that qualifies.

In its only real stab at a special justification, the majority focuses on what it calls the "*San Remo* preclusion trap." *Ante*, at 2167. As the majority notes, this Court held in a post-*Williamson County* decision interpreting the full faith and credit statute, 28 U.S.C. § 1738, that a state court's resolution of an inverse condemnation proceeding has preclusive effect in a later federal suit. See *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323 (2005). The interaction between *San Remo* and *Williamson County* means that "many takings plaintiffs never have the opportunity to litigate in a federal forum." *Ante*, at 2179. According to the majority, that unanticipated result makes *Williamson County* itself "unworkable." *Ibid.*

But in highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When "correction can be had by legislation," Justice Brandeis once stated, the Court should let stand even "error[s on] matter[s] of serious concern." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting)). Or otherwise said, *stare decisis* then "carries enhanced force." *Kimble*, 576 U.S., at ——; see *South Dakota* v. *Wayfair, Inc.*, 585 U.S. ——, —— (2018) (ROBERTS, C.J., dissenting) (The *stare decisis* "bar is even higher" when Congress "can, if it wishes, override this Court's decisions with contrary legislation"). Here, Congress can reverse the *San Remo* preclusion rule any time it wants, and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court. The *San Remo* decision, as noted above, interpreted the federal full faith and credit statute; Congress need only add a provision to that law to flip the Court's result. In fact, Congress has already considered proposals responding to *San Remo*—though so far to no avail. See Brief for Congressman Steve King et al. as *Amici Curiae* 7. Following this Court's normal rules of practice means leaving the *San Remo* "ball[in] Congress's court," so that branch can decide whether to pick it up. *Kimble*, 576 U.S., at ——.

And the majority has no other special justification. It says *Williamson County* did not create "reliance

interests." *Ante,* at 2179. But even if so, those interests are a *plus-factor* in the doctrine; when they exist, *stare decisis* becomes "superpowered." *Kimble*, 576 U.S., at ——; *Payne*, 501 U.S. at 828 (*Stare decisis* concerns are "at their acme" when "reliance interests are involved"). The absence of reliance is not itself a reason for overruling a decision. Next, the majority says that the "justification for [*Williamson County*'s] state-litigation requirement" has "evolve[d]." *Ante*. But to start with, it has not. The original rationale—in the majority's words, that the requirement "is an element of a takings claim," *ante*, at 2178—has held strong for 35 years (including in the cases the majority cites), and is the same one I rely on today. See, *e.g., Horne*, 569 U.S. at 525–526 (quoting *Williamson County*'s rationale); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) (same); *supra*, at 2181 – 2182. And anyway, "evolution" in the way a decision is described has never been a ground for abandoning *stare decisis*. Here, the majority's only citation is to last Term's decision overruling a 40-year-old precedent. See *ante* (citing *Janus* v. *State, County, and Municipal Employees*, 585 U.S. ——, —— (2018)). If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all.

What is left is simply the majority's view that *Williamson County* was wrong. The majority repurposes all its merits arguments—all its claims that *Williamson County* was "ill founded"—to justify its overruling. *Ante*, at 2177 – 2178. But the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). For it is hard to overstate the value, in a country like ours, of stability in the law.

Just last month, when the Court overturned another longstanding precedent, Justice BREYER penned a dissent. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U.S. ——, —— (2019). He wrote of the dangers of reversing legal course "only because five Members of a later Court" decide that an earlier ruling was incorrect. *Id.*, at —— – ——. He concluded: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Ibid.* Well, that didn't take long. Now one may wonder yet again.

Supreme Court of the United States

Thomas E. DOBBS, State Health Officer of the Mississippi Department of Health, et al., Petitioners
v.
JACKSON WOMEN'S HEALTH ORGANIZATION, et al.

Decided June 24, 2022

Justice ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*, 410 U.S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life,"[1] it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2]

[1] *Roe v. Wade*, 410 U.S. 113, 163 (1973).

[2] J. Ely, The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*, 82 Yale L. J. 920, 926, 947 (1973) (Ely) (emphasis deleted).

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.[3] As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," 410 U.S. 179, 222 (1973), and it sparked a national controversy that has

embittered our political culture for a half century.[4]

[3] L. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

[4] See R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) ("*Roe*... halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue").

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way.[5] Four others wanted to overrule the decision in its entirety.[6] And the three remaining Justices, who jointly signed the controlling opinion, took a third position.[7] Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion.[8] But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong.[9] Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

[5] See 505 U.S. at 911 (Stevens, J., concurring in part and dissenting in part); *id.,* at 922 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

[6] See *id*., at 944 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

[7] See *id*., at 843 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[8] *Id*., at 853.

[9] *Id*., at 860.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part.[10]*Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion.[11] The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.[12]

[10] *Id*., at 861, 870, 873 (overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

[11] 505 U.S. at 874.

[12] *Id.*, at 867.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[13]

[13] Miss. Code Ann. § 41–41–191(4)(b) (2018).

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. § 41–41–191 (2018), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." § 4(b).[14]

[14] The Act defines "gestational age" to be "the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman." § 3(f).

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States "permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation."[15] § 2(a). The legislature then found that at 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails ... begin to form"; at 11 weeks "an unborn human being's diaphragm is developing," and he or she may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects." § 2(b)(i) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007)). It found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8).

[15] Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms 6–7 (2014); M. Lee, Is the United States One of Seven Countries That "Allow Elective Abortions After 20 Weeks of Pregnancy?" Wash. Post (Oct. 8, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-preganacy (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was "backed by data"). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021), https://reproductiverights.org/ maps/worlds-abortion-laws/.

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and that 15 weeks' gestational age is "prior to viability." *Jackson Women's Health Org. v. Currier*, 349 F.Supp.3d 536, 539–540 (S.D. Miss. 2019) (internal quotation marks omitted). The Fifth Circuit affirmed. 945 F.3d 265 (2019).

We granted certiorari, 593 U.S. —— (2021), to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional," Pet. for Cert. i. Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." Brief for Petitioners 49. Respondents answer that allowing

Mississippi to ban pre-viability abortions "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They tell us that "no half-measures" are available: We must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based. See *infra,* at ——— – ———.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden*, 9 Wheat. 1, 186–189 (1824), which offers a "fixed standard" for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. See 410 U.S. at 152–153. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.*, at 152.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded ... in the Ninth Amendment's reservation of rights to the people." *Id.,* at 153. Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. *Ibid*; see also *McDonald v. Chicago*, 561 U.S. 742, 763–766 (2010) (majority opinion) (discussing incorporation). And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe*, 410 U.S. at 153. *Roe* expressed the "feel[ing]" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.[16] The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

[16] The Court's words were as follows: "This right of privacy, whether it be founded in the Fourteenth

> Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for United States as *Amicus Curiae* 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae.* Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[17] The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–274 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.[18]

[17] See, *e.g., Sessions* v. *Morales-Santana*, 582 U.S. 47, ——(2017).

[18] We discuss this standard in Part VI of this opinion.

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. 505 U.S. at 846,; Brief for Respondents 17; Brief for United States 21–22.

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 247–251 (1833) (opinion for the Court by Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald*, 561 U.S. at 763–767, and nn. 12–13. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbs* v. *Indiana*, 586 U.S. ——, —— (2019) (internal quotation marks omitted); *McDonald*, 561 U.S. at 764, 767 (internal quotation marks omitted); *Glucksberg*, 521 U.S., at 721 (internal quotation marks omitted).[19] And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

[19] See also, *e.g., Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (asking whether "a right is among those

'fundamental principles of liberty and justice which lie at the base of our civil and political institutions' "); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (requiring "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

Justice Ginsburg's opinion for the Court in *Timbs* is a recent example. In concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," 586 U.S., at ——,(internal quotation marks omitted), her opinion traced the right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment. 586 U.S., at —— – ——.

A similar inquiry was undertaken in *McDonald*, which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U.S. at 767–777. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id*., at 778; see also *id.*, at 822–850 (THOMAS, J., concurring in part and concurring in judgment) (surveying history and reaching the same result under the Fourteenth Amendment's Privileges or Immunities Clause).

Timbs and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," 521 U.S., at 711, and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," *id*., at 720–721.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."[20] In a well-known essay, Isaiah Berlin reported that "[h]istorians of ideas" had cataloged more than 200 different senses in which the term had been used.[21]

[20] Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953).

[21] Four Essays on Liberty 121 (1969).

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "Substantive due process has at times been a treacherous field for this Court," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–226 (1985). As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."

521 U.S., at 720 (internal quotation marks and citation omitted).

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by " 'respect for the teachings of history,' " *Moore,* 431 U.S. at 503 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45 (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[22]

[22] That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. See, *e.g., McDonald v. Chicago*, 561 U.S. 742, 813–850 (2010) (THOMAS, J., concurring in part and concurring in judgment); *Duncan*, 391 U.S. at 165–166 (Black, J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 163–180 (1998) (Amar); J. Ely, Democracy and Distrust 22–30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089–1095 (1953). But even on that view, such a right would need to be rooted in the Nation's history and tradition. See *Corfield v. Coryell*, 6 F.Cas. 546, 551–552 (No. 3,230) (C.C.E.D. Pa. 1823) (describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, § 2, as those "fundamental" rights "which have, at all times, been enjoyed by the citizens of the several states"); Amar 176 (relying on *Corfield* to interpret the Privileges or Immunities Clause); cf. *McDonald*, 561 U.S. at 819–820, 832, 854 (opinion of THOMAS, J.) (reserving the question whether the Privileges or Immunities Clause protects "any rights besides those enumerated in the Constitution").

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.[23]

[23] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968) (Lucas); see also D. Garrow, Liberty and Sexuality 334–335 (1994) (Garrow) (stating that Lucas was "undeniably the first person to fully articulate on paper" the argument that "a woman's right to choose abortion was a fundamental individual freedom protected by the U.S. Constitution's guarantee of personal liberty").

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.[24]

[24] The exact meaning of "quickening" is subject to some debate. Compare Brief for Scholars of Jurisprudence as *Amici Curiae* 12–14, and n. 32 (emphasis deleted) (" 'a quick child' " meant simply a "live" child, and under the era's outdated knowledge of embryology, a fetus was thought to become "quick" at around the sixth week of pregnancy), with Brief for American Historical Association et al. as *Amici Curiae* 6, n. 2 ("quick" and "quickening" consistently meant "the woman's perception of fetal movement"). We need not wade into this debate. First, it suffices for present purposes to show that abortion was criminal by *at least* the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period—*i.e.,* the period surrounding the enactment of the Fourteenth Amendment—the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See *infra*, at ——— – ———.

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler* v. *Kansas*, 589 U.S. ———, ——— (2020), *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).[25]

[25] Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222–223 (L. Downer ed. 1972) (imposing penalty for any abortion and treating a woman who aborted a "quick" child "as if she were a murderess").

Sir Edward Coke's 17th-century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." 3 Institutes of the Laws of England 50–51 (1644). ("Misprision" referred to "some heynous offence under the degree of felony." *Id*., at 139.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke). 1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone).

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths of Abortion History 126, and n. 16, 134–142, 188–194, and nn. 84–86 (2006) (Dellapenna); J. Keown, Abortion, Doctors and the Law 3–12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "thereby causing her to miscarry."[26] For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.[27]

[26] 2 Gentleman's Magazine 931 (Aug. 1732).

[27] *Id*., at 932.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Cf. *Glucksberg*, 521 U.S., at

713 (removal of "common law's harsh sanctions did not represent an acceptance of suicide"). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had "never met with a case so barbarous and unnatural."[28] Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." Keown 7 (discussing *R.* v. *Webb*, Calendar of Assize Records, Surrey Indictments 512 (1980)).

[28] *Ibid.*

That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child*"* a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Hale 429–430 (emphasis added). As Blackstone explained, to be "murder" a killing had to be done with "malice aforethought, ... either express or implied." 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

> "[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it." *Id.*, at 200–201 (emphasis added; footnote omitted).[29]

[29] Other treatises restated the same rule. See 1 W. Russell & C. Greaves, Crimes and Misdemeanors 540 (5th ed. 1845) ("So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder" (footnotes omitted)); 1 E. East, Pleas of the Crown 230 (1803) (similar).

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be "with quick child"—only that she be "with child." *Id*., at 201. And it is revealing that Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient "without any intent of doing [the patient] any bodily hurt." Hale 429; see 4 Blackstone 197. These other physicians—even if "unlicensed"—would not be "guilty of murder or manslaughter." Hale 429. But a physician performing an abortion would, precisely because his aim was an "unlawful" one.

In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," *District of Columbia v. Heller*, 554 U.S. 570 (2008), reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor," 2 St. George Tucker, Blackstone's Commentaries 129–130 (1803), and that edition also included Blackstone's discussion of the proto-felony-murder rule, 5 *id*., at 200–201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's

statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. See, *e.g.*, J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221–222 (7th ed. 1762) (English manual stating the same).[30]

[30] For manuals restating one or both rules, see J. Davis, Criminal Law 96, 102–103, 339 (1838); Conductor Generalis 194–195 (1801) (printed in Philadelphia); Conductor Generalis 194–195 (1794) (printed in Albany); Conductor Generalis 220 (1788) (printed in New York); Conductor Generalis 198 (1749) (printed in New York); G. Webb, Office and Authority of a Justice of Peace 232 (1736) (printed in Williamsburg); Conductor Generalis 161 (1722) (printed in Philadelphia); see also J. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices' "primary source of legal reference" and of "practical value for a wider audience than the justices").
For cases stating the proto-felony-murder rule, see, *e.g.*, *Commonwealth v. Parker*, 50 Mass. 263, 265 (1845); *People v. Sessions*, 58 Mich. 594, 595–596, 26 N.W. 291, 292–293 (1886); *State v. Moore*, 25 Iowa 128, 131–132 (1868); *Smith v. State*, 33 Me. 48, 54–55 (1851).

The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215–228 (collecting cases). In Maryland in 1652, for example, an indictment charged that a man "Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb." *Proprietary* v. *Mitchell*, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891). And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, *e.g*., *Smith v. Gaffard*, 31 Ala. 45, 51 (1857); *Smith v. State*, 33 Me. 48, 55 (1851); *State v. Cooper*, 22 N.J.L. 52, 52–55 (1849); *Commonwealth v. Parker*, 50 Mass. 263, 264–268 (1845).

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,[31] and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no *evidence* of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined *evidencesof life*." *Evans v. People*, 49 N.Y. 86, 90 (emphasis added); *Cooper*, 22 N.J.L. at 56 ("In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives *the first physical proof of life*, no matter when it first received it" (emphasis added)).

[31] See E. Rigby, A System of Midwifery 73 (1841) ("Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months"); see also *id.,* at 74–80 (discussing rudimentary techniques for detecting early pregnancy); A. Taylor, A Manual of Medical Jurisprudence 418–421 (6th Am. ed. 1866) (same).

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.' " Brief for United States 26 (quoting *Parker*, 50 Mass. at 266). But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Ibid*. (citing 1 Blackstone 129); see also *Evans,* 49 N.Y. at 89; *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *Hall v. Hancock*, 32 Mass. 255, 258 (1834); *Thellusson* v. *Woodford*, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because

the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." F. Wharton, Criminal Law § 1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, Researches in Medicine and Medical Jurisprudence 26–28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious").[32] In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation." Keown 22.

[32] See *Mitchell v. Commonwealth*, 78 Ky. 204, 209–210 (1879) (acknowledging the common-law rule but arguing that "the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation"); *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) (the quickening rule "never ought to have been the law anywhere"); J. Bishop, Commentaries on the Law of Statutory Crimes § 744, p. 471 (1873) ("If we look at the reason of the law, we shall prefer" a rule that "discard[s] this doctrine of the necessity of a quickening"); I. Dana, Report of the Committee on the Production of Abortion, in 5 Transactions of the Maine Medical Association 37–39 (1866); Report on Criminal Abortion, in 12 Transactions of the American Medical Association 75–77 (1859); W. Guy, Principles of Medical Forensics 133–134 (1845); J. Chitty, Practical Treatise on Medical Jurisprudence 438 (2d Am. ed. 1836); 1 T. Beck & J. Beck, Elements of Medical Jurisprudence 293 (5th ed. 1823); 2 T. Percival, The Works, Literary, Moral and Medical 430 (1807); see also Keown 38–39 (collecting English authorities).

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order).[33] By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.[34] See *ibid.* Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. See *ibid.*

[33] See generally Dellapenna 315–319 (cataloging the development of the law in the States); E. Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L. J. 395, 435–437, 447–520 (1961) (Quay) (same); J. Witherspoon, Reexamining *Roe*: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment, 17 St. Mary's L. J. 29, 34–36 (1985) (Witherspoon) (same).

[34] Some scholars assert that only 27 States prohibited abortion at all stages. See, *e.g.*, Dellapenna 315; Witherspoon 34–35, and n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See Acts and Resolves R. I. 1861, ch. 371, § 1, p. 133 (criminalizing the attempt to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant," without mention of quickening). The *amicus* brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare Brief for American Historical Association 27–28 (citing Quay), with Appendix A, *infra*.

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). See Appendix B, *infra*; see also *Casey*, 505 U.S. at 952 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); Dellapenna 317–319. By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U.S. at 139.[35]

[35] The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed "unlawfully" or "without lawful justification." *Roe*, 410 U.S. at 139 (internal quotation marks omitted). In Massachusetts, case law held that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the woman's life or her physical or emotional health. *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mother's life was not at risk. See *State v. Brandenburg*, 137 N.J.L. 124, 58 A.2d 709 (1948); *Commonwealth v. Trombetta*, 131 Pa.Super. 487, 200 A. 107 (1938).
Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted "abortion to preserve the mother's health." *Roe*, 410 U.S. at 139. Case law in those jurisdictions does not clarify the breadth of these exceptions.

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *id.*, at 118, and n. 2 (listing States). And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. *Id.*, at 140; Tribe 2. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793 (1986) (White, J., dissenting).

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]." 521 U.S., at 719.

3

Respondents and their *amici* have no persuasive answer to this historical evidence.

* * * *

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U.S. at 154, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U.S. at 851. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid*.

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *tothink* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*, 410 U.S. at 150 (emphasis deleted); *Casey*, 505 U.S. at 852. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. § 41–41–191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 470 U.S. 753 (1985), *Washington v. Harper*, 494 U.S. 210 (1990), *Rochin v. California*, 342 U.S. 165 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States 23–24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U.S. at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. *Id*., at 1440, 1445.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." See *Roe*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U.S. at 848. Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Roe* and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy;[42] that leave for pregnancy and childbirth are now guaranteed by law in many cases;[43] that the costs of medical care associated with pregnancy are covered by insurance or government assistance;[44] that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously;[45] and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.[46] They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

[42] See, *e.g.*, Pregnancy Discrimination Act, 92 Stat. 2076, 42 U.S. C. § 2000e(k) (federal law prohibiting pregnancy discrimination in employment); Dept. of Labor, Women's Bureau, Employment Protections for Workers Who Are Pregnant or Nursing, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (showing that 46 States and the District of Columbia have employment protections against pregnancy discrimination).

[43] See, *e.g.*, Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U.S. C. § 2612 (federal law guaranteeing employment leave for pregnancy and birth); Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

[44] The Affordable Care Act (ACA) requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U.S. C. § 18022(b)(1)(D). The ACA also prohibits annual limits, see § 300gg–11, and limits annual cost-sharing obligations on such benefits, § 18022(c). State Medicaid plans must provide coverage for pregnancy-related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 CFR §§ 440.210(a)(2)(i)–(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U.S. C. §§ 1396***o***(a)(2)(B), (b)(2)(B).

[45] Since *Casey*, all 50 States and the District of Columbia have enacted such laws. Dept. of Health and Human Servs., Children's Bureau, Infant Safe Haven Laws 1–2 (2016), https://www.childwelfare.gov/pubPDFs/safehaven.pdf (noting that safe haven laws began in Texas in 1999).

[46] See, *e.g.*, CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18–44 Years of Age in the United States 16 (Aug. 2008) ("[N]early 1 million women were seeking to adopt children in 2002 (*i.e.*, they were in demand for a child), whereas the domestic supply of infants relinquished

at birth or within the first month of life and available to be adopted had become virtually nonexistent"); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, https://www.cdc.gov/nchs/nsfg/key_statistics/a-keystat.htm# adoption (showing that approximately 3.1 million women between the ages of 18–49 had ever "[t]aken steps to adopt a child" based on data collected from 2015–2019).

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a " 'deeply rooted' " one, " 'in this Nation's history and tradition.' " *Glucksberg*, 521 U.S., at 721; see *post*, at ——— – ——— (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare *post*, at ——— – ———, n. 2, with *supra,* at ——— – ———, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," *Roe*, 410 U.S. at 139; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. Compare *post*, at ——— – ———, nn. 2–3, with *supra,* at ——— – ———, and nn. 33–34.[47]

[47] By way of contrast, at the time *Griswold v. Connecticut*, 381 U.S. 479 (1965), was decided, the Connecticut statute at issue was an extreme outlier. See Brief for Planned Parenthood Federation of America, Inc. as *Amicus Curiae* in *Griswold* v. *Connecticut*, O. T. 1964, No. 496, p. 27.

The dissent's failure to engage with this long tradition is devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be " 'deeply rooted in this Nation's history and tradition' " before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*, 521 U.S., at 721; cf. *Timbs*, 586 U.S., at ———. But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of *Glucksberg.* The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," *post,* at ———, but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920, see *post*, at ———; Amdt. 19—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey.* The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." *Post*,

at ——— (internal quotation marks omitted). This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe*, 410 U.S. at 222 (dissenting opinion), and while the dissent claims that its standard "does not mean anything goes," *post*, at ———, any real restraints are hard to discern.

The largely limitless reach of the dissenters' standard is illustrated by the way they apply it here. First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life." See *supra*, at ———.

So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not " 'an inexorable command.' " *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. The dissent repeatedly praises the "balance," *post*, at ———, ———, ———, ———, ———, that the viability line strikes between a woman's liberty interest and the State's interest in prenatal life. But for reasons we discuss later, see *infra,* at ——— – ———, ——— – ———, and given in the opinion of THE CHIEF JUSTICE, *post,* at ——— – ——— (opinion concurring in judgment), the viability line makes no sense. It was not adequately justified in *Roe*, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has

passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that " 'theory of life.' " *Post*, at ———

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. See *Casey*, 505 U.S. at 856 (joint opinion); see also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U.S. at 455. It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. *Payne*, 501 U.S. at 827. It "contributes to the actual and perceived integrity of the judicial process." *Ibid*. And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (internal quotation marks omitted), and it "is at its weakest when we interpret the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235 (1997). It has been said that it is sometimes more important that an issue " 'be settled than that it be settled right.' " *Kimble*, 576 U.S. at 455 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages," *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816) (opinion for the Court by Story, J.)—we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; *Kimble*, 576 U.S. at 456. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. *Id*., at 488 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U.S. at 491.

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.*, at 545. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding invalid a law setting maximum working hours); *Coppage v. Kansas*, 236 U.S. 1 (1915) (holding invalid a law banning contracts forbidding employees to join a union); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, (1924) (holding invalid laws fixing the weight of loaves of bread).

Finally, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), and held that public school

students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. (We include a partial list in the footnote that follows.[48]) Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

[48] See, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage), overruling *Baker v. Nelson*, 409 U.S. 810 (1972); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) (right to engage in campaign-related speech), overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 6526 (1990), and partially overruling *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Montejo v. Louisiana*, 556 U.S. 778 (2009) (Sixth Amendment right to counsel), overruling *Michigan v. Jackson*, 475 U.S. 625 (1986); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront witnesses), overruling *Ohio v. Roberts*, 448 U.S. 56 (1980); *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in consensual, same-sex intimacy in one's home), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Ring v. Arizona*, 536 U.S. 584 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling *Walton v. Arizona*, 497 U.S. 639 (1990); *Agostini v. Felton*, 521 U.S. 203 (1997) (evaluating whether government aid violates the Establishment Clause), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate States' Eleventh Amendment immunity), overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Payne v. Tennessee*, 501 U.S. 808 (1991) (the Eighth Amendment does not erect a *per se* bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Batson v. Kentucky*, 476 U.S. 79 (1986) (the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling *Swain v. Alabama*, 380 U.S. 202 (1965); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements, such as minimum wage laws, against the States " 'in areas of traditional governmental functions' "), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Illinois v. Gates*, 462 U.S. 213 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informant's tip establishes probable cause), overruling *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Scott*, 437 U.S. 82 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling *United States v. Jenkins*, 420 U.S. 358 (1975); *Craig v. Boren*, 429 U.S. 190 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause), overruling *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (jury system which operates to exclude women from jury service violates the defendant's Sixth and Fourteenth Amendment right to an impartial jury), overruling *Hoyt v. Florida*, 368 U.S. 57 (1961); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action), overruling *Whitney v. California*, 274 U.S. 357 (1927); *Katz v. United States*, 389 U.S. 347, 351 (1967) (Fourth Amendment "protects people, not places," and extends to what a person "seeks to preserve as private"), overruling *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942); *Miranda v. Arizona*, 384 U.S. 436 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self-incrimination), overruling *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. La Gay*, 357 U.S. 504, (1958); *Malloy v. Hogan*, 378 U.S. 1 (1964) (the Fifth Amendment privilege against self-incrimination

is also protected by the Fourteenth Amendment against abridgment by the States), overruling *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (congressional districts should be apportioned so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"), overruling in effect *Colegrove v. Green*, 328 U.S. 549 (1946); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments), overruling *Betts v. Brady*, 316 U.S. 455 (1942); *Baker v. Carr*, 369 U.S. 186 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part *Colegrove*, 328 U.S. 549; *Mapp v. Ohio*, 367 U.S. 643 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949); *Smith v. Allwright*, 321 U.S. 649 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment), overruling *Grovey v. Townsend*, 295 U.S. 45 (1935); *United States v. Darby*, 312 U.S. 100, 312 U.S. 657 (1941) (congressional power to regulate employment conditions under the Commerce Clause), overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling *Swift v. Tyson*, 16 Pet. 1 (1842).

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. *Janus* v. *State, County, and Municipal Employees*, 585 U.S. ——, —— – —— (2018); *Ramos* v. *Louisiana*, 590 U.S. ——, —— – —— (2020) (KAVANAUGH, J., concurring in part).

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy* v. *Ferguson*, was one such decision. It betrayed our commitment to "equality before the law." 163 U.S. at 562 (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, see *Ramos,* 590 U.S., at —— (opinion of KAVANAUGH, J.), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Tr. of Oral Arg. 92–93.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe*, 410 U.S. at 222 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the

national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey*, 505 U.S. at 995–996 (opinion of Scalia, J.). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." *Thornburgh*, 476 U.S. at 787 (dissenting opinion).

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. See *Janus*, 585 U.S., at —— ; *Ramos*, 590 U.S., at ——— – ———(opinion of KAVANAUGH, J.). In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained. *Roe*'s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe*'s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. See 410 U.S. at 163–164. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, the Court announced, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's

attending physician." *Id*., at 164. After that point, a State's interest in regulating abortion for the sake of a woman's health became compelling, and accordingly, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health." *Ibid*. Finally, in "the stage subsequent to viability," which in 1973 roughly coincided with the beginning of the third trimester, the State's interest in "the potentiality of human life" became compelling, and therefore a State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.,* at 164–165.

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. See Brief for Appellant and Brief for Appellee in *Roe* v. *Wade*, O. T. 1972, No. 70–18; see also C. Forsythe, Abuse of Discretion: The Inside Story of *Roe* v. *Wade,* 127, 141 (2012).

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See 410 U.S. at 130–132 (discussing ancient Greek and Roman practices).[49] When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," *id*., at 139, but it implied that these laws might have been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct," *id*., at 148.

[49] See, *e.g.*, C. Patterson, "Not Worth the Rearing": The Causes of Infant Exposure in Ancient Greece, 115 Transactions Am. Philosophical Assn. 103, 111–123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 Classical Rev. 105–108 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 Classical J. 341–351 (1923); W. Harris, Child-Exposure in the Roman Empire, 84 J. Roman Studies 1 (1994).

Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested—contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority—that the common law had probably never really treated post-quickening abortion as a crime. See *id*., at 136 ("[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus"). This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision. *Id*., at 165.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "[t]he position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion legislation. *Id*., at 141, 144, 146 (emphasis deleted). Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. *Id*., at 137–138. The Court did not explain why these

sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional "right of personal privacy," *id.,* at 152, but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce*, 268 U.S. 510 (right to send children to religious school); *Meyer*, 262 U.S. 390 (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving*, 388 U.S. 1 (right to marry a person of a different race), or procreation, *Skinner*, 316 U.S. 535 (right not to be sterilized); *Griswold*, 381 U.S. 479 (right of married persons to obtain contraceptives); *Eisenstadt*, 405 U.S. 438 (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." *Roe*, 410 U.S*.,* at 165. Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. *Id.*, at 163. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb." 410 U.S. at 163.

As Professor Laurence Tribe has written, "[c]learly, this mistakes 'a definition for a syllogism.' " Tribe 4 (quoting Ely 924). The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," 410 U.S. at 163, why isn't that interest

"equally compelling before viability"? *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (plurality opinion) (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting)). *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof.[50] By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

[50] See, *e.g.*, P. Singer, Rethinking Life & Death 218 (1994) (defining a person as "a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future"); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9–13 (1992) (arguing that "the possession of interests is both necessary and sufficient for moral status" and that the "capacity for conscious awareness is a necessary condition for the possession of interests" (emphasis deleted)); M. Warren, On the Moral and Legal Status of Abortion, 57 The Monist 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are "central to the concept of personhood": (1) "consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain"; (2) "reasoning (the developed capacity to solve new and relatively complex problems)"; (3) "self-motivated activity (activity which is relatively independent of either genetic or direct external control)"; (4) "the capacity to communicate, by whatever means, messages of an indefinite variety of types"; and (5) "the presence of self-concepts, and self-awareness, either individual or racial, or both" (emphasis deleted)); M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37, 49 (Autumn 1972) (arguing that "having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states").

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.[51] When *Roe* was decided, viability was gauged at roughly 28 weeks. See 410 U.S. at 160. Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?

[51] See W. Lusk, Science and the Art of Midwifery 74–75 (1882) (explaining that "[w]ith care, the life of a child born within [the eighth month of pregnancy] may be preserved"); *id*., at 326 ("Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week"); J. Beck, Researches in Medicine and Medical Jurisprudence 68 (2d ed. 1835) ("Although children born before the completion of the seventh month have occasionally survived, and been reared, yet in a medico-legal point of view, no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed"); see also J. Baker, The Incubator and the Medical Discovery of the Premature Infant, J. Perinatology 322 (2000) (explaining that, in the 19th century, infants born at seven to eight months' gestation were unlikely to survive beyond "the first days of life").

Viability also depends on the "quality of the available medical facilities." *Colautti v. Franklin*, 439 U.S. 379,

396 (1979). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman's location? And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

In addition, as the Court once explained, viability is not really a hard-and-fast line. *Ibid*. A physician determining a particular fetus's odds of surviving outside the womb must consider "a number of variables," including "gestational age," "fetal weight," a woman's "general health and nutrition," the "quality of the available medical facilities," and other factors. *Id.*, at 395–396. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. *Id.*, at 396. And even if each fetus's probability of survival could be ascertained with certainty, settling on a "probabilit[y] of survival" that should count as "viability" is another matter. *Ibid.* Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual "attending physician on the particular facts of the case before him"? *Id.*, at 388.

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.[52] The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

[52] According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request. See Center for Reproductive Rights, The World's Abortion Laws (Feb. 23, 2021), https://reproductiverights.org/maps/worlds-abortion-laws.

d

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that *Roe* was "not constitutional law and g[ave] almost no sense of an obligation to try to be." Ely 947 (emphasis deleted). Archibald Cox, who served as Solicitor General under President Kennedy, commented that *Roe* "read[s] like a set of hospital rules and regulations" that "[n]either historian, layman, nor lawyer will be persuaded ... are part of ... the Constitution." The Role of the Supreme Court in American Government 113–114 (1976). Laurence Tribe wrote that "even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, 'interest-balancing' of the form the Court pursues fails to justify any of the lines actually drawn." Tribe 4–5. Mark Tushnet termed *Roe* a "totally unreasoned judicial opinion." Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988). See also P. Bobbitt, Constitutional Fate 157 (1982); A. Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 110 (2000).

Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 433–439 (1983); that minors obtain parental consent, *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, *Akron*, 462 U.S. at 442–445; that women wait 24 hours for an abortion, *id.*, at 449–451; that a physician determine viability

in a particular manner, *Colautti*, 439 U.S. at 390–397; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.,* at 397–401; and that fetal remains be treated in a humane and sanitary manner, *Akron*, 462 U.S. at 451–452.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences." *Thornburgh*, 476 U.S. at 794 (dissenting opinion). And the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, see 505 U.S. at 844 (joint opinion), and then asked the Court to overrule it once more in *Casey* itself.

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U.S. at 846. The Court did not reaffirm *Roe*'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that *Roe* had cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—*Casey* did not attempt to bolster *Roe*'s reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its much-criticized discussion of viability. The Court retained what it called *Roe*'s "central holding"—that a State may not regulate pre-viability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. 505 U.S. at 860, 870–871. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." 505 U.S. at 870. Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*." *Id*., at 853.

The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U.S. at 872, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

Casey, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. See *infra*, at ——— – – ———. This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Montejo v. Louisiana*, 556 U.S. 778, 792

(2009); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283–284 (1988). *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." 505 U.S. at 992; see also *June Medical Services L. L. C.* v. *Russo*, 591 U.S. ——, —— (2020) (GORSUCH, J., dissenting) ("[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them" (internal quotation marks and alterations omitted)).

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878 (emphasis added); see also *id*., at 877. But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. In the sense relevant here, "substantial" means "of ample or considerable amount, quantity, or size." Random House Webster's Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly "substantial," and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." *Casey*, 505 U.S. at 878. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 591 U.S., at ——– – ——– (plurality opinion), with *id.,* at ——– – ——– (ROBERTS, C. J., concurring).

The third rule complicates the picture even more. Under that rule, *"[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right." *Casey*, 505 U.S. at 878emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussed—"undue burden" and "substantial obstacle"—even though they are inconsistent. And it adds a third ambiguous term when it refers to "*unnecessary* health regulations." The term "necessary" has a range of meanings—from "essential" to merely "useful." See Black's Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1971). *Casey* did not explain the sense in which the term is used in this rule.

In addition to these problems, one more applies to all three rules. They all call on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," 505 U.S. at 895, but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 627–628 (2016), with *id.,* at 666–667, and n. 11 (ALITO, J., dissenting).

2

The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," *Casey*, 505 U.S. at 881–887, but Justice Stevens, applying the same test, reached the opposite result, *id.,* at 920–922 (opinion concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that "the undue burden standard presents nothing more workable than the trimester framework." *Id.*, at 964–966 (dissenting opinion).

The ambiguity of the "undue burden" test also produced disagreement in later cases. In *Whole Woman's Health*, the Court adopted the cost-benefit interpretation of the test, stating that "[t]he rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." 579 U.S. at 607 (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See *June Medical*, 591 U.S. ——. Four Justices reaffirmed *Whole Woman's Health*'s instruction to "weigh" a law's "benefits" against "the burdens it imposes on abortion access." 591 U.S., at —— (plurality opinion) (internal quotation marks omitted). But THE CHIEF JUSTICE—who cast the deciding vote—argued that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."*Id.,* at —— (opinion concurring in judgment). And the four Justices in dissent rejected the plurality's interpretation of *Casey*. See 591 U.S., at —— (opinion of ALITO, J., joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ.); *id.,* at —— – —— (opinion of GORSUCH, J.); *id*., at —— – —— (opinion of KAVANAUGH, J.) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard").

This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." *Casey*, 505 U.S. at 965 (opinion concurring in judgment in part and dissenting in part).

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U.S., at ——.

Casey has generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework.[53] They have disagreed on the legality of parental notification rules.[54] They have disagreed about bans on certain dilation and evacuation procedures.[55] They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.[56] And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability.[57]

[53] Compare *Whole Woman's Health v. Paxton*, 10 F.4th 430, 440 (5th Cir. 2021), *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020), and *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (*per curiam*), with *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 751–752 (7th Cir.

2021).

[54] Compare *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998), with *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 985–990 (7th Cir. 2019), cert. granted, judgment vacated, 591 U.S. —— (2020), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995).

[55] Compare *Whole Woman's Health v. Paxton*, 10 F.4th at 435–436, with *West Ala. Women's Center v. Williamson*, 900 F.3d 1310, 1319, 1327 (11th Cir. 2018), and *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 960 F.3d 785, 806–808 (6th Cir. 2020).

[56] Compare *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004), with *Women's Medical Professional Corp.* v. *Baird*, 438 F.3d 595, 605 (6th Cir, 2006), and *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 171–172 (4th Cir. 2000).

[57] Compare *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 520–535 (6th Cir. 2021), with *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 688–690 (8th Cir. 2021).

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching unpredictable results.[58] And they have candidly outlined *Casey*'s many other problems.[59]

[58] See, *e.g.,Bristol Regional Women's Center, P.C. v. Slatery*, 7 F.4th 478, 485 (6th Cir, 2021); *Reproductive Health Servs. v. Strange*, 3 F.4th 1240, 1269 (11th Cir. 2021) (*per curiam*); *June Medical Servs., L.L.C. v. Gee*, 905 F.3d 787, 814 (5th Cir. 2018), rev'd, 591 U.S. —— (2020); *Preterm-Cleveland*, 994 F.3d at 534; *Planned Parenthood of Ark. & Eastern Okla. v. Jegley*, 864 F.3d 953, 958–960 (8th Cir. 2017); *McCormack v. Hertzog*, 788 F.3d 1017, 1029–1030 (9th Cir. 2015); compare *A Womans Choice–East Side Womens Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002) (Coffey, J., concurring), with *id.*, at 708 (Wood, J., dissenting).

[59] See, *e.g., Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 994 F.3d at 524; *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Dept. of Health*, 888 F.3d 300, 313 (7th Cir. 2018) (Manion, J., concurring in judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of reh'g en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be ... and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)"); *National Abortion Federation v. Gonzales*, 437 F.3d 278, 290–296 (2d Cir. 2006) (Walker, C. J., concurring); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 931 (10th Cir. 2002) (Baldock, J., dissenting).

Casey's "undue burden" test has proved to be unworkable. "[P]lucked from nowhere," 505 U.S. at 965 (opinion of Rehnquist, C. J.), it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal

principles." *Payne*, 501 U.S. at 827.

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos*, 590 U.S., at ——(opinion of KAVANAUGH, J.); *Janus*, 585 U.S., at ——.

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting); see *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting in part); *Whole Woman's Health*, 579 U.S. at 631–633 (THOMAS, J., dissenting); *id.,* at 645–666, 678–684 (ALITO, J., dissenting); *June Medical*, 591 U.S., at —— – —— (GORSUCH, J., dissenting).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges.[60] They have ignored the Court's third-party standing doctrine.[61] They have disregarded standard *res judicata* principles.[62] They have flouted the ordinary rules on the severability of unconstitutional provisions,[63] as well as the rule that statutes should be read where possible to avoid unconstitutionality.[64] And they have distorted First Amendment doctrines.[65]

[60] Compare *United States v. Salerno*, 481 U.S. 739, 745 (1987), with *Casey*, 505 U.S. at 895; see also *supra,* at —— – ——.

[61] Compare *Warth v. Seldin*, 422 U.S. 490, 499 (1975), and *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15, 17–18 (2004), with *June Medical*, 591 U.S., at —— (ALITO, J., dissenting), *id.*, at —— – —— (GORSUCH, J., dissenting) (collecting cases), and *Whole Woman's Health*, 579 U.S. at 632, n. 1 (THOMAS, J., dissenting).

[62] Compare *id.*, at 598–606 (majority opinion), with *id.,* at 645–666 (ALITO, J., dissenting).

[63] Compare *id.*, at 623–626 (majority opinion), with *id*., at 644–645 (ALITO, J., dissenting).

[64] See *Stenberg v. Carhart*, 530 U.S. 914, 977–978, (2000) (Kennedy, J., dissenting); *id.,* at 996–997 (THOMAS, J., dissenting).

[65] See *Hill v. Colorado*, 530 U.S. 703, 741–742 (2000) (Scalia, J., dissenting); *id.*, at 765 (Kennedy, J., dissenting).

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *Id*., at —— (THOMAS, J., dissenting) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance

interests. See *Ramos*, 590 U.S., at ——— (opinion of KAVANAUGH, J.); *Janus*, 585 U.S., at ——— – ———.

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*, 505 U.S. at 856 (joint opinion); see also *Payne*, 501 U.S. at 828. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U.S. at 856. For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Id.*, at 957 (opinion of Rehnquist, C. J.). *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." *Payne*, 501 U.S. at 828.

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34–36; Brief for Women Scholars et al. as *Amici Curiae* 13–20, 29–41, with Brief for Respondents 36–41; Brief for National Women's Law Center et al. as *Amici Curiae* 15–32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729–730 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[66] In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,[67] constituted 55.5 percent of the voters who cast ballots.[68]

[66] See Dept. of Commerce, U.S. Census Bureau (Census Bureau), An Analysis of the 2018 Congressional Election 6 (Dec. 2021) (Fig. 5) (showing that women made up over 50 percent of the voting population in every congressional election between 1978 and 2018).

[67] Census Bureau, QuickFacts, Mississippi (July 1, 2021), https://www. census.gov/quickfacts/MS.

[68] Census Bureau, Voting and Registration in the Election of November 2020, Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States 26 (citing *Obergefell*, 576 U.S. 644; *Lawrence*, 539 U.S. 558; *Griswold*, 381 U.S. 479). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." 505 U.S. at 852; see also *Roe*, 410 U.S. at 159 (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." 505 U.S. at 865. There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*. 505 U.S. at 866–867. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," 505 U.S. at 867, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, see 505 U.S. at 869.

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. Cf. *Texas v. Johnson*, 491 U.S. 397 (1989); *Brown*, 347 U.S. 483. That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." *Casey*, 505 U.S. at 963 (opinion concurring in judgment in part and dissenting in part). In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion

right simply by saying that the matter was closed. *Id.,* at 867. That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. *Casey*, 505 U.S. at 995 (opinion of Scalia, J.); see also R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue"). And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power." *Roe*, 410 U.S. at 222 (White, J., dissenting).

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V
A
1

The dissent argues that we have "abandon[ed]" *stare decisis*, *post,* at ——, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." *Post*, at ——. To support this contention, the dissent claims that *Brown v. Board of Education*, 347 U.S. 483, and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." *Post,* at ——. The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects? *Post,* at ——— – ———.

Here is another example. On the dissent's view, it must have been wrong for *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, to overrule *Minersville School Dist. v. Gobitis*, 310 U.S. 586 , a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The *Barnette* Court did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissent's new version of *stare decisis,* it would have been compelled to adhere to *Gobitis* and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so. *Post*, at ———.

2

Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of post-*Casey* developments, see *supra*, at ——— – ———, ——— – ———, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division," 505 U.S. at 867. That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. See *post,* at ——— – ———. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. See *post,* at ———. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. *Post*, at ——— – ———, ——— – ———, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Supra*, at ———. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." *Roe*, 410 U.S. at 150 (emphasis deleted); *Casey*, 505 U.S. at 852. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." *Supra*, at ———. It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these

cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. That opinion (which for convenience we will call simply "the concurrence") recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." *Post*, at ——— (opinion of ROBERTS, C. J.). The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at ———, and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion, *post*, at ———. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." *Post*, at ———, ———.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and the Solicitor General have urged us either to reaffirm or overrule *Roe* and *Casey*. See *supra*, at ——— – ———. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents' counsel termed it "completely unworkable" and "less principled and less workable than viability." Tr. of Oral Arg. 54. The Solicitor General argued that abandoning the viability line would leave courts and others with "no continued guidance." *Id*., at 101. What is more, the concurrence has not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or *amicus* asked the Court to adopt." *Post*, at ———.

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "discar[d]" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." *Post*, at ——— . But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." *Post*, at ———. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. *Post*, at ——— – ———. That is simply incorrect.

Roe's trimester rule was expressly tied to viability, see 410 U.S. at 163–164, and viability played a critical role in later abortion decisions. For example, in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, the Court reiterated *Roe*'s rule that a "State may regulate an abortion to protect the life of the fetus and even may proscribe abortion" at "the stage *subsequent to viability*." 428 U.S. at 61, (emphasis added). The Court then rejected a challenge to Missouri's definition of viability, holding that the State's definition was consistent with *Roe*'s. 428 U.S. at 63–64. If viability was not an essential part of the rule adopted in *Roe*, the Court would have had no need to make that comparison.

The holding in *Colautti v. Franklin*, 439 U.S. 379, is even more instructive. In that case, the Court noted that prior cases had "stressed viability" and reiterated that "[v]iability is the critical point" under *Roe*.439 U.S. at 388–389,. It then struck down Pennsylvania's definition of viability, *id.*, at 389–394, and it is hard to see how the Court could have done that if *Roe*'s discussion of viability was not part of its holding.

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*'s "central holding," 505 U.S. at 860, and repeatedly stated that the right it reaffirmed was "the right of the woman to choose to have an abortion *before viability*." *Id*., at 846 (emphasis added). See *id*., at 871 ("The woman's right to terminate her pregnancy *before viability* is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce" (emphasis added)); *id*., at 872 (A "woman has a right to choose to terminate or continue her pregnancy *before viability*" (emphasis added)); *id*., at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy *before viability*" (emphasis added)).

Our subsequent cases have continued to recognize the centrality of the viability rule. See *Whole Women's Health*, 579 U.S. at 589–590 ("[A] provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*' " (emphasis deleted and added)); *id.*, at 627 ("[W]e now use *'viability'* as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health" (emphasis added)).

Not only is the new rule proposed by the concurrence inconsistent with *Casey*'s unambiguous "language," *post*, at ——, it is also contrary to the judgment in that case and later abortion cases. In *Casey*, the Court held that Pennsylvania's spousal-notification provision was facially unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. See 505 U.S. at 887–898. The same is true of *Whole Women's Health*, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed "a substantial obstacle in the path of women seeking *a previability abortion*." 579 U.S. at 591 (emphasis added).

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is " 'deeply rooted in this Nation's history and tradition' " and " 'implicit in the concept of ordered liberty.' " *Glucksberg*, 521 U.S., at 720–721. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United*, 558 U.S. at 375 (ROBERTS, C. J., concurring). For the reasons that we have explained, the concurrence's approach is not.

3

The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at ——, but "another day" would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi's. See, *e.g.*, *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th at 414 (considering law with bans "at cascading intervals of two to three weeks" beginning at six

weeks), reh'g en banc granted, 14 F. 4th at 550 (6th Cir. 2021). If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a "reasonable" opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see *post*, at ——— – ———, ——— – ———, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. *Post*, at ———. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. See *supra,* at ——— – ———.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U.S. at 729–730; see also *Dandridge v. Williams*, 397 U.S. 471, 484–486 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–368 (2001) ("treatment of the disabled"); *Glucksberg*, 521 U.S., at 728 ("assisted suicide"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32–35, 55, (1973) ("financing public education").

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U.S. at 157–158; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *id.*, at 156–157; *Roe*, 410 U.S. at 150; cf. *Glucksberg*, 521 U.S., at 728–731 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. § 41–41–191(4)(b). The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." § 2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8); see also *Gonzales*, 550 U.S. at 135–143 (describing such procedures). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDICES

* * * *

Justice THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty" protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). "[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical." *June Medical Services L. L.C.* v. *Russo*, 591 U.S. ——, —— (2020) (THOMAS, J., dissenting).

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, *e.g., Johnson v. United States*, 576 U.S. 591, 623 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." *United States* v. *Vaello Madero*, 596 U.S. ——, —— (2022) (THOMAS, J., concurring) (internal

quotation marks omitted). Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also, *e.g., Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U.S. at 607–608 (opinion of THOMAS, J.); see also, *e.g., Vaello Madero*, 596 U.S., at ——— (THOMAS, J., concurring) ("[T]ext and history provide little support for modern substantive due process doctrine"). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment); see also *United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring in judgment). The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives)[*]; *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, see *ante,* at ——— – ———, ———, ——— – ———, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," *McDonald*, 561 U.S. at 813 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante,* at ———.

[*] *Griswold* v. *Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." 381 U.S. at 484. Since *Griswold,* the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process. See, *e.g.,Obergefell v. Hodges*, 576 U.S. 644, 663 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos* v. *Louisiana*, 590 U.S. ———, ——— (2020) (THOMAS, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States*, 587 U.S. ———, ——— (2019) (THOMAS, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. Amdt. 14, § 1; see *McDonald*, 561 U.S. at 806 (opinion of THOMAS, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. See *id.*, at 854. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See *ante,* at ———, n. 22.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." *McDonald*, 561 U.S. at 811 (opinion of

THOMAS, J.); accord, *Obergefell*, 576 U.S. at 722 (THOMAS, J., dissenting). At least three dangers favor jettisoning the doctrine entirely.

First, "substantive due process exalts judges at the expense of the People from whom they derive their authority." *Ibid*. Because the Due Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." *Timbs* v. *Indiana*, 586 U.S. ——, —— (2019) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." *Carlton*, 512 U.S. at 41–42 (opinion of Scalia, J.); see also *McDonald*, 561 U.S. at 812 (opinion of THOMAS, J.) (substantive due process is "a jurisprudence devoid of a guiding principle"). The Court divines new rights in line with "its own, extraconstitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court divined a right to abortion because it "fe[lt]" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.,* at 153. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than a "right of privacy," it invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*, at 851. As the Court's preferred manifestation of "liberty" changed, so, too, did the test used to protect it, as *Roe*'s author lamented. See *Casey*, 505 U.S. at 930 (Blackmun, J., concurring in part and dissenting in part) ("[T]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard").

Now, in this case, the nature of the purported "liberty" supporting the abortion right has shifted yet again. Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith," Brief for Respondents 21, and "women's equal citizenship," Brief for United States as *Amicus Curiae* 24. That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, *e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453–454 (1972) (relying on *Griswold* to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain "nonfundamental" rights, meanwhile, receive only cursory review. See, *e.g., Armour v. Indianapolis*, 566 U.S. 673, 680 (2012). Similarly, this Court deems unconstitutionally "vague" or "overbroad" those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. See, *e.g.*, *Johnson*, 576 U.S. at 618–621 (opinion of THOMAS, J.); *United States* v. *Sineneng-Smith*, 590 U.S. ——, —— – —— – (2020) (THOMAS, J., concurring). "In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe* v. *Wade*," and it since has been "deployed ... to nullify even mild regulations of the abortion industry." *Johnson,* 576 U.S. at 620–621 (opinion of THOMAS, J.). Therefore, regardless of the doctrinal context, the Court often "demand[s] extra justifications for encroachments" on "preferred rights" while "relax[ing] purportedly higher standards of review for less preferred rights." *Whole Woman's*

Health v. Hellerstedt, 579 U.S. 582, 640–642 (2016) (THOMAS, J., dissenting). Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to "disastrous ends." *Gamble*, 587 U.S., at —— (THOMAS, J., concurring). For instance, in *Dred Scott v. Sandford*, 19 How. 393 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. See *id.,* at 452. While *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox," *Obergefell*, 576 U.S. at 696 (ROBERTS, C. J., dissenting), that overruling was "[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment). Now today, the Court rightly overrules *Roe* and *Casey*—two of this Court's "most notoriously incorrect" substantive due process decisions, *Timbs*, 586 U.S., at —— (opinion of THOMAS, J.)—after more than 63 million abortions have been performed, see National Right to Life Committee, Abortion Statistics (Jan. 2022), https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf. The harm caused by this Court's forays into substantive due process remains immeasurable.

* * *

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U.S. at 42 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Justice KAVANAUGH, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today's decision.

I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health. They contend that the widespread availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity and fundamental morality. And they stress that a significant percentage of Americans with pro-life views are women.

When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy.

Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal life—at least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be s ure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.[1]

[1] The Court's opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified, and that abortion remained largely prohibited in most American States until *Roe* was decided in 1973.

On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

Some *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the "States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979 (1992) (opinion concurring in judgment in

part and dissenting in part).

Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the *amici* States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may maintain laws that more strictly limit abortion. After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.[2]

[2] In his dissent in *Roe*, Justice Rehnquist indicated that an exception to a State's restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113, 173 (1973). Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. Some statutes also provide other exceptions.

In arguing for a *constitutional* right to abortion that would override the people's choices in the democratic process, the plaintiff Jackson Women's Health Organization and its *amici* emphasize that the Constitution does not freeze the American people's rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. See generally Amdt. 9; Amdt. 10; Art. I, § 8; Art. V; J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7–21, 203–216 (2018); A. Amar, America's Constitution: A Biography 285–291, 315–347 (2005).

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not "been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (dissenting opinion); see *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292–293 (1990) (Scalia, J., concurring).

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion. See *Casey*, 505 U.S. at 953 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 980, (opinion of Scalia, J.); *Roe v. Wade*, 410 U.S. 113 (1973) (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the *Roe* decision.

The principle of *stare decisis* requires respect for the Court's precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. *Stare decisis* is rooted in Article III of the

Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent. This Court's history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); and *Bowers v. Hardwick*, 478 U.S. 186 (1986), would never have been overruled and would still be the law.

In his canonical *Burnet* opinion in 1932, Justice Brandeis stated that in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (dissenting opinion). That description of the Court's practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Taft's appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, *e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015) (overruling *Baker* v. *Nelson*); *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy* v. *Ferguson*); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.* and in effect *Lochner* v. *New York*).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See *Ramos* v. *Louisiana*, 590 U.S. ——, ——– – ——– (2020) (KAVANAUGH, J., concurring in part).

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, *Roe* was "an improvident and extravagant exercise of the power of judicial review" because "nothing in the language or history of the Constitution" supports a constitutional right to abortion. *Bolton*, 410 U.S. at 221−222 (dissenting opinion).

Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court's constitutional authority; gravely distorted the Nation's understanding of this Court's proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U.S. at 162,. All of that explains why tens of millions of Americans—and the 26 States that explicitly ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later. Under the Court's longstanding *stare decisis* principles, *Roe* should be overruled.[3]

[3] I also agree with the Court's conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of *Roe*, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525 (1923), to construct a laissez-faire economy that was free of

substantial regulation. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court nonetheless overruled *Adkins* and in effect *Lochner*. An entire region of the country relied on *Plessy v. Ferguson*, 163 U.S. 537 (1896), to enforce a system of racial segregation. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court overruled *Plessy*. Much of American society was built around the traditional view of marriage that was upheld in *Baker v. Nelson*, 409 U.S. 810 (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court nonetheless overruled *Baker*.

But the *stare decisis* analysis here is somewhat more complicated because of *Casey*. In 1992, 19 years after *Roe*, *Casey* acknowledged the continuing dispute over *Roe*. The Court sought to find common ground that would resolve the abortion debate and end the national controversy. After careful and thoughtful consideration, the *Casey* plurality reaffirmed a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than *Roe* had allowed.[4]

[4] As the Court today notes, *Casey*'s approach to *stare decisis* pointed in two directions. *Casey* reaffirmed *Roe*'s viability line, but it expressly overruled the *Roe* trimester framework and also expressly overruled two landmark post-*Roe* abortion cases—*Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). See *Casey*, 505 U.S. at 870, 872. *Casey* itself thus directly contradicts any notion of absolute *stare decisis* in abortion cases.

I have deep and unyielding respect for the Justices who wrote the *Casey* plurality opinion. And I respect the *Casey* plurality's good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, *Casey*'s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U.S. at 162. In this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

In short, *Casey*'s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people's views on the abortion issue. But that predictive judgment has not borne out. As the Court today explains, the experience over the last 30 years conflicts with *Casey*'s predictive judgment and therefore undermines *Casey*'s precedential force.[5]

[5] To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Court's traditional *stare decisis* factors. The only point here is that *Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms.

In any event, although *Casey* is relevant to the *stare decisis* analysis, the question of whether to overrule *Roe* cannot be dictated by *Casey* alone. To illustrate that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed *Plessy* v. *Ferguson* and upheld the States' authority to segregate people on the basis of race. Would the Court in *Brown* some 30 years later in 1954 have

reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

In sum, I agree with the Court's application today of the principles of *stare decisis* and its conclusion that *Roe* should be overruled.

III

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause. Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

* * *

The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution. As Justice Scalia explained, *Roe*" destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level." *Casey*, 505 U.S. at 995 (opinion concurring in judgment in part and dissenting in part).

The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the people's authority to resolve the issue of abortion through the processes of democratic self government established by the Constitution.

To be sure, many Americans will disagree with the Court's decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must

scrupulously adhere to the Constitution's neutral position on the issue of abortion.

Since 1973, more than 20 Justices of this Court have now grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

Chief Justice ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. i. That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. § 41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade*, 410 U.S. 113, (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Pet. for Cert. 5.

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe a*nd *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as "viable" outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. See *ante,* at ——— – ———. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), included *any* gestational age limit. No party or *amicus* asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument. See Tr. of Oral Arg. 17–18, 51 (fleeting discussion of the viability rule).

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Court's jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb. See 410 U.S. at 163–164; see also J. Ely, The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*, 82 Yale L. J. 920, 924 (1973) (*Roe*'s reasoning "mistake[s] a definition for a syllogism").

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. See 505 U.S. at 870. But see *ante,* at ——— (opinion of the Court) (discussing the difficulties in applying the viability standard). Although the plurality attempted to add more content by opining that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child," *Casey*, 505 U.S. at 870, that mere suggestion provides no basis for choosing viability as the critical tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant, A. Ayoola, M. Nettleman, M. Stommel, & R. Canady, Time of Pregnancy Recognition and Prenatal Care Use: A Population-based Study in the United States 39 (2010) (Pregnancy Recognition). The dissent, which would retain the viability line, offers no justification for it either.

This Court's jurisprudence since *Casey,* moreover, has "eroded" the "underpinnings" of the viability line, such as they were. *United States v. Gaudin*, 515 U.S. 506, 521 (1995). The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of "potential life." *Roe*, 410 U.S. at 162–163. That changed with *Gonzales v. Carhart*, 550 U.S. 124 (2007). There, we recognized a broader array of interests, such as drawing "a bright line that clearly distinguishes abortion and infanticide," maintaining societal ethics, and preserving the integrity of the medical profession. *Id.,* at 157–160. The viability line has nothing to do with advancing such permissible goals. Cf. *id.,* at 171 (Ginsburg, J., dissenting) (*Gonzales* "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions"); see also R. Beck, *Gonzales*, *Casey*, and the Viability Rule, 103 Nw. U. L. Rev. 249, 276–279 (2009).

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, *e.g.,*Ala. Code § 26–23B–2 (2018). Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to "protect[ ] the integrity and ethics of the medical profession" and restrict procedures likely to "coarsen society" to the "dignity of human life." *Gonzales*, 550 U.S. at 157. Mississippi's law, for instance, was premised in part on the legislature's finding that the "dilation and evacuation" procedure is a "barbaric practice, dangerous for the maternal patient, and demeaning to the

medical profession." Miss. Code Ann. § 41–41–191(2)(b)(i)(8). That procedure accounts for most abortions performed after the first trimester—two weeks before the period at issue in this case—and "involve[s] the use of surgical instruments to crush and tear the unborn child apart." *Ibid.*; see also *Gonzales*, 550 U.S. at 135. Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed "telling that other countries almost uniformly eschew" a viability line. *Ante,* at —— (opinion of the Court). Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12–week line. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021) (online source archived at www.supremecourt.gov) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in*Roe*. Mississippi itself previously argued as much to this Court in this litigation.

When the State petitioned for our review, its basic request was straightforward: "clarify whether abortion prohibitions before viability are always unconstitutional." Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, *id.*, at 15–26—arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*." *Id.,* at 5. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile *Roe* and *Casey* with current facts or other cases, it "should not retain erroneous precedent." Pet. for Cert. 5–6, n. 1. But the State never argued that we should grant review for that purpose.

After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule *Roe* and *Casey*. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12–13.

The Court now rewards that gambit, noting three times that the parties presented "no half-measures" and argued that "we must either reaffirm or overrule *Roe* and *Casey*." *Ante,* at ——, ——, ——. Given those two options, the majority picks the latter.

This framing is not accurate. In its brief on the merits, Mississippi in fact argued at length that a decision simply rejecting the viability rule would result in a judgment in its favor. See Brief for Petitioners 5, 38–48. But even if the State had not argued as much, it would not matter. There is no rule that parties can confine this Court to disposing of their case on a particular ground—let alone when review was sought and granted on a different one. Our established practice is instead not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288 (1936) (Brandeis, J., concurring)); see also *United States v. Raines*, 362 U.S. 17, 21 (1960).

Following that "fundamental principle of judicial restraint," *Washington State Grange*, 552 U.S. at 450, we

should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. See, *e.g.,Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (declining to address the claim that a constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument).

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 518, 521 (1989) (plurality opinion) (rejecting *Roe*'s viability line as "rigid" and "indeterminate," while also finding "no occasion to revisit the holding of *Roe*" that, under the Constitution, a State must provide an opportunity to choose to terminate a pregnancy).

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." See *Carey v. Population Services Int'l*, 431 U.S. 678, 688–689 (1977) ("underlying foundation of the holdings" in *Roe* and *Griswold v. Connecticut*, 381 U.S. 479 (1965), was the "right of decision in matters of childbearing"); *Maher v. Roe*, 432 U.S. 464, 473 (1977) (*Roe* and other cases "recognize a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion" (internal quotation marks omitted)); *id.*, at 473–474 (*Roe* "did not declare an unqualified constitutional right to an abortion," but instead protected "the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (internal quotation marks omitted)); *Webster*, 492 U.S. at 520 (plurality opinion) (*Roe* protects "the claims of a woman to decide for herself whether or not to abort a fetus she [is] carrying"); *Gonzales*, 550 U.S. at 146 (a State may not "prohibit any woman from making the ultimate decision to terminate her pregnancy"). If that is the basis for *Roe*, *Roe*'s viability line should be scrutinized from the same perspective. And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. See *Webster*, 492 U.S. at 519 (plurality opinion) (finding no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability").

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." 505 U.S. at 860. Other cases of ours have repeated that language. See, *e.g., Gonzales*, 550 U.S. at 145–146. But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. See Brief for Appellants and Brief for Appellees, in *Roe* v. *Wade*, O. T. 1971, No. 70–18. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to "choose to terminate [a] pregnancy" under the Constitution, see 410 U.S. at 129–159, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see *id.*, at 163. The viability line is a separate rule fleshing out the metes and bounds of *Roe*'s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence.

The majority lists a number of cases that have stressed the importance of the viability rule to our abortion

precedents. See *ante,* at ——— – ———. I agree that—whether it was originally holding or dictum—the viability line is clearly part of our "past precedent," and the Court has applied it as such in several cases since *Roe*. *Ante,* at ——— – ———. My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address *Roe*'s conclusion that the Constitution protects the woman's right to abortion, without also addressing *Roe*'s rule that the State's interests are not constitutionally adequate to justify a ban on abortion until viability. See *ibid*. But we have partially overruled precedents before, see, *e.g.,United States v. Miller*, 471 U.S. 130, 142–144 (1985); *Daniels v. Williams*, 474 U.S. 327, 328–331 (1986); *Batson v. Kentucky*, 476 U.S. 79, 90–93 (1986), and certainly have never held that a distinct holding defining the contours of a constitutional right must be treated as part and parcel of the right itself.

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722 (2017). Almost all know by the end of the first trimester. Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., Abortion, 22 Geo. J. Gender & L. 279, 303 (2021). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, Abortion Surveillance—United States 1 (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman "to decide for herself " whether to terminate her pregnancy. *Webster*, 492 U.S. at 520 (plurality opinion).[1]

[1] The majority contends that "nothing like [my approach] was recommended by either party." *Ante,* at ——— . But as explained, Mississippi in fact pressed a similar argument in its filings before this Court. See Pet. for Cert. 15–26; Brief for Petitioners 5, 38–48 (urging the Court to reject the viability rule and reverse); Reply Brief 20–22 (same). The approach also finds support in prior opinions. See *Webster*, 492 U.S. at 518–521 (plurality opinion) (abandoning "key elements" of the *Roe* framework under *stare decisis* while declining to reconsider *Roe*'s holding that the Constitution protects the right to an abortion).

III

Whether a precedent should be overruled is a question "entirely within the discretion of the court." *Hertz v. Woodman*, 218 U.S. 205, 212 (1910); see also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (*stare decisis* is a "principle of policy"). In my respectful view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely. The Court says there is no "principled basis" for this approach, *ante,* at ———, but in fact it is firmly grounded in basic principles of *stare decisis* and judicial restraint.

The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. Brief for Respondents 36–41; see also *Casey*, 505 U.S. at 856 (making the same point). The Court questions whether these concerns are pertinent under our precedents, see *ante,* at ——— – ———, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education*, 347 U.S. 483 (1954), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See *ante,* at ——— – ———. The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court's interpretation of the Constitution, "signal[ing] the demise of an entire line of important precedents," *ante,* at ———a feature the Court expressly disclaims in today's decision, see *ante,* at ———, ———. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. See *ante*, at ——— – ———. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." *Ante*, at ———. But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective

* * *

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372–373 (1955) (Frankfurter, J., for the Court). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

For half a century, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey*

reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*, 505 U.S. at 853; *Gonzales v. Carhart*, 550 U.S. 124, 171–172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*, 505 U.S. at 850. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." *Id.*, at 846. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. *Ante*, at ——. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of

State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. *Ante*, at ——. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto. *Ante*, at —— (KAVANAUGH, J., concurring).

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, 505 U.S. at 856. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." *Ante*, at ——; cf. *ante*, at —— (THOMAS, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. *Ante*, at ——–. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." *Ante*, at ——. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no

good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. It understood that different people's "experiences," "values," and "religious training" and beliefs led to "opposing views" about abortion. 410 U.S. at 116. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*, at 152–153 (citations omitted). For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. The Court recognized the myriad ways bearing a child can alter the "life and future" of a woman and other members of her family. *Ibid.* A State could not, "by adopting one theory of life," override all "rights of the pregnant woman." *Id.*, at 162.

At the same time, though, the Court recognized "valid interest[s]" of the State "in regulating the abortion

decision." *Id.*, at 153. The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. *Id.*, at 154. No "absolut[ist]" account of the woman's right could wipe away those significant state claims. *Ibid.*

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." *Id.*, at 155. It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability—the point when the fetus "has the capability of meaningful life outside the mother's womb"—the State could ban abortions, except when necessary to preserve the woman's life or health. *Id.*, at 163–164.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that "arguments [against *Roe*] continue to be made," we responded that the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419–420 (1983). And we avowed that the "vitality" of "constitutional principles cannot be allowed to yield simply because of disagreement with them." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986). So the Court, over and over, enforced the constitutional principles *Roe* had declared. See, *e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important. But we leave for later that aspect of the Court's decision. The key thing now is the substantive aspect of the Court's considered conclusion that "the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed." 505 U.S. at 846.

Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." 505 U.S. at 847–848. And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. See *id.*, at 848. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Id.*, at 849 (citations omitted); see *id.*, at 851 (similarly describing the constitutional protection given to "personal decisions relating to marriage, procreation, contraception, [and] family relationships"). Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. *Ibid.*; see *id.*, at 852–853. In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. *Id.*, at 851 (emphasis deleted). So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course. See *id.*, at 853.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. Some Americans, the Court stated, "deem [abortion] nothing short of an act of violence against innocent human life." 505 U.S. at 852. And each State has an interest in "the protection of potential life"—as *Roe* itself had recognized. 505 U.S. at 871(plurality opinion). On the one hand, that interest was not conclusive. The State could not "resolve" the "moral and spiritual" questions raised by abortion in "such a definitive way that a woman lacks all choice in the matter." *Id.*, at 850 (majority opinion). It could not force her to bear the "pain" and "physical constraints" of "carr[ying] a child to full term" when she would have chosen an early abortion. *Id.*, at 852. But on the other hand, the State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions in the later phase of a pregnancy. And it had an ever-present interest in "ensur[ing] that the woman's choice is informed" and in presenting the case for "choos[ing] childbirth over abortion." 505 U.S. at 878 (plurality opinion).

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. 505 U.S. at 860 (majority opinion). The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. *Id.*, at 870 (plurality opinion). At that point, a "second life" was capable of "independent existence." *Ibid.* If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on [the developing child's] behalf." *Ibid.* At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promot[e] prenatal life." 505 U.S. at 873 (plurality opinion). In particular, the State could ensure informed choice and could try to promote childbirth. See *id.*, at 877–878. But the State still could not place an "undue burden"—or "substantial obstacle"—"in the path of a woman seeking an abortion." *Id.*, at 878. Prior to viability, the woman, consistent with the constitutional "meaning of liberty," must "retain the ultimate control over her destiny and her body." *Id.*, at 869.

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." *Ante*, at ——. Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.[1] But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for "repeatedly prais[ing] the 'balance' " the two cases arrived at (with the word "balance" in scare quotes). *Ante*, at ——. To the majority "balance" is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

[1] For this reason, we do not understand the majority's view that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think "[t]he Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance." *Ante*, at ——. To the contrary. The liberty interests underlying those rights are, as we will describe, quite similar. See *infra*, at —— – ——. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both *Roe* and *Casey* recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority's failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U.S. ——, ——, —— – —— (2022) (slip op., at 8, 15–17). The majority thinks that a woman has *no* liberty or equality interest in the decision to bear a child, so a State's interest in protecting fetal life necessarily prevails.

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? *Ante*, at —— – —— . The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. See *ante*, at ——. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U.S. ——, —— (2022) (slip op., at 26) ("Historical evidence that long predates [ratification] may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. See *ibid.* (It is "better not to go too far back into antiquity," except if olden "law survived to become our Founders' law"). Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb.[2] And early American law followed the common-law rule.[3] So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. See *ante*, at ——, ——. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn., Inc.*, 597 U.S., at —— – —— (slip op., at 27–28). Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

[2] See, *e.g.*, 1 W. Blackstone, Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone); E. Coke, Institutes of the Laws of England 50 (1644).

[3] See J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900, pp. 3–4 (1978). The majority offers no evidence to the contrary—no example of a founding-era law making prequickening abortion a crime (except when a woman died). See *ante*, at —— – ——. And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical

Association et al. as *Amici Curiae* 27, and n. 14.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. See *ante*, at —— ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted"); see also *ante*, at ——, ——, and n. 24, 23, 25, 28. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. See *infra*, at —— – ——. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. See 505 U.S. at 896–897 (majority opinion) (citing *Bradwell v. State*, 16 Wall. 130 (1873)). "There was a time," *Casey* explained, when the Constitution did not protect "men and women alike." 505 U.S. at 896. But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was "no longer consistent with our understanding" of the Constitution. *Id.*, at 897. Now, "[t]he Constitution protects all individuals, male or female," from "the abuse of governmental power" or "unjustified state interference." *Id.*, at 896, 898.

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB v. Noel Canning*, 573 U.S. 513, 533–534 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come,"

and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, 521 U.S. 702 (1997), that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. *Obergefell*, 576 U.S. at 671. And the Court specifically rejected that view.[4] In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See *ibid.* The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia*, 388 U.S. 1 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. 576 U.S. at 671. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

[4] The majority ignores that rejection. See *ante*, at ——, ——, ——. But it is unequivocal: The *Glucksberg* test, *Obergefell* said, "may have been appropriate" in considering physician-assisted suicide, but "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." 576 U.S. at 671.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." *Ante*, at ——. At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. See *ante*, at ——, ——, —— – ——; *ante*, at —— (KAVANAUGH, J., concurring); but see *ante*, at —— (THOMAS, J., concurring). But that is a matter we discuss later. See *infra*, at —— – ——. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."505 U.S. at 848.[5] To hold otherwise—as the majority does today—"would be inconsistent with our law." *Id.*, at 847. Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." *Id.*, at 847, 849, 851. *Casey* described in detail the Court's contraception cases. See *id.*, at 848–849, 851–853. It noted decisions protecting the right to marry, including to someone of another race. See *id.*, at 847–848 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference"). In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.*, at 849.

[5] In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from *Casey* is true. See *ante*, at ——— – ———. But how could that be? Has not the majority insisted for the prior 30 or so pages that the "specific practice[ ]" respecting abortion at the time of the Fourteenth Amendment precludes its recognition as a constitutional right? *Ante*, at ———. It has. And indeed, it has given no other reason for overruling *Roe* and *Casey*. *Ante*, at ——— – ———. We are not mindreaders, but here is our best guess as to what the majority means. It says next that "[a]bortion is nothing new." *Ante*, at ———. So apparently, the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See *ante*, at ——— – ——— (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably "license fundamental rights" to illegal "drug use [and] prostitution"). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as Justice KAVANAUGH tries to argue. *Ante*, at ——— – ———, ———, ———, ——— – ——— (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? *Ante*, at ———. If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose Justice KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves

everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. Justice KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Court's cases protecting "bodily integrity." *Casey*, 505 U.S. at 84. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (Every adult "has a right to determine what shall be done with his own body"). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 766–767 (1985) (forced surgery); *Rochin v. California*, 342 U.S. 165, 166, 173–174 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U.S. 210, 229, 236 (1990) (forced administration of antipsychotic drugs).

Casey recognized the "doctrinal affinity" between those precedents and *Roe*. 505 U.S. at 857. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. See *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 618 (2016). That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. See 410 U.S. at 153. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*, 505 U.S. at 851, 857; *Roe*, 410 U.S. at 152–153; see also *ante*, at ——— – ——— (listing the myriad decisions of this kind that *Casey* relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*, 505 U.S. at 851. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in

hand; they do not inhabit the hermetically sealed containers the majority portrays. Compare *Obergefell*, 576 U.S. at 672–675, with *ante*, at ———–———. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. See, *e.g.*, *Loving*, 388 U.S. 1 (interracial couples); *Turner v. Safley*, 482 U.S. 78 (1987) (prisoners); see also, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651–652 (1972) (offering constitutional protection to untraditional "family unit[s]"). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*, 539 U.S. 558; *Obergefell*, 576 U.S. 644. In considering that question, the Court held, "[h]istory and tradition," especially as reflected in the course of our precedent, "guide and discipline [the] inquiry." *Id.*, at 664. But the sentiments of 1868 alone do not and cannot "rule the present." *Ibid.*

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. See *supra*, at ———. A woman then, *Casey* wrote, "had no legal existence separate from her husband." 505 U.S. at 897. Women were seen only "as the center of home and family life," without "full and independent legal status under the Constitution." *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." *Id.*, at 852. And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." *Id.*, at 856. Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. See *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). That clause, we explained, necessarily conferred a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453; see *Carey*, 431 U.S. at 684–685. *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." 505 U.S. at 852. "[R]easonable people," the Court noted, could also oppose contraception; and indeed, they could believe that "some forms of contraception" similarly implicate a concern with "potential life." *Id.*, at 853, 859. Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—"the liberty of the woman is at stake in a sense unique to the human condition." *Id.*, at 852. No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice. *Id.*, at 850.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." *Ante*, at ———; *Casey*, 505 U.S. at 851. Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—

in particular, rights to same-sex intimacy and marriage. See *supra*, at ——.[6] On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante*, at ——; see *ante*, at —— – ——. That right is unique, the majority asserts, "because [abortion] terminates life or potential life." *Ante*, at —— (internal quotation marks omitted); see *ante*, at ——, —— – ——. So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

[6] And note, too, that the author of the majority opinion recently joined a statement, written by another member of the majority, lamenting that *Obergefell* deprived States of the ability "to resolve th[e] question [of same-sex marriage] through legislation." *Davis* v. *Ermold*, 592 U.S. —— (2020) (statement of THOMAS, J.) (slip op., at 1). That might sound familiar. Cf. *ante*, at —— (lamenting that *Roe* "short-circuited the democratic process"). And those two Justices hardly seemed content to let the matter rest: The Court, they said, had "created a problem that only it can fix." *Davis*, 592 U.S., at —— (slip op., at 4).

The first problem with the majority's account comes from Justice THOMAS's concurrence—which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, Justice THOMAS explains, he means only that they are not at issue in this very case. See *ante*, at —— ("[T]his case does not present the opportunity to reject" those precedents). But he lets us know what he wants to do when they are. "[I]n future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." *Ante*, at ——; see also *supra*, at ——, and n. 6. And when we reconsider them? Then "we have a duty" to "overrul[e] these demonstrably erroneous decisions." *Ante*, at ——. So at least one Justice is planning to use the ticket of today's decision again and again and again.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." *Ante*, at ——; see *ante*, at —— (aligning itself with *Roe*'s and *Casey*'s stance of not deciding whether life or potential life is involved); *ante*, at —— – —— (similar). The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life).[7] According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. *Ante*, at —— – ——.[8]

[7] Indulge a few more words about this point. The majority had a choice of two different ways to overrule *Roe* and *Casey*. It could claim that those cases underrated the State's interest in fetal life. Or it could claim that

they overrated a woman's constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. See *ante*, at ——— – ———, ———. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected "person," such that an abortion ban is constitutionally *mandated.* The majority therefore chooses the second path, arguing that the Fourteenth Amendment does not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection. The trouble is that the chosen path—which is, again, the solitary rationale for the Court's decision—provides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception.

[8] The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority's (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority's redoing any other decision it considered egregiously wrong. See *infra*, at ——— – ———.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to explain lines. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did "not involve" same-sex marriage. 539 U.S. at 604. That could be true, he wrote, "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.*, at 605. Score one for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen because of today's decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. See *supra*, at ———, ——— – ———. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then ... what *is* the basis of today's decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.[9]

[9] As this Court has considered this case, some state legislators have begun to call for restrictions on certain forms of contraception. See I. Stevenson, After *Roe* Decision, Idaho Lawmakers May Consider Restricting Some Contraception, Idaho Statesman (May 10, 2022), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html; T. Weinberg, "Anything's on the Table": Missouri Legislature May Revisit Contraceptive Limits Post-*Roe*, Missouri Independent (May 20, 2022), https://www.missouriindependent.com/2022/05/ 20/anythings-on-the-table-missouri-legislature-may-

revisit-contraceptivelimits-post-roe/.

Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. "*Stare decisis*" means "to stand by things decided." Black's Law Dictionary 1696 (11th ed. 2019). Blackstone called it the "established rule to abide by former precedents." 1 Blackstone 69. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827. It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568–569 (1994).

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." *Vasquez*, 474 U.S. at 26. As Hamilton wrote: It "avoid[s] an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 Blackstone 69. The "glory" of our legal system is that it "gives preference to precedent rather than ... jurists." H. Humble, Departure From Precedent, 19 Mich. L. Rev. 608, 614 (1921). That is why, the story goes, Chief Justice John Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Gamble* v. *United States*, 587 U.S. ——, —— (2019). *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015).

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, as further described below and in the Appendix. See *infra*, at ——— – ———. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. See *ante*, at ———.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. In holding that a State could not "resolve" the debate about abortion "in such a definitive way that a woman lacks all choice in the matter," the Court protected women's liberty and women's equality in a way comporting with our Fourteenth Amendment precedents. *Casey*, 505 U.S. at 850. Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here. *Ante*, at ———; see *ante*, at ———. To repeat: The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638; *supra*, at ———. However divisive, a right is not at the people's mercy.

In any event "[w]hether or not we ... agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." *Ante*, at ———. That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. So how does that approach prevent the "scale of justice" from "waver[ing] with every new judge's opinion"? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical Services L.L.C.* v. *Russo*, 591 U.S. ———, ——— (2020) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more

conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See *Dickerson*, 530 U.S. at 441 ("No court laying down a general rule can possibly foresee the various circumstances" in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011); *Burdick v. Takushi*, 504 U.S. 428, 433–434 (1992); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Casey* undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. See *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 62 (1911); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42–43 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much "is to be expected in the application of any legal standard which must accommodate life's complexity." 505 U.S. at 878 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying the standard. We count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the *June Medical* majority about whether *Casey* called for weighing the benefits of an abortion regulation against its burdens. See 591 U.S., at ——— – ———; *ante*, at ———, ———, and n. 53.[10] We agree that the *June Medical* difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in *June Medical*), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. See *ante*, at ———, and n. 57. That is about it, as far as we can see.[11] And that is not much. This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority's summer.

[10] Some lower courts then differed over which opinion in *June Medical* was controlling—but that is a dispute not about the undue burden standard, but about the "*Marks* rule," which tells courts how to determine the precedential effects of a divided decision.

[11] The rest of the majority's supposed splits are, shall we say, unimpressive. The majority says that lower courts have split over how to apply the undue burden standard to parental notification laws. See *ante*, at ———, and n. 54. But that is not so. The state law upheld had an exemption for minors demonstrating adequate maturity, whereas the ones struck down did not. Compare *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 383–384 (4th Cir. 1998), with *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 981 (7th Cir. 2019), cert. granted, judgment vacated, 591 U.S. ——— (2020), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995). The majority says there is a split about bans on certain types of abortion procedures. See *ante*, at ———, and n. 55. But the one court to have separated itself on that issue did so based on a set of factual findings significantly different from those in other cases. Compare *Whole Woman's Health v. Paxton*, 10 F.4th 430, 447–453 (5th Cir. 2021), with *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 960 F.3d 785, 798–806 (6th Cir. 2020), and *West Ala.*

Women's Center v. Williamson, 900 F.3d 1310, 1322–1324 (11th Cir. 2018). Finally, the majority says there is a split about whether an increase in travel time to reach a clinic is an undue burden. See *ante*, at ——, and n. 56. But the cases to which the majority refers predate this Court's decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), which clarified how to apply the undue burden standard to that context.

Anyone concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Ante*, at ——. And the majority lists interests like "respect for and preservation of prenatal life," "protection of maternal health," elimination of certain "medical procedures," "mitigation of fetal pain," and others. *Ante*, at ——. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? See generally L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe* v. *Wade*, 386 New England J. Med. 2061 (2022).[12]

[12] To take just the last, most medical treatments for miscarriage are identical to those used in abortions. See Kaiser Family Foundation (Kaiser), G. Weigel, L. Sobel, & A. Salganicoff, Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/ understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-andfetal-harm-laws/. Blanket restrictions on "abortion" procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies. See Health Affairs, J. Strasser, C. Chen, S. Rosenbaum, E. Schenk, & E. Dewhurst, Penalizing Abortion Providers Will Have Ripple Effects Across Pregnancy Care (May 3, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220503.129912/.

Finally, the majority's ruling today invites a host of questions about interstate conflicts. See *supra*, at ——; see generally D. Cohen, G. Donley, & R. Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4032931. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming "interjurisdictional abortion wars." *Id.*, at —— (draft, at 1).

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. A review of the Appendix to this dissent proves the point. See *infra*, at ——— – ———. Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Certainly, that was so of the main examples the majority cites: *Brown v. Board of Education*, 347 U.S. 483 (1954), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. *Ante*, at ———; see *ante*, at ———. The majority briefly invokes the current controversy over abortion. See *ante*, at ——— – ———. But it has to acknowledge that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, than to jettison, existing precedent. See *infra*, at ——— – ———.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law. See *ante*, at ———.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. *Casey*, 505 U.S. at 857. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*, 539 U.S. at 578; *supra*, at ———. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U.S. at 665–666; *supra*, at ———. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. See *supra*, at ——— – ———. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of " 'obsolete constitutional thinking.' " *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Casey*, 505 U.S. at 857).

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. See *supra*, at ———. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.[13] Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. See *ante*, at ——— – ———. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away.[14] Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.[15]

[13] See L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the

Overturn of *Roe* v. *Wade*, 386 New England J. Med. 2061, 2063 (2022). This projected racial disparity reflects existing differences in maternal mortality rates for black and white women. Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes. See Brief for Howard University School of Law Human and Civil Rights Clinic as *Amicus Curiae* 18.

[14] See Centers for Medicare and Medicaid Services, Issue Brief: Improving Access to Maternal Health Care in Rural Communities 4, 8, 11 (Sept. 2019), https://www.cms.gov/About-CMS/Agency-Information/ OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf. In Mississippi, for instance, 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist. Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–13.

[15] Dept. of Labor, National Compensation Survey: Employee Benefits in the United States, Table 31 (Sept. 2020), https://www.bls.gov/ncs/ebs/ benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf# page=299.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see *ante*, at ——, and nn. 45–46, but, to the degree that these are changes at all, they too are irrelevant.[16] Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption.[17] The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.[18]

[16] Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die. See Centers for Disease Control and Prevention (CDC), R. Wilson, J. Klevens, D. Williams, & L. Xu, Infant Homicides Within the Context of Safe Haven Laws—United States, 2008–2017, 69 Morbidity and Mortality Weekly Report 1385 (2020).

[17] A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves. See G. Sisson, L. Ralph, H. Gould, & D. Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Women's Health Issues 136, 139 (2017).

[18] The majority finally notes the claim that "people now have a new appreciation of fetal life," partly because of viewing sonogram images. *Ante*, at ——. It is hard to know how anyone would evaluate such a claim and as we have described above, the majority's reasoning does not rely on any reevaluation of the interest in protecting fetal life. See *supra*, at ——, and n. 7. It is worth noting that sonograms became widely used in the 1970s, long before *Casey*. Today, 60 percent of women seeking abortions have at least one child, and one-third have two or more. See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 6 (2021). These women know, even as they choose to have an abortion, what it is to look at a sonogram image and to value a fetal life.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*,

notwithstanding the majority's supposed "modern developments." *Ante*, at ——. Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use.[19] The State neither bans pregnancy discrimination nor requires provision of paid parental leave. Brief for Yale Law School Information Society Project as *Amicus Curiae* 13 (Brief for Yale Law School); Brief for National Women's Law Center et al. as *Amici Curiae* 32. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. See Brief for 547 Deans, Chairs, Scholars and Public Health Professionals et al. as *Amici Curiae* 32–34 (Brief for 547 Deans). Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. See Brief for Yale Law School 12–13. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death.[20] It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. See Brief for 547 Deans 9–10. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health. See Brief for 547 Deans 23–34.

[19] Guttmacher Institute, K. Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002, Table 1 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf; Kaiser, State Requirements for Insurance Coverage of Contraceptives (May 1, 2022), https://www.kff.org/state-category/womens-health/family-planning; Miss. Code Ann. § 37–13–171(2)(d) (Cum. Supp. 2021) ("In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied").

[20] See CDC, Infant Mortality Rates by State (Mar. 3, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant _mortality.htm; Mississippi State Dept. of Health, Infant Mortality Report 2019 & 2020, pp. 18–19 (2021), https://www.msdh.ms.gov/msdhsite/_static/resources/18752.pdf; CDC, Percentage of Babies Born Low Birthweight by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm; CDC, Cesarean Delivery Rate by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm; Mississippi State Dept. of Health, Mississippi Maternal Mortality Report 2013–2016, pp. 5, 25 (Mar. 2021), https://www.msdh.ms.gov/msdhsite/_static/resources/8127.pdf.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. See *ante*, at —— and n. 15. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 18–22. Canada has decriminalized abortion at any point in a pregnancy. See *id.*, at 13–15. Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. See *id.*, at 24–27; Brief for European Law Professors as *Amici Curiae* 16–17, Appendix. They also typically make access to early abortion easier, for example, by helping cover

its cost.[21] Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 28–29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

[21] See D. Grossman, K. Grindlay, & B. Burns, Public Funding for Abortion Where Broadly Legal, 94 Contraception 451, 458 (2016) (discussing funding of abortion in European countries).

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

2

In support of its holding, see *ante*, at ——, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co.* v. *Parrish* and *Brown* v. *Board of Education*. But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is. See 505 U.S. at 861–864.

West Coast Hotel overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525 (1923), and a whole line of cases beginning with *Lochner v. New York*, 198 U.S. 45 (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. 261 U.S. at 554–555. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkins*'s assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). In *West Coast Hotel*, the Court caught up, recognizing through the lens of experience the flaws of existing legal doctrine. See also *ante*, at —— (ROBERTS, C. J., concurring in judgment). The havoc the Depression had worked on ordinary Americans, the Court noted, was "common knowledge through the length and breadth of the land." 300 U.S. at 399. The *laissez-faire* approach had led to "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living." *Ibid.* And since *Adkins* was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens' economic well-being. See, *e.g.*, *Nebbia v. New York*, 291 U.S. 502 (1934); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931). The statements in those decisions, *West Coast Hotel* explained, were "impossible to reconcile" with *Adkins*. 300 U.S. at 398. There was no escaping the need for *Adkins* to go.

Brown v. *Board of Education* overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[ ] [in]equal[ity]." *Brown*, 347 U.S. at 495. Segregation was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*'s time, the *Brown* Court explained, both experience and "modern authority" showed the "detrimental effect[s]" of state-sanctioned segregation: It "affect[ed] [children's] hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools' exclusion of black students. See, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents of Univ. of Okla.,* 332 U.S. 631 (1948) (*per curiam*); *Missouri ex rel. Gaines v.*

Canada, 305 U.S. 337 (1938). The logic of those cases, *Brown* held, "appl[ied] with added force to children in grade and high schools." 347 U.S. at 494. Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. See *ante*, at ——. That is not so. First, if the *Brown* Court had used the majority's method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was "[a]t best ... inconclusive." 347 U.S. at 489. But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, which the majority also relies on. See *ante*, at —— – ——, ——. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court's ruling today. They protected individual rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

Casey itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported *Roe*'s overruling. In *West Coast Hotel*, *Casey* explained, "the facts of economic life" had proved "different from those previously assumed." 505 U.S. at 862. And even though "*Plessy* was wrong the day it was decided," the passage of time had made that ever more clear to ever more citizens: "Society's understanding of the facts" in 1954 was "fundamentally different" than in 1896. *Id.*, at 863. So the Court needed to reverse course. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations." *Id.*, at 864. And because such dramatic change had occurred, the public could understand why the Court was acting. "[T]he Nation could accept each decision" as a "response to the Court's constitutional duty." *Ibid*. But that would not be true of a reversal of *Roe*—"[b]ecause neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed." 505 U.S. at 864.

That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe*, the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). By 1973, when the Court decided *Roe*, fundamental social change was underway regarding the place of women—and the law had begun to follow. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S. at 897; see *supra*, at ——, —— – ——. Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests

those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." 505 U.S. at 856. Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence of any serious discussion" of how its ruling will affect women. *Ante*, at ——. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," *ante*, at ——, it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." 505 U.S. at 856. Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.*; see *supra*, at —— – ——. Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45.[22] Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. See Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings" (footnotes omitted)).

[22] See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 7 (2021); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 9.

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that " 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' " *Ante*, at —— (quoting *Casey*, 505 U.S. at 856).[23] The facts are: 45 percent of pregnancies in the United States are unplanned. See Brief for 547 Deans 5. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.[24] Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. See Brief for Legal Voice et al. as *Amici Curiae* 18–19. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a

pregnancy. See *supra*, at ——. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

[23] Astoundingly, the majority casts this statement as a "conce[ssion]" from *Casey* with which it "agree[s]." *Ante*, at ——. In fact, *Casey* used this language as part of describing an argument that it *rejected*. See 505 U.S. at 856. It is only today's Court that endorses this profoundly mistaken view.

[24] See Brief for 547 Deans 6–7 (noting that 51 percent of women who terminated their pregnancies reported using contraceptives during the month in which they conceived); Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–14 (explaining financial and geographic barriers to access to effective contraceptives).

That is especially so for women without money. When we "count[ ] the cost of [*Roe*'s] repudiation" on women who once relied on that decision, it is not hard to see where the greatest burden will fall. *Casey*, 505 U.S. at 855. In States that bar abortion, women of means will still be able to travel to obtain the services they need.[25] It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. See Brief for 547 Deans 7; Brief for Abortion Funds and Practical Support Organizations as *Amici Curiae* 8 (Brief for Abortion Funds). Even with *Roe*'s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. See Brief for Abortion Funds 7–12.[26] After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.[27]

[25] This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion. See *supra*, at ——, —— – ——. Even assuming that is so, increased out-of-state demand will lead to longer wait times and decreased availability of service in States still providing abortions. See Brief for State of California et al. as *Amici Curiae* 25–27. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation. See *United States* v. *Texas*, 595 U.S. ——, —— (2021) (SOTOMAYOR, J., concurring in part and dissenting in part) (slip op., at 6).

[26] The average cost of a first-trimester abortion is about $500. See Brief for Abortion Funds 7. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high. Guttmacher Institute, M. Donovan, In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact (Jan. 5, 2017), https://www.guttmacher.org/gpr/2017/01/real-life-federal-restrictions-abortion-coverage-and-women-they-impact#:~:text=Although%20the%20Hyde%20Amendment%20bars,provide%20abortion%20coverage%20to%20enrollees; Brief for Abortion Funds 11.

[27] Mississippi is likely to be one of the States where these costs are highest, though history shows that it will have company. As described above, Mississippi provides only the barest financial support to pregnant women. See *supra*, at ——— – ———. The State will greatly restrict abortion care without addressing any of the financial, health, and family needs that motivate many women to seek it. The effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. See L. Reagan, When Abortion Was a Crime 42–43, 198–199, 208–209 (1997). It is a history of women dying.

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. See *Casey*, 505 U.S. at 856. That expectation helps define a woman as an "equal citizen[ ]," with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting); see *supra*, at ——— – ———. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." 505 U.S. at 856. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. *Id.*, at 851. It is to alter her "views of [herself]" and her understanding of her "place[ ] in society" as someone with the recognized dignity and authority to make these choices. *Id.*, at 856. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be "very concrete," like those involving "property" or "contract." *Ante*, at ——— – ———. While many of this Court's cases addressing reliance have been in the "commercial context," *Casey*, 505 U.S. at 855, none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection.[28] This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

[28] The majority's sole citation for its "concreteness" requirement is *Payne v. Tennessee*, 501 U.S. 808 (1991). But *Payne* merely discounted reliance interests in cases involving "procedural and evidentiary rules." *Id.*, at 828. Unlike the individual right at stake here, those rules do "not alter primary conduct." *Hohn v. United States*, 524 U.S. 236, 252 (1998). Accordingly, they generally "do not implicate the reliance interests of private parties" at all. *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (SOTOMAYOR, J., concurring).

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. *Ante*, at ———. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether

to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[ ] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." *Casey*, 505 U.S. at 855; *ante*, at ——W. *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it. See *Casey*, 505 U.S. at 855

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty. *Ante*, at ——.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, *e.g.*, *Dickerson*, 530 U.S. at 443 (recognizing that *Miranda* "warnings have become part of our national culture" in declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." *Ante*, at ——. But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." *Casey*, 505 U.S. at 867–868; see *Roe*, 410 U.S. at 116. But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today's majority had done likewise.

Consider how the majority itself summarizes this aspect of *Casey*:

> "The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.' There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made 'under fire' and as a 'surrender to political pressure.' " *Ante*, at ——— – ——— (citations omitted).

That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. See *ante*, at ———. To which *Casey* would have said: That is exactly the point. Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey*, 505 U.S. at 850. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Id.*, at 868. A breach of that promise is "nothing less than a breach of faith." *Ibid.* "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996) (opinion of O'Connor, J.).

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu v. United States*, 323 U.S. 214, 246 (1944). We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

III

"Power, not reason, is the new currency of this Court's decisionmaking." *Payne*, 501 U.S. at 844 (Marshall, J., dissenting). *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has

changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*. The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to eight weeks of pregnancy, and three States enacted all-out bans.[29] Mississippi itself decided in 2019 that it had not gone far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. "[A] lot of people thought," he explained, that "finally, we have" a conservative Court "and so now would be a good time to start testing the limits of *Roe*."[30] In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back *Roe* and *Casey*, specifically assuring the Court that "the questions presented in this petition do not require the Court to overturn" those precedents. Pet. for Cert. 5; see *ante*, at ——— – ——— (ROBERTS, C. J., concurring in judgment). But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough.

[29] Guttmacher Institute, E. Nash, State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century (Dec. 16, 2021), https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other (Dec. 15, 2020), https://www.guttmacher.org/article/2020/12/state-policy-trends-2020reproductive-health-and-rights-year-no-other; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back (Dec. 10, 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back.

[30] A. Pittman, Mississippi's Six-Week Abortion Ban at 5th Circuit Appeals Court Today, Jackson Free Press (Oct. 7, 2019), https://www. jacksonfreepress.com/news/2019/oct/07/mississippis-six-week-abortion-ban-5th-circuit-app/.

Earlier this Term, this Court signaled that Mississippi's stratagem would succeed. Texas was one of the fistful of States to have recently banned abortions after six weeks of pregnancy. It added to that "flagrantly unconstitutional" restriction an unprecedented scheme to "evade judicial scrutiny." *Whole Woman's Health* v. *Jackson*, 594 U.S. ———, ——— (2021) (SOTOMAYOR, J., dissenting). And five Justices acceded to that cynical maneuver. They let Texas defy this Court's constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule in the Nation's second largest State.

And now the other shoe drops, courtesy of that same five-person majority. (We believe that THE CHIEF JUSTICE's opinion is wrong too, but no one should think that there is not a large difference between upholding a 15-week ban on the grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. See *ante*, at ———, ———, ———, and nn. 61–64 (relying on former dissents). It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

Casey itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappositeness of *West Coast Hotel* and *Brown*; the absence of any "changed circumstances" (or other reason) justifying the reversal of precedent. 505 U.S. at 864; see *supra*, at ——— – ———, ——— – ———. "[T]he Court," *Casey* explained, "could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." 505 U.S. at 864. And to overrule for that reason? Quoting Justice Stewart, *Casey* explained that to do so—to reverse prior law "upon a ground no firmer than a change in [the Court's] membership"—would invite the view that "this institution is little different from the two political branches of the Government." *Ibid.* No view, *Casey* thought, could do "more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Ibid.* For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." 505 U.S. at 864.

The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that "the legitimacy of the Court [is] earned over time." *Id.*, at 868. They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. *Id.*, at 864. It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools 30 (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

APPENDIX

This Appendix analyzes in full each of the 28 cases the majority says support today's decision to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). As explained herein, the Court in each case relied on traditional *stare decisis* factors in overruling.

A great many of the overrulings the majority cites involve a prior precedent that had been rendered out of step with or effectively abrogated by contemporary case law in light of intervening developments in the broader doctrine. See *Ramos* v. *Louisiana*, 590 U.S. ———, ——— (2020) (holding the Sixth Amendment requires a unanimous jury verdict in state prosecutions for serious offenses, and overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), because "in the years since *Apodaca*, this Court ha[d] spoken inconsistently about its meaning" and had undercut its validity "on at least eight occasions"); *Ring v. Arizona*, 536 U.S. 584, 608–609 (2002) (recognizing a Sixth Amendment right to have a jury find the aggravating factors necessary to impose a death sentence and, in so doing, rejecting *Walton v. Arizona*, 497 U.S. 639 (1990), as overtaken by and irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *Agostini v. Felton*, 521 U.S. 203, 235–236 (1997) (considering the Establishment Clause's constraint on government aid to religious instruction, and overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), in light of several related doctrinal developments that had so undermined *Aguilar* and the assumption on which it rested as to

render it no longer good law); *Batson v. Kentucky*, 476 U.S. 79, 93–96 (1986) (recognizing that a defendant may make a prima facie showing of purposeful racial discrimination in selection of a jury venire by relying solely on the facts in his case, and, based on subsequent developments in equal protection law, rejecting part of *Swain v. Alabama*, 380 U.S. 202 (1965), which had imposed a more demanding evidentiary burden); *Brandenburg v. Ohio*, 395 U.S. 444, 447–448 (1969) (*per curiam*) (holding that mere advocacy of violence is protected by the First Amendment, unless intended to incite it or produce imminent lawlessness, and rejecting the contrary rule in *Whitney v. California*, 274 U.S. 357 (1927), as having been "thoroughly discredited by later decisions"); *Katz v. United States*, 389 U.S. 347, 351, 353 (1967) (recognizing that the Fourth Amendment extends to material and communications that a person "seeks to preserve as private," and rejecting the more limited construction articulated in *Olmstead v. United States*, 277 U.S. 438 (1928), because "we have since departed from the narrow view on which that decision rested," and "the underpinnings of *Olmstead* ... have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling"); *Miranda v. Arizona*, 384 U.S. 436, 463–467, 479, n. 48 (1966) (recognizing that the Fifth Amendment requires certain procedural safeguards for custodial interrogation, and rejecting *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958), which had already been undermined by *Escobedo v. Illinois*, 378 U.S. 478 (1964)); *Malloy v. Hogan*, 378 U.S. 1, 6–9 (1964) (explaining that the Fifth Amendment privilege against "self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States," and rejecting *Twining v. New Jersey*, 211 U.S. 78 (1908), in light of a "marked shift" in Fifth Amendment precedents that had "necessarily repudiated" the prior decision); *Gideon v. Wainwright*, 372 U.S. 335, 343–345 (1963) (acknowledging a right to counsel for indigent criminal defendants in state court under the Sixth and Fourteenth Amendments, and overruling the earlier precedent failing to recognize such a right, *Betts v. Brady*, 316 U.S. 455 (1942));[31] *Smith v. Allwright*, 321 U.S. 649, 659–662 (1944) (recognizing all-white primaries are unconstitutional after reconsidering in light of "the unitary character of the electoral process" recognized in *United States v. Classic*, 313 U.S. 299 (1941), and overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)); *United States v. Darby*, 312 U.S. 100, 115–117 (1941) (recognizing Congress's Commerce Clause power to regulate employment conditions and explaining as "inescapable" the "conclusion ... that *Hammer v. Dagenhart*, [247 U.S. 251 (1918)]," and its contrary rule had "long since been" overtaken by precedent construing the Commerce Clause power more broadly); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (applying state substantive law in diversity actions in federal courts and overruling *Swift v. Tyson*, 16 Pet. 1 (1842), because an intervening decision had "made clear" the "fallacy underlying the rule").

[31] We have since come to understand *Gideon*as part of a larger doctrinal shift—already underway at the time of *Gideon*—where "the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments." *McDonald v. Chicago*, 561 U.S. 742, 763 (2010); see also *id.*, at 766.

Additional cases the majority cites involved fundamental factual changes that had undermined the basic premise of the prior precedent. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 364 (2010) (expanding First Amendment protections for campaign-related speech and citing technological changes that undermined the distinctions of the earlier regime and made workarounds easy, and overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and partially overruling *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003)); *Crawford v. Washington*, 541 U.S. 36, 62–65 (2004) (expounding on the Sixth Amendment right to confront witnesses and rejecting the prior framework, based on its practical failing to keep out core testimonial evidence, and overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Mapp v. Ohio*, 367 U.S. 643, 651–652 (1961) (holding that the exclusionary rule under the Fourth Amendment applies to the States, and overruling the contrary rule of *Wolf v. Colorado*, 338 U.S. 25 (1949), after considering and rejecting "the current validity of the factual grounds upon which *Wolf* was based").

Some cited overrulings involved *both* significant doctrinal developments *and* changed facts or understandings that had together undermined a basic premise of the prior decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U.S. ——, ——, ——– – ——– (2018) (holding that requiring public-sector union dues from nonmembers violates the First Amendment, and overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), based on "both factual and legal" developments that had "eroded the decision's underpinnings and left it an outlier among our First Amendment cases" (internal quotation marks omitted)); *Obergefell v. Hodges*, 576 U.S. 644, 659–663 (2015) (holding that the Fourteenth Amendment protects the right of same-sex couples to marry in light of doctrinal developments, as well as fundamentally changed social understanding); *Lawrence v. Texas*, 539 U.S. 558, 572–578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), after finding anti-sodomy laws to be inconsistent with the Fourteenth Amendment in light of developments in the legal doctrine, as well as changed social understanding of sexuality); *United States v. Scott*, 437 U.S. 82, 101 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975), three years after it was decided, because of developments in the Court's double jeopardy case law, and because intervening practice had shown that government appeals from midtrial dismissals requested by the defendant were practicable, desirable, and consistent with double jeopardy values); *Craig v. Boren*, 429 U.S. 190, 197–199, 210, n. 23 (1976) (holding that sex-based classifications are subject to intermediate scrutiny under the Fourteenth Amendment's Equal Protection Clause, including because *Reed v. Reed*, 404 U.S. 71 (1971), and other equal protection cases and social changes had overtaken any "inconsistent" suggestion in *Goesaert v. Cleary*, 335 U.S. 464 (1948)); *Taylor v. Louisiana*, 419 U.S. 522, 535–537 (1975) (recognizing as "a foregone conclusion from the pattern of some of the Court's cases over the past 30 years, as well as from legislative developments at both federal and state levels," that women could not be excluded from jury service, and explaining that the prior decision approving such practice, *Hoyt v. Florida*, 368 U.S. 57 (1961), had been rendered inconsistent with equal protection jurisprudence).

Other overrulings occurred very close in time to the original decision so did not engender substantial reliance and could not be described as having been "embedded" as "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000); see *Payne v. Tennessee*, 501 U.S. 808 (1991) (revising procedural rules of evidence that had barred admission of certain victim-impact evidence during the penalty phase of capital cases, and overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987), which had been decided two and four years prior, respectively); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state-sovereign immunity under its Article I commerce power, and rejecting the result in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), seven years later; the decision in *Union Gas* never garnered a majority); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (holding that local governments are not constitutionally immune from federal employment laws, and overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), after "eight years" of experience under that regime showed *Usery*'s standard was unworkable and, in practice, undermined the federalism principles the decision sought to protect).

The rest of the cited cases were relatively minor in their effect, modifying part or an application of a prior precedent's test or analysis. See *Montejo v. Louisiana*, 556 U.S. 778 (2009) (citing workability and practical concerns with additional layers of prophylactic procedural safeguards for defendants' right to counsel, as had been enshrined in *Michigan v. Jackson*, 475 U.S. 625 (1986)); *Illinois v. Gates*, 462 U.S. 213, 227–228 (1983) (replacing a two-pronged test under *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), in favor of a traditional totality-of-the-circumstances approach to evaluate probable cause for issuance of a warrant); *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964), and *Baker v. Carr*, 369 U.S. 186, 202 (1962) (clarifying that the "political question" passage of the minority opinion in

Colegrove v. Green, 328 U.S. 549 (1946), was not controlling law).

In sum, none of the cases the majority cites is analogous to today's decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

Supreme Court of New Jersey.

Donald J. ENGLISH, Appellant-Respondent,
v.
COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY, Respondent-Appellant.

Decided March 25, 1977.

PER CURIAM.

The plaintiff, Donald J. English, supervisor of the morgue section of the Department of Anatomy of the College of Medicine and Dentistry of New Jersey, was discharged by the College's Board of Trustees because of misconduct in the performance of his duties. On appeal the Appellate Division affirmed the finding of misconduct, but held that the penalty was too harsh. It concluded a one year suspension without pay was appropriate. One Appellate Division judge dissented, finding that the sanction did not constitute an abuse of the Board's discretion. The College appealed to this Court pursuant to R. 2:2—1(a).

The formal charge submitted to English specified that he had failed to maintain proper identification of and accurate records with respect to the bodies in the morgue section of the Department of Anatomy. He was advised that he would be given a hearing at which the College would present testimony to support the charge, and he might adduce evidence in his own behalf. English accepted the offer. Hearings were held before Dr. Harold Logan, Associate Dean of the College, on December 2 and 3, 1971. After receipt of the hearing officer's report, the President of the College delineated findings of fact and found English guilty of the charge. He determined that dismissal was warranted. English appealed to the Appellate Division. While this appeal was pending, the College's motion that the matter be remanded and presented to a new independent hearing officer was granted.

A De novo hearing was held on June 4, 1974 before retired Judge Victor S. Kilkenny. The parties stipulated that the record consist of the testimony and evidence presented at the prior hearing. Judge Kilkenny sustained the charge of serious neglect of duty and recommended discharge. The Board of Trustees affirmed and adopted his findings. It permanently terminated English's appointment as of January 28, 1972.

The record is abundantly clear, indeed English conceded, that there was a lack of proper identification of bodies and failure of record keeping. The factual dispute concerned the question of who was responsible for performing those functions. Prior to October 1970, English, who had been the Senior Morgue Technician in charge of the morgue, maintained all records and identification. In October, English was requested to assist the Audio Visual Department. Although he was not relieved of his duties as Senior Morgue Technician, and he knew that his assistant was incapable of maintaining the necessary identification and record keeping, English neglected these responsibilities. Ample evidence supported the conclusions of both hearing officers and the Board of Trustees that English failed to perform his duties during the period in question as supervisor of the morgue.

But in any case, under the circumstances here English's status was such that he cannot complain. As an employee of the College of Medicine and Dentistry of New Jersey, a state institution, N.J.S.A. 18A:64G—3, he was not in a civil service classification. Nor did he enjoy any statutory tenure or the benefits of any collective bargaining agreement. Moreover, the Legislature has vested the Board of Trustees with broad general managerial control over the College's employees. In this respect, N.J.S.A. 18A:64G—6 provides

that the Board of Trustees 'shall have the power and duty to . . . appoint, remove, promote and transfer . . . officers, agents, or employees . . . and assign their duties. . . .' It would appear that generally English's employee relationship could be terminated at will by the Board of Trustees. See College of Medicine and Dentistry of New Jersey v. Morrison, 141 N.J.Super. 104, 111, 357 A.2d 306 (App.Div.1976).

At common law an employer had the unbridled authority to discharge, with or without cause, an employee in the absence of contractual or statutory restrictions. Schlenk v. Lehigh Valley Railroad Co., 1 N.J. 131, 135 (1948). Accord, Jorgensen v. Pennsylvania R.R. Co., 25 N.J. 541, 554 (1958). The same situation had existed with respect to public employees. In Zimmerman v. Board of Education of Newark, 38 N.J. 65, 70, 183 A.2d 25, 28 (1962), Cert. denied 371 U.S. 956 (1963), the Court commented 'that such an unprotected employee relationship is not uncommon in our State today for many public employees are still in such an unprotected and uncertain employment status.'

The only limitations (other than contractual or statutory) upon the right to discharge public employees are founded on constitutionally protected interests—such as freedom of speech. Perry v. Sindermann, 408 U.S. 593 (1972); Williams v. Civil Service Commission, 66 N.J. 152, 157—158; Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 239—240 (1974). The plaintiff urges that we modify the general principle to require that just cause be shown. But, even if we were to add that element, which we do not, the record here would amply justify the Board of Trustees' judgment, in which the Appellate Division agreed, that just cause existed. The action of the Board of Trustees in discharging the plaintiff was within its prerogative.

The judgment of the Appellate Division is modified in accordance with this opinion, and, as modified, is affirmed.

Supreme Court of New Jersey.

Richard M. WOOLLEY, Plaintiff-Appellant,
v.
HOFFMANN–La ROCHE, INC., a New Jersey corporation, Defendant-Respondent.

Decided May 9, 1985.

The opinion of the Court was delivered by WILENTZ, C.J.

I

The issue before us is whether certain terms in a company's employment manual may contractually bind the company. We hold that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.

II

Plaintiff, Richard Woolley, was hired by defendant, Hoffmann-La Roche, Inc., in October 1969, as an Engineering Section Head in defendant's Central Engineering Department at Nutley. There was no written employment contract between plaintiff and defendant. Plaintiff began work in mid-November 1969. Some time in December, plaintiff received and read the personnel manual on which his claims are based.

In 1976, plaintiff was promoted, and in January 1977 he was promoted again, this latter time to Group Leader for the Civil Engineering, the Piping Design, the Plant Layout, and the Standards and Systems Sections. In March 1978, plaintiff was directed to write a report to his supervisors about piping problems in one of defendant's buildings in Nutley. This report was written and submitted to plaintiff's immediate supervisor on April 5, 1978. On May 3, 1978, stating that the General Manager of defendant's Corporate Engineering Department had lost confidence in him, plaintiff's supervisors requested his resignation. Following this, by letter dated May 22, 1978, plaintiff was formally asked for his resignation, to be effective July 15, 1978.

Plaintiff refused to resign. Two weeks later defendant again requested plaintiff's resignation, and told him he would be fired if he did not resign. Plaintiff again declined, and he was fired in July.

Plaintiff filed a complaint alleging breach of contract, intentional infliction of emotional distress, and defamation, but subsequently consented to the dismissal of the latter two claims. The gist of plaintiff's breach of contract claim is that the express and implied promises in defendant's employment manual created a contract under which he could not be fired at will, but rather only for cause, and then only after the procedures outlined in the manual were followed.[1] Plaintiff contends that he was not dismissed for good cause, and that his firing was a breach of contract.

[1] According to the provisions of the manual, defendant could, and over the years apparently did, unilaterally change these provisions. Defendant concedes, for the purpose of these proceedings, that plaintiff's version of the provisions of the manual as of the date he was fired is accurate. At oral argument

plaintiff's counsel claimed that defendant followed a fairly consistent pattern of firing only for cause and offered to prove that fact on remand.

Defendant's motion for summary judgment was granted by the trial court, which held that the employment manual was not contractually binding on defendant, thus allowing defendant to terminate plaintiff's employment at will.[2] The Appellate Division affirmed. We granted certification. 91 *N.J.* 548 (1982).[3]

[2] The termination provisions of the employment manual are set forth in the Appendix to this opinion. It may be of some help to point out some of the manual's general provisions here. It is entitled "Hoffmann-La Roche, Inc. Personnel Policy Manual" and at the bottom of the face page is the notation "issued to: [and then in handwriting] Richard Woolley 12/1/69." The portions of the manual submitted to us consist of eight pages. It describes the employees "covered" by the manual ("all employees of Hoffmann-La Roche"), the manual's purpose ("a practical operating tool in the equitable and efficient administration of our employee relations program"); five of the eight pages are devoted to "termination." In addition to setting forth the purpose and policy of the termination section, it defines "the types of termination" as "layoff," "discharge due to performance," "discharge, disciplinary," "retirement" and "resignation." As one might expect, layoff is a termination caused by lack of work, retirement a termination caused by age, resignation a termination on the initiative of the employee, and discharge due to performance and discharge, disciplinary, are both terminations for cause. There is no category set forth for discharge without cause. The termination section includes "Guidelines for discharge due to performance," consisting of a fairly detailed procedure to be used before an employee may be fired for cause. Preceding these definitions of the five categories of termination is a section on "Policy," the first sentence of which provides: "It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."

[3] Mr. Woolley died prior to oral argument before this Court. The claim for damages, while diminished, survives. See *infra* at 1270.

III

Hoffmann-La Roche contends that the formation of the type of contract claimed by plaintiff to exist—Hoffmann-La Roche calls it a permanent employment contract for life—is subject to special contractual requirements: the intent of the parties to create such an undertaking must be clear and definite; in addition to an explicit provision setting forth its duration, the agreement must specifically cover the essential terms of employment—the duties, responsibilities, and compensation of the employee, and the proof of these terms must be clear and convincing; the undertaking must be supported by consideration in addition to the employee's continued work. Woolley claims that the requirements for the formation of such a contract have been met here and that they do not extend as far as Hoffmann-La Roche claims. Further, Woolley argues that this is not a "permanent contract for life," but rather an employment contract of indefinite duration that may be terminated only for good cause and in accordance with the procedure set forth in the personnel policy manual. Both parties agree that the employment contract is one of indefinite duration; Hoffmann-La Roche contends that in New Jersey, when an employment contract is of indefinite duration, the inescapable legal conclusion is that it is an employment at will; Woolley claims that even such a contract—of indefinite duration—may contain provisions requiring that termination be only for cause.

The trial court, relying on *Savarese v. Pyrene Mfg. Co.,* 9 *N.J.* 595 (1952), *Hindle v. Morrison Steel Co.,* 92 *N.J.Super.* 75 (App.Div.1966), and *Piechowski v. Matarese,* 54 *N.J.Super.* 333 (App.Div.1959), held that in

the absence of a "most convincing [ ]" demonstration that "it was the intent of the parties to enter into such long-range commitments ... clearly, specifically and definitely expressed" (using, almost verbatim, the language of *Savarese, supra,* 9 *N.J.* at 601), supported by consideration over and above the employee's rendition of services, the employment is at will. Finding that the personnel policy manual did not contain any such clear and definite expression and, further, that there was no such additional consideration, the court granted summary judgment in favor of defendant, sustaining its right to fire plaintiff with or without cause.

The Appellate Division, viewing plaintiff's claim as one for a "permanent or lifetime employment," found that the company's policy manual did not specifically set forth the term, work, hours or duties of the employment and "appear[ed] to be a unilateral expression of company policies and procedures ... not bargained for by the parties," this last reference being similar to the notion, relied on by the trial court, that additional consideration was required. Based on that view, it held that the "promulgation and circulation of the personnel policy manual by defendant did not give plaintiff any enforceable contractual rights." In so doing it noted the "objections to a lifetime employment contract that make it contrary to public policy, *i.e.,* lack of definiteness, unequal burden of performance, etc.," citing *Savarese, supra,* 9 *N.J.* at 600–01. While it did not purport to establish any special contractual rule concerning company personnel policy manuals, its analysis suggests they would ordinarily not lead to contractual consequences except for such provisions as those "involving severance pay," which "deal with a specific term of a contract. Its parameters are clearly set forth. The conditions and factors involved are definite and easily ascertained."

We are thus faced with the question of whether this is the kind of employment contract—a "long-range commitment"—that must be construed as one of indefinite duration and therefore at will unless the stringent requirements of *Savarese* are met, or whether ordinary contractual doctrine applies. In either case, the question is whether Hoffmann-La Roche retained the right to fire with or without cause or whether, as Woolley claims, his employment could be terminated only for cause. We believe another question, not explicitly treated below, is involved: should the legal effect of the dissemination of a personnel policy manual by a company with a substantial number of employees be determined solely and strictly by traditional contract doctrine? Is that analysis adequate for the realities of such a workplace?

IV

As originally conceived in the late 1800's, the law was that an employment contract for an indefinite term was presumed to be terminable at will; an employee with an at-will contract could be fired for any reason (or no reason) whatsoever, be it good cause, no cause, or even morally wrong cause. Comment, "A Common Law Action For The Abusively Discharged Employee," 26 *Hastings L.J.,* 1435, 1438 (1975) [hereinafter cited as Comment, 26 *Hastings L.J.* 1435]. Pursuant to that rule, in New Jersey employers were free to terminate an at-will employment relationship with or without cause. *English v. College of Medicine and Dentistry of N.J.,* 73 *N.J.* 20, 23 (1977); *Schlenk v. Lehigh Valley R.R. Co.,* 1 *N.J.* 131, 135 (1948).

The at-will rule has come under severe criticism from commentators who argue that the economic justifications for the development of the rule have changed dramatically and no longer support its harshness. *See, e.g.,* Note, "Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith," 93 *Harv.L.Rev.* 1816 (1980) [hereinafter cited as Note, 93 *Harv.L.Rev.* 1816]; Comment, *supra,* 26 *Hastings L.J.* 1435; Comment, "Implied Contract Rights To Job Security," 26

Stan.L.Rev. 335 (1974). The Legislature here, as in most states, has limited the at-will rule to the extent that it conflicts with the policies of our various civil rights laws so that, for instance, a firing cannot be sustained in New Jersey if it is based on the employee's race, color, religion, sex, national origin, or age. *N.J.S.* 10:5–4; *see also* 42 *U.S.C.* § 2000e–1 to –15 (1970) (Title VII of the Civil Rights Act of 1964); 29 *U.S.C.* § 623 (1970) (Age Discrimination in Employment Act).

This Court has clearly announced its unwillingness to continue to adhere to rules regularly leading to the conclusion that an employer can fire an employee-at-will, with or without cause, for any reason whatsoever. Our holding in *Pierce v. Ortho Pharmaceutical Corp.,* 84 *N.J.* 58, 72 (1980), while necessarily limited to the specific issue of that case (whether employer can fire employee-at-will when discharge is contrary to a clear mandate of public policy), implied a significant questioning of that rule in general.

> Commentators have questioned the compatibility of the traditional at will doctrine with the realities of modern economics and employment practices.... The common law rule has been modified by the enactment of labor relations legislation.... The National Labor Relations Act and other labor legislation illustrate the governmental policy of preventing employers from using the right of discharge as a means of oppression.... Consistent with this policy, many states have recognized the need to protect employees who are not parties to a collective bargaining agreement or other contract from abusive practices by the employer.
> ....
> This Court has long recognized the capacity of the common law to develop and adapt to current needs.... The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.
> ....
> In recognizing a cause of action to provide a remedy for employees who are wrongfully discharged, we must balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing that they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees

Id. at 66–67, 71 (citations omitted).

The spirit of this language foreshadows a different approach to these questions. No longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee. Instead, as Justice Pollock so effectively demonstrated, this Court was no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest, and the extent to which our deference to one or the other served or disserved the needs of society as presently understood.

In the last century, the common law developed in a laissez-faire climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an employee at will.... The twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the

number of employees has been accompanied by increasing recognition of the need for stability in labor relations. [*Id.* at 66 (citations omitted)].

The thrust of the thought is unmistakable. There is an interest to be served in addition to "freedom" of contract, an interest shared by practically all. And while "stability in labor relations" is the only specifically identified public policy objective, the reference to the "laissez-faire climate" and "the right to fire without cause an employee at will" as part of the "last century" suggests that any application of the employee-at-will rule (not just its application in conflict with "a clear mandate of public policy"—the precise issue in *Pierce*) must be tested by its legitimacy today and not by its acceptance yesterday. *See also Nicoletta v. North Jersey Dist. Water Supply Comm'n,* 77 *N.J.* 145 (1978) (at-will employee in public sector entitled, as a matter of constitutional right, to hearing prior to discharge).

Given this approach signaled by *Pierce, supra,* 84 *N.J.* 58, the issue is not whether the rules applicable to individual lifetime or indefinite long-term employment contracts should be changed, but rather whether a correct understanding of the "underlying interests involved," *supra* at 1261, in the relationship between the employer and its workforce calls for compliance by the employer with certain rudimentary agreements voluntarily extended to the employees.

V

****

We acknowledge that most of the out-of-state cases demonstrate an unwillingness to give contractual force to company policy manuals that purport to enhance job security. *See, e.g., Caster v. Hennessey,* 727 *F.*2d 1075 (11th Cir.1984); *Beidler v. W.R. Grace, Inc.,* 461 *F.Supp.* 1013 (E.D.Pa.1978), aff'd, 609 *F.*2d 500 (3d Cir.1979); *Uriarte v. Perez-Molina,* 434 *F.Supp.* 76 (D.D.C.1977); *Schroeder v. Dayton-Hudson Corp.,* 448 *F.Supp.* 910 (E.D.Mich.1977), amended, 456 *F.Supp.* 650 (E.D.Mich.1978); *Heideck v. Kent Gen. Hosp., Inc.,* 446 *A.*2d 1095 (Del.1982); *Shaw v. Kresge,* 167 *Ind.App.* 1 (1975); *Johnson v. National Beef Packing Co.,* 220 *Kan.* 52 (1976); *Degen v. Investors Diversified Servs. Inc.,* 260 *Minn.* 424 (1961); *Gates v. Life of Montana Ins. Co.,* 638 *P.*2d 1063 (Mont.1982); *Mau v. Omaha National Bank,* 207 *Neb.* 308 (1980); *Chin v. American Tel. & Tel. Co.,* 96 *Misc.*2d 1070 (Sup.Ct.1978). These cases, holding that policy manual provisions do not give rise to any contractual obligation, have to some extent confused policy manuals with individual long-term employment contracts and have applied to the manuals rules appropriate only to the individual employment contract. When there was such an individual contract before them (often consisting of oral assurances or a skeletal written agreement) not specifying a duration or term, courts understandably ruled them to be "at-will" contracts. They did so since they feared that by interpreting a contract of indefinite duration to be terminable only for cause, the courts would be saddling an employer with an employee for many years. In order to insure that the employer intended to accept the burdens of such an unusual "lifetime employment," the courts understandably insisted that the contract and the surrounding circumstances demonstrate unmistakably clear signs of the employer's intent to be bound, leading to the requirements of additional independent consideration and convincing specificity.

* * * *

Whatever their worth in dealing with individual long-term employment contracts, these requirements, over and above those ordinarily found in contract law, have no relevancy when a policy manual is involved. In that case, there is no individual lifetime employment contract involved, but rather, if there

is a contract, it is one for a group of employees—sometimes all of them—for an indefinite term, and here, fairly read, one that may not be terminated by the employer without good cause.

More recently there have been some voices that sound this different note on the subject. See *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.,* 458 *F. Supp.* 505 (E.D.Pa.1978), aff'd, 624 *F.*2d 1092 (3d Cir.1980); *Leikvold v. Valley View Community Hosp.,* 141 *Ariz.* 544 (1984) (en banc); *Pugh v. See's Candies, Inc.,* 116 *Cal.App.*3d 311 (1981); *Toussaint v. Blue Cross & Blue Shield of Mich., supra,* 408 *Mich.* 579; *Pine River State Bank v. Mettille, supra,* 333 *N.W.*2d 622; *Weiner v. McGraw-Hill, Inc.,* 57 *N.Y.*2d 458 (1982); *Thompson v. St. Regis Paper Co.,* 102 *Wash.*2d 219 (1984) (en banc); *see also Salimi v. Farmers Insurance Group,* 684 *P.*2d 264 (Colo.App.1984) (employee's allegation that his demotion was a breach of contract based on procedures in the employment manual survives a motion to dismiss); *Kaiser v. Dixon,* 127 *Ill.App.*3d 251 (1984) (public employee entitled to notice and hearing before discharge as provided for in staff policy manual adopted by the village).[5] While the dividing line between these two groups of out-of-state cases may be explained by the different analyses of whether the requirements imposed by the law of contracts have been met, the results can also be explained by a difference in attitude, some courts continuing to be concerned with the adverse impact on employers of long-term employment contracts, while others are concerned with the adverse impact on employees when apparent commitments expressed in policy manuals are not honored.

[5] A recent article asserts that at least eighteen states have specifically held or pointed out in opinions that they recognize, to various extents, implied-in-fact contracts arising from employee manuals, other personnel policies, and/or oral or written representations regarding job security. F. Lopatka, "The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's," 40 *Bus.Law.* 1, 17 (1984).

What is before us in this case is not a special contract with a particular employee, but a general agreement covering all employees. There is no reason to treat such a document with hostility.

The trial court viewed the manual as an attempt by Hoffmann-La Roche to avoid a collective bargaining agreement.[6] Implicit is the thought that while the employer viewed a collective bargaining agreement as an intrusion on management prerogatives, it recognized, in addition to the advantages of an employment manual to both sides, that unless this kind of company manual were given to the workforce, collective bargaining, and the agreements that result from collective bargaining, would more likely take place.

[6] The trial court, after noting that if Hoffmann-La Roche had been unionized, Woolley would not be litigating the question of whether the employer had to have good cause to fire him, said "[T]here is no question in my mind that Hoffmann-La Roche offered these good benefits to their employees to steer them away from this kind of specific collective bargaining contract...."

A policy manual that provides for job security grants an important, fundamental protection for workers. *See* F. Tanenbaum, *A Philosophy of Labor* 9 (1951), *quoted in* L. Blades, "Employment At Will *vs.* Individual Freedom: on Limiting the Abusive Exercise of Employer Power," 67 *Colum.L.Rev.* 1404, 1404 (1967) [hereinafter cited as Blades]. If such a commitment is indeed made, obviously an employer should be required to honor it. When such a document, purporting to give job security, is distributed by the employer to a workforce, substantial injustice may result if that promise is broken.

We do not believe that Hoffmann-La Roche was attempting to renege on its promise when it fired Woolley. On the contrary, the record strongly suggests that even though it believed its manual did not create any contractually binding agreements, Hoffmann-La Roche nevertheless almost invariably

honored it. In effect, it gave employees more than it believed the law required. Its position taken before us is one of principle: while contending it treated Woolley fairly, it maintains it had no legal obligation to do so.

VI

Given the facts before us and the common law of contracts interpreted in the light of sound policy applicable to this modern setting, we conclude that the termination clauses of this company's Personnel Policy Manual, including the procedure required before termination occurs, could be found to be contractually enforceable. Furthermore, we conclude that when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of "grudgingly" conceding the enforceability of those provisions, *Saverese, supra,* 9 *N.J.* at 601, should construe them in accordance with the reasonable expectations of the employees.

The employer's contention here is that the distribution of the manual was simply an expression of the company's "philosophy" and therefore free of any possible contractual consequences. The former employee claims it could reasonably be read as an explicit statement of company policies intended to be followed by the company in the same manner as if they were expressed in an agreement signed by both employer and employees. From the analysis that follows we conclude that a jury, properly instructed, could find, in strict contract terms, that the manual constituted an offer; put differently, it could find that this portion of the manual (concerning job security) set forth terms and conditions of employment.

In determining the manual's meaning and effect, we must consider the probable context in which it was disseminated and the environment surrounding its continued existence.[7] The manual, though apparently not distributed to all employees ("in general, distribution will be provided to supervisory personnel ..."), covers all of them. Its terms are of such importance to all employees that in the absence of contradicting evidence, it would seem clear that it was intended by Hoffmann-La Roche that all employees be advised of the benefits it confers.

[7] The somewhat meager record before us does not fully cover those facts. The eight pages of the manual submitted to the trial court and to us are just one part of the manual. We do not know, therefore, what other matters are covered, the extent to which they are covered, or whether they reinforce or call into question the binding nature of the terms which we deduce from that part of the manual that is before us. Since the matter was decided against plaintiff on motion for summary judgment, we shall assume that the manual's origin, dissemination, and continued existence is similar in context to that of the ordinary personnel policy manual, of which context we take judicial notice.

We take judicial notice of the fact that Hoffmann-La Roche is a substantial company with many employees in New Jersey. The record permits the conclusion that the policy manual represents the most reliable statement of the terms of their employment. At oral argument counsel conceded that it is rare for any employee, except one on the medical staff, to have a special contract. Without minimizing the importance of its specific provisions, the context of the manual's preparation and distribution is, to us, the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment. Having been employed, like hundreds of his co-employees, without any individual employment contract, by an employer whose good reputation made it so attractive, the employee is given this one document that purports to set forth the terms and conditions of his employment, a document obviously carefully prepared by the company with all of the appearances of corporate legitimacy that one could imagine. If

there were any doubt about it (and there would be none in the mind of most employees), the name of the manual dispels it, for it is nothing short of the official *policy* of the company, it is the Personnel *Policy* Manual. As every employee knows, when superiors tell you "it's company policy," they mean business.

The mere fact of the manual's distribution suggests its importance. Its changeability—the uncontroverted ability of management to change its terms—is argued as supporting its non-binding quality, but one might as easily conclude that, given its importance, the employer wanted to keep it up to date, especially to make certain, given this employer's good reputation in labor relations, that the benefits conferred were sufficiently competitive with those available from other employers, including benefits found in collective bargaining agreements. The record suggests that the changes actually made almost always favored the employees.

Given that background, then, unless the language contained in the manual were such that no one could reasonably have thought it was intended to create legally binding obligations, the termination provisions of the policy manual would have to be regarded as an obligation undertaken by the employer. It will not do now for the company to say it did not mean the things it said in its manual to be binding. Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable.

Whatever else the manual may deal with (as noted above, we do not have the entire manual before us), one of its major provisions deals with the single most important objective of the workforce: job security. The reasons for giving such provisions binding force are particularly persuasive. Wages, promotions, conditions of work, hours of work, all of those take second place to job security, for without that all other benefits are vulnerable.

We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.* [*F. Tanenbaum,* A Philosophy of Labor, 9 (1951), *quoted in* Blades, *supra,* at 1404.] *See Pugh v. See's,* 116 *Cal.App.*3d 311, 320–21 (1981); *see also* Blades, *supra* at 1410 & n. 30 (right of discharge has been limited in collective bargaining agreements).

Job security is the assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily; it can be cut off only "for good cause," fairly determined. Hoffmann-La Roche's commitment here was to what working men and women regard as their most basic advance. It was a commitment that gave workers protection against arbitrary termination.

Many of these workers undoubtedly know little about contracts, and many probably would be unable to analyze the language and terms of the manual. Whatever Hoffmann-La Roche may have intended, that which was read by its employees was a promise not to fire them except for cause.

Under all of these circumstances, therefore, it would be most unrealistic to construe this manual and determine its enforceability as if it were the same as a lifetime contract with but one employee designed to induce him to play on the company's baseball team. *See Saverese, supra,* 9 *N.J.* at 597.[8]

[8] The contract arising from the manual is of indefinite duration. It is *not* the extraordinary "lifetime" contract explicitly claimed in *Savarese.* For example, a contract arising from a manual ordinarily may be terminated when the employee's performance is inadequate; when business circumstances require a general reduction in the employment force, the positions eliminated including that of plaintiff; when those same circumstances require the elimination of employees performing a certain function, for instance, for technological reasons, and plaintiff performed such functions; when business conditions require a general reduction in salary, a reduction that brings plaintiff's pay below that which he is willing to accept; or when any change, including the cessation of business, requires the elimination of plaintiff's position, an elimination made in good faith in pursuit of legitimate business objectives: all of these terminations, long before the expiration of "lifetime" employment, are ordinarily contemplated in a contract arising from a manual, although the list does not purport to be exhaustive. The essential difference is that the "lifetime" contract purports to protect the employment against any termination; the contract arising from the manual protects the employment only from arbitrary termination.

VII

* * * *

VIII

Defendant expresses some concern that our interpretation will encourage lawsuits by disgruntled employees. As we view it, however, if the employer has in fact agreed to provide job security, plaintiffs in lawsuits to enforce that agreement should not be regarded as disgruntled employees, but rather as employees pursuing what is rightfully theirs. The solution is not deprivation of the employees' claim, but enforcement of the employer's agreement. The defendant further contends that its future plans and proposed projects are premised on continuance of the at-will employment status of its workforce. We find this argument unpersuasive. There are many companies whose employees have job security who are quite able to plan their future and implement those plans. If, however, the at-will employment status of the workforce was so important, the employer should not have circulated a document so likely to lead employees into believing they had job security.

IX

We therefore reverse the Appellate Division's affirmance of the trial court's grant of summary judgment and remand this matter to the trial court for further proceedings consistent with this opinion. Those proceedings should have the benefit of the entire manual that was in force at the time Woolley was discharged. The provisions of the manual concerning job security shall be considered binding unless the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer's intent not to be bound. The ordinary division of issues between the court and the jury shall apply.[13] If the court concludes that the job security provisions are binding (or submits that issue to the jury), it shall either determine their meaning or, if reasonable men could differ as to that meaning, submit that issue as well to the jury.

[13] [Omitted.]

[14] [Omitted.]

X

* * * *

XI

Our opinion need not make employers reluctant to prepare and distribute company policy manuals. Such manuals can be very helpful tools in labor relations, helpful both to employer and employees, and we would regret it if the consequence of this decision were that the constructive aspects of these manuals were in any way diminished. We do not believe that they will, or at least we certainly do not believe that that constructive aspect *should* be diminished as a result of this opinion.

All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Reversed and remanded for trial.

APPENDIX

The following are the termination provisions included in the portion of the Personnel Policy Manual submitted to the courts below.

TERMINATION

I. PURPOSE
This policy states the company's philosophy with respect to terminations of employees and provides uniform guidelines for the administration of this policy.

II. POLICY
It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively. However, it may become necessary under certain conditions to terminate employment for the good of the employee and/or the company. The types of terminations that exist are lay-off, discharge due to performance, disciplinary discharge, retirement, and resignation.

III. GENERAL
The definitions of the types of termination are as follows:
—Layoff means termination of employment on the initiative of the company under circumstances, normally lack of work, such that the employee is subject to recall. He/she may be reinstated without loss of seniority if recalled within one year of the date of layoff.

—Discharge due to Performance means termination of employment on the initiative of the company under circumstances generally related to the quality of the employee's performance, whereby the employee is considered unable to meet the requirements of the job. In this case, the employee is not subject to recall or reinstatement.
—Discharge, Disciplinary means termination of employment on the initiative of the company for reasons of misconduct or willful negligence in the performance of job duties such that the employee will not be considered for re-employment.
—Retirement means termination of active work by the employee at the age or under conditions set forth in the company's retirement plan, under which the employee receives retirement pay and enjoys other benefits.
—Resignation means termination of employment on the initiative of the employee. Employees are expected to give no less than two weeks notice of resignation. An employee who resigns will retain no reinstatement or re-employment rights.
Resignation requested is a category of information on the Personnel Action Form and means termination of employment, for cause, on the initiative of the company. "Mutual Agreement" terminations must be further identified as either discharge due to performance or disciplinary for purposes of severance pay eligibility (see Guidelines, pp. 10.2 and 10.3 and Severance Pay, pp. 10.4 and 10.5).
For pay purposes, terminations are effective on the last day worked, unless otherwise specified by the Department Head.

IV. GUIDELINES FOR DISCHARGE DUE TO PERFORMANCE
In keeping with the company's concern for all employees, termination of employment on the initiative of the company under circumstances generally related to the quality of the employee's job performance deserves special consideration. We would like to insure that every reasonable step has been taken to help the employee continue in a productive capacity. It is the responsibility of each manager and supervisor to develop the people working for him/her. In cases of unsatisfactory job performance, which may develop into termination of employment, each manager and supervisor should consider the following:
A. Has the employee been made aware of the problem in specific terms?
B. Are the suggestions as to how these problems can be eliminated in writing?
C. Has assistance been offered to the employee to help the employee remedy the situation?
D. Has the employee been given a sufficient amount of time and help to remedy the situation?

If a situation related to poor job performance has just come to a manager's or supervisor's attention, joint evaluation between the employee and the manager is recommended. The manager should try to determine the cause of the problem. Is it lack of experience in the job, education, motivation, employee personal problems, or personality conflict? Once the cause is identified, the employee should be given time, if possible, to remedy the situation. The manager should also be considering ways to remedy the situation and to improve the individual's performance. This may mean the use of outside sources to develop the employee and/or the job to put the employee on an appropriate career path. Other alternatives are:
A. Changing the employee's responsibilities in his/her present job.
B. Reassignment to a different job in the department.
C. Encouraging the employee to bid into an area where his/her chances of success are felt to be better.
D. A change to a position of lesser responsibility.
If, after sufficient time and consideration of the above, the employee does not remedy the situation, the supervisor should then proceed with the termination of the employee (see VI below).

V. GUIDELINES FOR DISCIPLINARY TERMINATIONS (See section on Discipline 9.1 through 9.4)
The termination of any employee for disciplinary causes must follow the procedures as set forth in Section 9.1 through 9.4 of the Personnel Policy Manual.

VI. TERMINATION PROCEDURE
It is the responsibility of the manager to:
—Notify the Payroll Department and the Personnel Department of the cause and date of termination;
—Notify the employee of the cause and date of termination;
—Prepare a Personnel Action Form stating the reason for termination and forward this to the Personnel Department.
It is the responsibility of the Personnel Department to:
—Provide the terminating employee with Termination Procedure Forms;
— Contact the terminating employee and set up an appointment for an interview (preferably the last day of work);
—Review Termination Procedure Forms for completeness and required clearance signatures;
—Notify the Dispensary, Payroll Department and Credit Union of the termination;
—Provide appropriate Unemployment Compensation information and forms to the terminating employee;
—Conduct appropriate follow-up correspondence with the company that the terminated employee has accepted employment, stating the continuing nature of the patent secrecy agreement. Copies of the letter should go to the employee and the Personnel file;
—Forward all termination procedure forms to the Personnel Department Record Room.
It is the responsibility of the Payroll Department to:
—Verify that the terminating employee has no outstanding financial liabilities to the company;
—Issue and mail a final pay check upon completion of all termination procedures and receipt of a copy of the Personnel Action Form.
It is the responsibility of the HLR Federal Credit Union to:
—Check the status of the terminating employee with respect to:
• balances due the employee;
• outstanding Credit Union loans;
and to make arrangements for an interview with the employee for purposes of proper disposition of any amounts due either the employee or the Credit Union.

Supreme Court of New Jersey.

Anthony NICOSIA, Plaintiff–Respondent,
v.
WAKEFERN FOOD CORPORATION, Defendant–Appellant.

Decided June 30, 1994.

HANDLER, J.

In this case, a low-level supervisor was fired for the mishandling of merchandise. He filed a wrongful-discharge action against his employer. As in the companion case, *Witkowski v. Thomas J. Lipton, Inc.,* 136 *N.J.* 385 (1994), also decided today, the employee denies that his employer had any grounds to terminate him and claims that his discharge was wrongful because the employment manual distributed by the employer constitutes an implied contract that bars termination without cause under *Woolley v. Hoffmann–La Roche,* 99 *N.J.* 284, *modified,* 101 *N.J.* 10 (1985). The employer contends that the employee is "at will" and therefore can be fired without cause and, further, that its employment manual does not constitute an implied employment contract, particularly in light of its disclaimer. The employer also claims that following the employee's termination, additional evidence was discovered that indicated that other grounds for his dismissal existed and that such "after-acquired evidence" constitutes a defense to the wrongful-discharge claim.

Following a jury trial, the trial court entered judgment in favor of the employee. On appeal, the Appellate Division upheld the judgment entered on the jury's verdict. The employer filed a petition for certification, which this Court granted, 134 *N.J.* 476 (1993). We affirm the judgment of the Appellate Division.

I

Plaintiff, Anthony Nicosia ("Nicosia"), was hired by defendant, Wakefern Food Corporation ("Wakefern"), in 1971. Nicosia was promoted several times during his eighteen-and-one-half years of employment. When Nicosia was terminated, he held the position of Warehouse Shift Supervisor.

Merchandise was illegally removed from Wakefern's warehouse on at least two occasions during Nicosia's employment. Wakefern never accused Nicosia of stealing the goods. Rather, it discharged him for failing to maintain safe storage of the merchandise and for not following appropriate procedures on discovering the thefts. Nicosia claimed that he did in fact follow proper company procedures by immediately reporting the first theft to the "Inventory Control Department" and by reporting the second theft to both that department and his immediate supervisor.

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Nicosia contends that he was terminated without receiving the benefit of the progressive-discipline steps outlined in an eleven-page section entitled "Wakefern Disciplinary Procedures," which was part of a larger manual entitled "Human Resources Policies and Procedures Manual" (the "manual"). That eleven-page section did not contain a disclaimer. Nicosia maintains that either that eleven-page document or the entire 160–page loose-leaf manual creates an implied employment contract, and that Wakefern breached it by terminating him without following the manual's procedural protections.

Wakefern does not dispute that the progressive-discipline policy existed at the time of Nicosia's

termination. Wakefern asserts, however, that its disciplinary policy was embodied not in the eleven-page section but in the complete manual, which includes certain immediate-termination offenses. It also argues that because its manual was not "widely distributed," the manual does not give rise to an employment contract. Wakefern further contends that even if it was widely distributed, the disclaimer, which appeared in the first paragraph on the manual's first page, negated any employment contract. Therefore, the manual was not binding, and Nicosia could be fired without cause. In addition, Wakefern asserts that even if the disclaimer was ineffective, Nicosia was not entitled to the manual's disciplinary policy protections because he committed an immediately terminable offense. Finally, Wakefern claims that evidence discovered after Nicosia's discharge, which allegedly indicated his conversion of merchandise, constitutes a defense to plaintiff's wrongful-discharge claim.

The trial court ruled that the disclaimer contained in the manual was insufficient as a matter of law to negate Wakefern's obligations as set forth in its manual. It submitted to the jury the issue of whether the entire manual or the eleven-page section, which contained the progressive-discipline procedure, constituted an implied employment contract, and if so, whether plaintiff's discharge violated those provisions. The jury found that the eleven-page manual section received by Nicosia created an implied contract of employment that was subsequently breached by Wakefern. On defendant's counterclaim, the jury also found plaintiff not guilty of conversion. In addition, the court refused to charge the jury with respect to the after-acquired-evidence defense.

On appeal, the Appellate Division "recognize[d] defendant's argument that even if plaintiff received only a portion of the manual, he is bound by the entire manual, including the disclaimer." However, it declined to resolve that issue because of its concurrence with the trial judge regarding "the inefficacy of the disclaimer," implicitly holding that either the manual or the eleven-page section did create an implied contract. The court also ruled that "[d]isputes of fact as to the contract status of an employee under a manual are properly submitted to the jury." Finally, the Appellate Division concluded that it need not consider the after-acquired-evidence defense because the jury had found Nicosia not guilty of conversion.

II

This Court in *Woolley, supra,* 99 *N.J.* 284, stated that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." 99 *N.J.* at 285–86.

In the companion case, *Witkowski, supra,* 136 *N.J.* 385, we revisited the standards for determining whether an employment manual constitutes a contract of employment. We noted:

> In sum, under *Woolley,* the basic test for determining whether a contract of employment can be implied turns on the reasonable expectations of employees. A number of factors bear on whether an employee may reasonably understand that an employment manual is intended to provide enforceable employment obligations, including the definiteness and comprehensiveness of the termination policy and the context of the manual's preparation and distribution.
>
> [136 *N.J.* at 393.]

The context of the preparation and distribution of the manual in this case supports the finding that the manual was intended to constitute an enforceable employment contract. *Woolley, supra,* 99 *N.J.* at 299;

see Schwartz v. Leasametric, Inc., 224 *N.J.Super.* 21, 31 (App.Div.1988). The entire manual was distributed to a substantial number of Wakefern's workforce, although Nicosia may not have received it. *See Woolley, supra,* 99 *N.J.* at 304–05 n. 10; *Gilbert v. Durand Glass Mfg. Co., Inc.,* 258 *N.J.Super.* 320, 330 (App.Div.1992). As was the manual in *Woolley,* Wakefern's manual, coincidentally, was distributed to 300 of the 3,000 person workforce. *See also Witkowski, supra,* 136 *N.J.* at 395 (holding enforceable employee manual that was distributed to all employees); *Preston v. Claridge Hotel & Casino,* 231 *N.J.Super.* 81, 86 (App.Div.1989) (holding employee manual binding based in part on its "widespread distribution"). In fact, because approximately 1,500 of Wakefern's 3,000–person workforce is unionized and covered by a collective bargaining agreement, the manual would apply to only those 1,500 non-unionized employees. Moreover, Nicosia did actually receive the eleven-page section of the manual covering terminations.

Wakefern's manual also includes a definite, comprehensive termination policy. *See Witkowski, supra,* 136 *N.J.* at 393; *Woolley, supra,* 99 *N.J.* at 296. Its termination provision provides a three-step disciplinary procedure, which includes "employee counseling" (a first written warning), "caution" (a second written warning), and a "final warning." *See Witkowski, supra,* 136 *N.J.* at 396–397. The manual further provides that "[a]ll steps *must* be completed in order to discharge for cause." "Cause" includes: "poor job performance; excessive absenteeism/tardiness/early departures, insubordination, violation of rules and regulations, gross negligence."

The procedural protections do not, however, apply in cases of "immediate discharge." Grounds for immediate discharge include:

> Theft of Company property
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> Theft of an employee's property
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> Sexual harassment of any employee
>
> Threatening or intimidating fellow employees
>
> Use of alcohol or illegal substances on Company property, or possession of same
>
> Overstaying a leave of absence
>
> Willful destruction of Company property or property of other employees
>
> Initialing for another employee's time on the time sheet
>
> Falsification of records
>
> Gross insubordination
>
> Breach of Confidentiality

The evidence was clearly sufficient to support the determination that Wakefern's employees reasonably expected that the manual, particularly its discipline and termination policy, was intended to govern the rights and duties of Wakefern's workforce based on both the manual's content and distribution. *Id.* at 397. Therefore, sufficient evidence showed that the manual, which included the eleven-page section, constituted an enforceable employment contract.

III

Wakefern argues that the existence of a *Woolley* contract can be determined only on the basis of the entire or complete manual, not just a *part* of the manual. Accordingly, Wakefern contends that the trial court committed reversible error by instructing the jury that the eleven-page excerpt from the Wakefern manual could constitute the basis for an enforceable implied contract of employment.

Nicosia testified that he had never seen the 160–page Wakefern manual, but only the eleven-page excerpt on disciplinary procedures. The trial court instructed the jury that it should determine whether either the eleven-page section or the entire manual "constituted an offer which could be accepted by him by his continued employment with the company." The jury found that the eleven-page section, not the entire manual, constituted a contract between Nicosia and Wakefern, and that Wakefern had breached that contract.

In denying defendant's motion for dismissal, the trial court explained: "I find and conclude that when only that limited part of the manual is made available to the Plaintiff ... he was not bound by the remainder of the manual which he had never seen. In any event, I find that the disclaimer provision of this case does not met the requirements of the *Woolley* decision."

The Appellate Division did not squarely address the issue of whether only part of an employment manual can become the basis for implying an enforceable employment contract: "We recognize defendant's argument that even if plaintiff received only a portion of the manual, he is bound by the entire manual, including the disclaimer. We need not, however, resolve this issue in light of our concurrence with the trial judge's view of the inefficacy of the disclaimer."

Woolley indicates that where an *entire* manual has been distributed to a workforce, that manual as a whole, not just a section of the manual, is relevant to the determination of whether it creates an implied contract of employment. 99 *N.J.* at 307. The Court in *Woolley* also noted that when a manual, in its entirety, is widely distributed to the workforce, it may give rise to an implied contract even for an employee who did not read the manual, know of its existence, or rely on it. *Id.* at 304–05 n. 10; *see also Gilbert, supra,* 258 *N.J.Super.* at 330 (noting that under *Woolley,* "that the employee knows nothing of the particulars of the employer's policies and procedures" does not matter). That is because a widely-distributed manual is the "most reliable statement of the terms of the employment." *Woolley, supra,* 99 *N.J.* at 298–99.

The lower court here apparently believed that a partial manual itself could constitute an employment contract because plaintiff claimed to have received only the eleven-page section dealing with termination, and not the entire manual. However, whether Nicosia actually received only a section of the manual is not the critical inquiry. Rather, it is whether the Wakefern manual as a whole, regardless of its actual receipt by the employee, gives rise to an implied contract of employment because of its terms—including most importantly those relating to employment security—and its wide distribution. *See Fregara v. Jet Aviation Business Jets,* 764 F.Supp. 940, 953 (D.N.J.1991) (noting that *Woolley* claim cannot rely on only portion of manual without being held accountable for all manual provisions: "*Woolley* stands for the proposition that a binding contract can be implied from provisions contained in an employee handbook. This contract, if implied, is binding as a whole.").

An employee may not select among the provisions of a employment manual to determine which provision should give rise to enforceable contractual obligations. If Nicosia "seeks to rely on provisions in the employee handbook as the source of an implied contract of employment, then he must accept the

agreement as a whole with its attendant responsibilities." See *id.* at 951. In this case, then, the eleven-page excerpt must be considered in light of the entire manual, including the disclaimer, even if Nicosia was unaware that the excerpt was part of a larger employment policy document.

The trial court's jury instructions, as noted, allowed the jury to find that a section of the Wakefern manual alone created a binding contract. Under the circumstances that instruction constitutes only harmless error because the entire employment manual—apart from the disclaimer—itself gave rise to an implied employment contract. That contract included the rights and obligations in the eleven-page section that plaintiff actually received.

IV

Wakefern contends that its employment manual contained a disclaimer that negated the enforceability of the termination provisions set forth in the eleven-page section on which Nicosia relies.

An effective disclaimer by the employer may overcome the implication that its employment manual constitutes an enforceable contract of employment. *Woolley, supra,* 99 *N.J.* at 309. The purpose of such a disclaimer is to provide adequate notice to an employee that she or he is employed only at will and is subject to termination without cause. "It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises." *Ibid.* An employer can make such a disclaimer by

> the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.
>
> [*Ibid.*]

In other words,

> [t]he provisions of the manual concerning job security shall be considered binding unless the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer's intent not to be bound.
>
> [*Ibid.* at 307.]

The Court in *Woolley* recognized that "[m]any ... workers undoubtedly know little about contracts, and many probably would be unable to analyze the language and terms of [an employee] manual." *Id.* at 300. Therefore, to determine whether a disclaimer constitutes an "appropriate statement" in a "very prominent" place, *id.* at 309, a court should construe the disclaimer "in accordance with the reasonable expectations of the employees," *id.* at 298. An effective disclaimer must be expressed in language "such that no one could reasonably have thought [the manual] was intended to create legally binding obligations." *Id.* at 299.

The disclaimer relied on by Wakefern provides:

> A. *Introduction*

> This manual contains statements of Wakefern Food Corp. and its subsidiaries' Human Resource policies and procedures. (Hereafter referred to as "the Company"). The terms and procedures contained therein are not contractual and are subject to change and interpretation at the sole discretion of the Company, and without prior notice or consideration to any employee.

Woolley stressed that a disclaimer must be clear. 99 N.J. at 309; *see, e.g., Toussaint v. Blue Cross & Blue Shield,* 408 Mich. 579 (1980); *Thompson v. St. Regis Paper Co.,* 102 Wash.2d 219 (1984); *Suter v. Harsco Corp.,* 184 W.Va. 734 (1991). Although *Woolley* does not require the use of specific language for an effective disclaimer, it does require that a disclaimer make clear "that the employer continues to have the absolute power to fire anyone with or without cause." 99 N.J. at 309; *see* Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship,* 17 *Hofstra L. Rev.* 365, 384 (1989) ("Employers wishing to confirm the terminable at-will status of their employees should include three components within their disclaimer: (1) that the employment relationship is terminable at the will of either party, (2) that it is terminable with or without cause, and (3) that it is terminable without prior notice.").

The Appellate Division, in *Preston, supra,* 231 N.J. Super. at 81, addressed the *Woolley* requirement for an "appropriate statement" that disclaims the binding effect of the terms and conditions set forth in an employment manual. The *Preston* court stated that an effective disclaimer must expressly "advise its employees that they could be discharged at will." *Id.* at 87. In so doing, "the language in the disclaimer must indicate, in straightforward terms, that the employee is subject to discharge at will." *Id.* at 85.

Wakefern's disclaimer language fails to constitute an "appropriate statement" under *Woolley* because it does not use "straightforward terms." *See Preston, supra,* 231 N.J. Super. at 87. Instead, it contains "confusing legalese," such as the terms "not contractual," "subject to ... interpretation," and "consideration." *See Woolley, supra,* 99 *N.J.* at 300; Chagares, *supra,* 17 *Hofstra L. Rev.* at 381 (stating "a disclaimer ... should not contain harsh language or confusing legalese"); *see also McDonald v. Mobil Coal Producing, Inc.,* 820 P.2d 986, 989 (Wyo.1991) (finding ineffective disclaimer that was unclear "[f]or persons untutored in contract law" for whom "such clarity is essential"). As the trial court noted, Wakefern uses "language that a lawyer would understand, but that an employee would not equate with the objectives of ... *Woolley.* " Nicosia should not be expected to understand that Wakefern's characterization of its manual as "not contractual" or "subject to change and interpretation at the sole discretion of the Company" meant that the employer, despite the discipline and termination provisions of its manual, reserved the "absolute power to fire anyone with or without cause" without actually changing those provisions. *See Woolley, supra,* 99 N.J. at 300; *see also Swanson v. Liquid Air Corp.,* 118 Wash.2d 512 (1992) (noting that term "contract of employment" is "manifestly unclear" because "at will employee *has* an employment contract—it is simply one that may be ended at any time for any reason"). The burden is not on the employee "to draw inferences from the handbook language." *McDonald, supra,* 820 *P.*2d at 989.

Woolley also held that the disclaimer must be in "a very prominent position." 99 N.J. at 309. Disclaimers in employee manuals fail for lack of prominence when the text is not set off in such a way as to bring the disclaimer to the attention of the reader. *Ibid.; McDonald, supra,* 820 *P.*2d at 988 (finding disclaimer that appeared on first page of employee manual as part of lengthy text not conspicuous because it was "not set off in any way, was placed under a general subheading, was not capitalized, and contained the same type size as another provision on the same page").

The "prominence" requirement can be met in many ways. Basically, a disclaimer must be separated from

or set off in a way to attract attention. *See Jimenez v. Colorado Interstate Gas Co.,* 690 F. Supp. 977, 980 (D.Wyo.1988). For example, "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." N.J.S. 12A:1–201(10); *see Hannah v. United Refrigerated Servs., Inc.,* 430 S.E.2d 539 (S.C.Ct.App.1993) (applying South Carolina U.C.C. to find disclaimer not conspicuous on second page of first section under heading "WELCOME"). A reader's attention may be called by setting off the disclaimer with different type, including bold, *see Perry v. Sears, Roebuck & Co.,* 508 So.2d 1086, 1088 (Miss.1987), capitals, *see Jimenez, supra,* 690 F. Supp. at 980, or italics, *see Kari v. General Motors Corp.,* 79 Mich. App. 93 (1977), *rev'd on other grounds,* 402 Mich. 926 (1978). A disclaimer may be underlined or set off by a different color or border. *See Jimenez, supra,* 690 F. Supp. at 980; *Kari, supra,* 261 N.W.2d at 223.

We concur in the finding of the Appellate Division that Wakefern had failed to meet the prominence test in part because its "statement is not highlighted, underscored, capitalized, or presented in any other way to make it likely that it would come to the attention of an employee reviewing it."

We conclude that although the requirement of prominence can be satisfied in a variety of settings, and that no single distinctive feature is essential *per se* to make a disclaimer conspicuous, in this case the disclaimer was not placed or presented in a way calculated to focus the attention of a reader.

We are also satisfied that when the facts surrounding the content and placement of a disclaimer are themselves clear and uncontroverted, as in this case, the effectiveness of a disclaimer can be resolved by the court as a question of law. Conspicuousness will always be a matter of law. *See, e.g.,* N.J.S. 12A:1–201(10); *Jimenez, supra,* 690 F.Supp. at 980 n. 1; *Hannah, supra,* 430 *S.E.*2d at 542; *McDonald, supra,* 820 *P.*2d at 988. In other cases, the effect of a disclaimer's content will also be a question of law. *Jimenez, supra,* 690 F.Supp. at 980 ("No genuine issue of fact exists as to matter such as the disclaimer's location or size, but exists to its effect only."). In some cases, however, just as a jury determines whether an employment manual gives rise to an implied contract, so too may a jury need to decide whether the content of a disclaimer is effective. *See Witkowski, supra,* 136 N.J. at 400–401. In this case, the trial court could find as a matter of law, as it did, that the placement of Wakefern's disclaimer was not prominent and consequently, the disclaimer was ineffective.

In summary, the trial court correctly submitted to the jury the question of whether a *Woolley* contract existed because, as the Appellate Division noted, "disputes of fact as to the contract status of an employee under a manual are properly submitted to the jury." *See, e.g., Woolley, supra,* 99 *N.J.* at 298; *Gilbert, supra,* 258 N.J.Super. at 331; *Preston, supra,* 231 N.J.Super. at 85; *Giudice v. Drew Chem. Corp.,* 210 N.J.Super. 32, 36 (App.Div.1986). The evidence, as recounted, was sufficient to support the determination that, by virtue of its specific provisions and distribution, the entire Wakefern employment manual, including the eleven-page section actually received by plaintiff, constituted an implied contract of employment that barred termination without cause. In addition, based on the uncontroverted lack of prominence, the issue of the effectiveness of the disclaimer under the circumstances posed only a question of law that the trial court properly resolved by determining that the disclaimer was ineffective in negating the enforceable obligations of the employment manual.

V

Lastly, Wakefern contends that the after-acquired-evidence doctrine should be a defense to a wrongful-discharge claim based on the breach of an implied contract of employment that derived from its personnel manual. It asserts that the doctrine should have been available as a defense to plaintiff's claim because

evidence discovered after plaintiff's discharge justified his immediate termination.

The after-acquired-evidence doctrine allows employers to escape or limit liability for an unlawful termination by introducing evidence of an employee's wrongdoing that the employer discovers *after* its decision to terminate the employee. *See* Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After–Acquired Evidence in Title VII Litigation,* 26 *Conn. L. Rev.* 145, 147 n. 10 (1993) (defining rule as "evidence of an employee's on-the-job misconduct or of an employee's misrepresentation on his [or her] job application or resume that the employer unearths only after making an adverse employment decision regarding the employee").

The after-acquired-evidence doctrine was first articulated by the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co.,* 864 F.2d 700, 708 (10th Cir. 1988), in a case in which an employer discovered evidence that a discharged employee, who contended that his termination had been unlawful because it violated laws against discrimination, had falsified insurance claims. The court ruled that the after-acquired evidence constituted a complete bar to the employee's recovery.

Generally, courts consider the after-acquired-evidence rule in the context of an unlawful termination based on a violation of the laws against discrimination. The basic rationale of the doctrine is that the employee is not entitled to relief because "the employee either should not have been hired in the first place or should have been fired before the discrimination occurred and therefore, is not entitled to any remedy for subsequent discrimination as a matter of law." William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims,* 9 *Lab.Law.* 19, 33 (1993). However, the after-acquired-evidence rule is not applied uniformly. Some courts have adopted a strict after-acquired defense, which precludes *all* recovery, while others have adopted a more limited application, which does not totally bar recovery for the unlawful termination but restricts or reduces compensatory relief. *See McKennon v. Nashville Banner Publishing Co.,* 9 F.3d 539 (6th Cir.1993), *cert. granted,* 511 U.S. 1106 (1994); Cheryl Krause Zemelman, *The After–Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility,* 46 *Stanford L.nRev.* 175, 176 (1993).

The availability of the after-acquired-evidence doctrine as a defense to a wrongful discharge claim based on an implied contract of employment presents a novel and controversial question. The policy concerns that are at stake in applying the after-acquired-evidence defense to an unlawful discharge based on invidious discrimination differ from those that are implicated in private-employment-contract actions under *Woolley. See Massey v. Trump's Castle Hotel & Casino,* 828 F. Supp. 314, 325 (D.N.J.1993) (noting that "unlike policies underlying the [New Jersey] anti-discrimination statutes, there is no competing policy under ordinary contract principles to discourage an employer's breach of contract"); *see also Bazzi v. Western & S. Life Ins. Co.,* 808 F. Supp. 1306, 1310 (E.D.Mich.1992) (noting "important distinction between the duties arising from contract and the duties imposed by remedial legislation"); *Schuessler v. Benchmark Mktg. & Consulting Inc.,* 243 Neb. 425 (1993) ("Breach of contract does not give rise to the same concerns or demand the same protections as does an action based on discrimination."). *See generally* David H. Ben–Asher, *Should Discriminating Employers Be Insulated From All Liability By the Use of After–Acquired Evidence?,* 17 *N.J.Lab. & Emp.L.Q.* 3 (Spring 1994) (criticizing potential adoption of after-acquired-evidence defense in New Jersey); David D. Kadue & William J. Dritsas, *When What You Didn't Know Can Help You—Employers' Use of After–Acquired Evidence of Employee Misconduct to Defend Wrongful Discharge Claims,* 27 *Beverly Hills B.A. J.* 117 (1993) (analyzing various contract theories under which after-acquired-evidence rule may be justified); Walter Lucas, *Throwing After–Acquired Evidence Into the Fire,* 136 N.J.L.J. 34, 54 (Jan. 3, 1994) (criticizing potential adoption of defense in New Jersey); Stephen E.

Trimboli & Nathaniel L. Ellison, *After–Acquired Evidence: Should Employees Profit From Their Own Wrongdoing?,* 17 *N.J.Lab. & Emp.L.Q.* 5 (Spring 1994) (arguing for adoption of defense in New Jersey).

We recognize the importance of employment security, which is at the core of the *Woolley* doctrine, when that is promised by an employer and relied on by its workers. *Woolley, supra,* 99 N.J. at 299. We have sought to protect the stability of employment relations and to encourage certainty with respect to employment rights and obligations, *Montells v. Haynes,* 133 N.J. 282 (1993), because "[w]e are a nation of employees" and the "[g]rowth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations," *Pierce v. Ortho Pharmaceutical Corp.,* 84 N.J. 58, 66 (1980).

The difficulty in assessing and weighing those policy concerns is compounded with respect to a termination that is not based on unlawful discrimination or similar violation of law. We are thus counselled to proceed cautiously, especially in this case, which does not squarely present the issue of whether and how the after-acquired-evidence rule should apply in actions for the breach of private employment contracts based on employment manuals under the *Woolley* doctrine.

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VI

The judgment of the Appellate Division is affirmed.

Supreme Court of New Jersey.

Edward B. WITKOWSKI, Plaintiff–Respondent,
v.
THOMAS J. LIPTON, INC., Defendant–Appellant,

Decided June 30, 1994.

HANDLER, J.

In this case, an employee who worked as a maintenance mechanic for a manufacturing company with a large workforce was fired by his employer. The employee claims that his discharge was wrongful because the employment manual, which provides grounds and procedures for termination, constitutes an employment contract that was not followed in the employee's discharge. The employer claims that the employee's discharge was not wrongful. It contends that the employee was hired as an "at-will" employee who could be fired without cause.

This case, as does the companion case of *Nicosia v. Wakefern Food Corp.,* 136 *N.J.* 401 (1994), also decided today, requires the Court again to consider, in light of *Woolley v. Hoffman LaRoche,* 99 *N.J.* 284, *modified,* 101 *N.J.* 10 (1985), the circumstances under which an employment manual may create an enforceable contract requiring the employer to discharge an employee only for cause in accordance with the manual's provisions.

I

Plaintiff Edward Witkowski ("Witkowski") was fired by defendant Thomas J. Lipton, Inc. ("Lipton") for theft when a can of oil was discovered in his locker. Witkowski denied that he had stolen the oil and asserted that under Lipton's employment manual he could not be fired without cause.

Witkowski and his wife filed a complaint against Lipton alleging, among other claims, wrongful discharge due to breach of contract based on Lipton's employment manual. Defendant moved for summary judgment, seeking dismissal of the complaint in its entirety. Defendant argued that Witkowski was an "at will" employee who could be fired without cause and that its manual did not express a comprehensive termination policy but merely provided some examples of terminable offenses and thus did not create an implied employment contract. Plaintiff Edward Witkowski opposed the motion, attacking solely the defense to the wrongful-discharge allegation of the complaint. The trial court found "as a matter of law that the [Lipton] manual ... was not intended to be a comprehensive treatment of the subject of employment termination and therefore there was no contract between plaintiff and defendant." Accordingly, it granted Lipton's motion for summary judgment.

Plaintiff appealed the decision to the Appellate Division, arguing that genuine issues of material fact existed regarding the existence of an employment contract based on the employment manual. That court, in an unreported *per curiam* opinion, reversed the judgment of the trial court and remanded, finding that the manual "created a factual question of an employment contract."

Defendant filed a petition for certification, which we granted. 134 *N.J.* 480 (1993). We affirm the judgment of the Appellate Division.

II

Lipton hired Witkowski in June 1980 as a Class B Maintenance Mechanic. In October 1989, a routine United States Department of Agriculture inspection of employee lockers revealed that plaintiff's locker contained a can of CRC industrial 3.36 lubricating oil, a type of oil used on the "demand conveyor car clutches" at the Lipton plant. Lipton fired Witkowski on the grounds that he had stolen the lubricating oil. Witkowski denied that he had stolen the oil, claiming that he had permission from his supervisor to keep the oil in his locker. Despite his denial, Lipton discharged Witkowski based on the alleged theft.

When he was hired, Witkowski received an employment manual from Lipton's personnel department entitled "Your Life at Lipton—Flemington Plant" ("manual"). The Lipton manual is divided into four sections: Section I—"Introduction"; Section II—"General Information"; Section III—"Your Job & Your Earnings"; and Section IV—"Employee Rights." Section I of the Lipton manual describes the history of Lipton and contains a statement of Lipton's equal-employment-opportunity policy. Section III includes information detailing salaries, promotions and transfers, overtime, and layoffs. Section IV provides information concerning certain benefits available to Lipton employees.

Section II covers several policies, including safety and sanitation, medical services, personnel and attendance, and leaves of absence. Under the heading "Some Important Basics" and the subheading "Trial Period," Section II provides:

> Time and effort are required on the part of an applicant seeking employment. Usually, considerable [sic] more of both is spent by the company. It is, therefore, in the best interests of both the applicant and the company that associations be entered into only when a mutually satisfactory and worthwhile relationship will occur.
>
> To this end we try to learn everything about applicants which is relevant to their success on the job with Lipton. We likewise try to inform applicants about the job and company requirements and benefits in order that they may decide whether or not they wish to accept employment.
>
> This careful manner of applicant selection before employment has proven successful over the years. The best judgement, however, does not always fully replace actual performance on the job. It is our policy, therefore, to treat the first three months of employment as a trial period during which time supervisors will be expected to decide whether or not to consider the employee qualified to become a regular employee.

The last page of Section II, under the heading "Warning Notices," provides:

> In fairness to both employees and the company we have a system of warning notices for violation of company policies or rules. Employees with poor records for lateness, absence, infringement of company rules or sanitation and safety regulations will be spoken to by their supervisor. A second infraction will mean a written warning, a copy of which is filed with the Personnel Department.
>
> If the employee's record does not improve sufficiently, he or she will receive a second written warning notice. The third written notice constitutes grounds for dismissal. In some situations, depending on the seriousness of the rules' infraction, a suspension from work may be given in addition to the first or second notice.

Some violations of company policies are grounds for immediate dismissal. Some examples of these

include:

1. Being unfit for work because of excessive use of intoxicants

2. Consuming intoxicants on the premises

3. Professional gambling on company premises

4. Fighting, wrestling and "horseplay" on premises

5. Clocking the time card of another employee

6. Insubordination

7. Stealing or unauthorized possession of Company property

The alleged violation of company policy that constituted the grounds for Witkowski's immediate dismissal was that encompassed by the seventh example: "Stealing or unauthorized possession of Company property."

III

The overriding issue presented is whether the Lipton manual created an employment contract that conferred on plaintiff the right to be discharged only in accordance with the terms of the manual. The Appellate Division reviewed the Lipton manual and found that the evidence would support a determination that the manual established an implied employment contract that governed termination of employment. We agree.

An employment manual providing terms and conditions of employment that include grounds and procedures for dismissal can create an employment contract. This Court held in *Woolley* that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." 99 *N.J.* at 285–86. Therefore, the Court ruled that the termination clause of the company's employment handbook, including the procedure required before termination, could be contractually enforced.

The Court in *Woolley* explained that "[a] policy manual that provides for job security grants an important, fundamental protection for workers." *Id.* at 297. In that case, the termination policy was "definite," *id.* at 305 n. 12, "explicit and clear," *id.* at 306, and provided "a fairly detailed procedure," *id.* at 287 n. 2. Hence, the Court reasoned "job security provisions contained in a personnel policy manual widely distributed among a larger workforce are supported by consideration and may therefore be enforced as a binding commitment of the employer." *Id.* at 302.

The key consideration in determining whether an employment manual gives rise to contractual obligations is the reasonable expectations of the employees. "When an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions)," courts should continue and enforce that manual "in accordance with the reasonable expectations of the employees." *Id.* at 297–98.

No categorical test can be applied in determining whether an employment manual when fairly read gives

rise to the reasonable expectations of employees that it confers enforceable obligations. Certain factors, however, will generally be relevant in determining whether such a manual creates a contract. Those ordinarily relate to both the manual's specific provisions and the context of its preparation and distribution. *Id.* at 299. An established employment manual that expresses " 'company-wide employer policy' " may give rise to an implied contract of employment if its provisions "contain an express or implied promise concerning the terms and conditions of employment." *Gilbert v. Durand Glass Mfg. Co., Inc.,* 258 N.J.Super. 320, 330 (App.Div.1992) (quoting *Shebar v. Sanyo Business Sys. Corp.,* 218 N.J.Super. 111, 120 (App.Div.1987), *aff'd,* 111 N.J. 276 (1988)); *see Woolley, supra,* 99 N.J. at 302; Kevin C. Donovan & David J. Reilly, *Employment "By the Book" in New Jersey: Woolley and Its Progeny,* 22 *Seton Hall L. Rev.* 814, 826 (1992) (observing that under *Woolley* "an explicit statement of a specific, detailed employer policy, not undermined by any other language in the handbook, is required to establish that the employer is clearly waiving its right to discharge without cause"). However, in *Woolley,* "[w]ithout minimizing the importance of [the manual's] specific provisions," the Court also emphasized that the Hoffman–La Roche employment manual created an implied contract of employment because of "the context of the manual's preparation and distribution." 99 *N.J.* at 299.

In sum, under *Woolley,* the basic test for determining whether a contract of employment can be implied turns on the reasonable expectations of employees. A number of factors bear on whether an employee may reasonably understand that an employment manual is intended to provide enforceable employment obligations, including the definiteness and comprehensiveness of the termination policy and the context of the manual's preparation and distribution.

Lipton contends that its manual did not contain a comprehensive termination policy and thus did not create a contract because the provision relating to termination listed only seven examples of terminable offenses, which could not be understood or construed by an employee to be binding or to prohibit the firing of an employee without cause.

The trial court found that "[t]his case is *not* like *Woolley* where the employment manual contains specific procedures and guidelines for termination." The court noted that the manual did not expressly delineate *all* grounds for immediate dismissal: "By the very language of the employee manual, Lipton leaves the possibility open that there may be other grounds for immediate dismissal and that only ... 'some examples' ... are merely a portion of the grounds."

The Appellate Division concluded that the trial court's interpretation of the termination policy was "too narrow," and "although the list [of terminable offenses] is not exhaustive, other grounds would be limited by the construction principle that they fall into the same class or category of violation." We concur in the Appellate Division's analysis and conclusion.

Comprehensiveness of job-security provisions is just one of several factors for a court to consider in determining whether that policy gives rise to an implied contract under *Woolley.* The Court in *Woolley* observed that that manual contained a "fairly detailed procedure to be used before an employee may be fired for cause." 99 *N.J.* at 287 n. 2. However, the Court found that the list of terminable offenses enumerated in the Hoffman–LaRoche manual set guidelines for determining what constituted cause for termination, *id.* at 310–13, and that the overall termination policy was "explicit and clear," *id.* at 306. Nowhere did the Court imply that a termination policy must be set forth exhaustively or list every "just cause" ground for termination to find that the job-security provision contained in the manual could give rise to employees' reasonable expectations of that provision's enforceability.

In *Preston v. Claridge Hotel & Casino,* 231 N.J. Super. 81 (App.Div.1989), the employer attempted to distinguish its termination policy from that in *Woolley,* arguing that the Hoffman–LaRoche policy was "more detailed and go[es] to greater length to spell out 'just cause' " than did that of Claridge's employee handbook. *Id.* at 85. The court reasoned that although the company's policies did not "expressly declare that employees will be fired only for just cause," such a contract was created because of the existence of several *Woolley* factors: the handbook was widely distributed; employees were required to read and sign employee handbook "acknowledgement form"; the manual contained a four-step progressive-discipline procedure and enumerated "types of prohibited conduct"; and the handbook made various representations of "maximum job security." *Ibid.; see House v. Carter–Wallace, Inc.,* 232 N.J. Super. 42, 55 (App.Div.), *certif. denied,* 117 N.J. 154 (1989); *see also Schwartz v. Leasametric, Inc.,* 224 N.J. Super. 21, 31 (App.Div.1988) (holding that employment manual with termination policy that provided non-exhaustive list of dischargeable offenses as well as three-step progressive-discipline procedure gave rise to implied contract); *cf. Kane v. Milikowsky,* 224 *N.J. Super.* 613 (App.Div.1988) (ruling that employer's one-page memorandum, which listed twenty-seven terminable offenses, that was not widely distributed did not constitute an implied promise to fire only for just cause); *Radwan v. Beecham Laboratories,* 850 F.2d 147, 149, 151 (3d Cir.1988) (holding no implied contract where termination policy that provided dismissal for cause "may include, but is not limited to" six examples because manual's " 'fairly detailed enumeration of grounds for dismissal with cause' is not exclusive") (quoting *Woolley, supra,* 99 *N.J.* at 287 n. 2); Donovan & Reilly, *supra,* 22 *Seton Hall L. Rev.* at 827 (finding that *Kane* "memorandum contained neither a comprehensive treatment of the subject of termination nor clear and specific job security provisions—key prerequisites to a *Woolley* contract—and therefore no enforceable promise existed").

In this case, Lipton distributed its manual to all employees. The wide distribution of the manual indicates that Lipton understood that it would be read and considered by all its employees. *See Woolley, supra,* 99 *N.J.* at 298 (finding that although employment manual had been distributed to only 300 of 3,000–person workforce, employer clearly intended that manual apply to all employees). We can infer that Lipton sought to gain the cooperation and loyalty of its employees by creating the employment manual and through its wide dissemination reasonably demonstrated its intent that the manual apply to the entire workforce.

In addition, the specific provisions of the manual relating to job security are sufficiently definite and comprehensive, thereby reinforcing the conclusion that Lipton intended those provisions to be regarded by its workforce as enforceable. *See Gilbert, supra,* 258 *N.J.Super.* at 257. The manual's terms cover all employees. *See Woolley, supra,* 99 N.J. at 298. The manual distinguishes between "trial employees" and "regular employees," indicating that a new employee must be "qualified to become a regular employee." It was clearly reasonable for Lipton employees to expect that if an employee successfully completes the three-month "trial" period and "qualifie[s]" as a "regular employee," he or she then would be considered a "regular employee" subject to the duties and entitled to the benefits and safeguards of "regular" employees. *See Fregara v. Jet Aviation Business Jets,* 764 F.Supp. 940, 950 (D.N.J.1991) (noting argument that "if the company expressly reserves the right to fire for any reason during the probationary period, then the employee who survives has earned the protection of a 'just cause requirement' for termination"); *Beales v. Hillhaven, Inc.,* 108 *Nev.* 96 (1992) (noting that distinction between "permanent" and "probationary" employee status "should be considered as one fact in determining if the employee is something other than at will, [but] this designation alone is insufficient to change the presumption of at will employment"); Andrew D. Hill, *"Wrongful Discharge" and the Derogation of the At–Will Doctrine* 116 (1987) (noting that handbook that provides "probationary period" may imply that after probationary period had been successfully completed, employee can be terminated only for just cause).

Furthermore, the employment conditions that apply to "regular employees" include those in the section under "Warning Notices," which delineates seven employment infractions that will result in "immediate" dismissal. Similar to the manual in *Preston, supra,* the Lipton manual also provides a progressive discipline procedure. 231 *N.J.Super.* at 86; *see Pine River State Bank v. Mettille,* 333 *N.W.*2d 622 (Minn.1983) (finding implied contract based on manual in part because of definite and detailed four-step disciplinary procedure); *cf. Johnston v. Panhandle Co-op. Ass'n,* 225 *Neb.* 732 (1987) (finding no implied contract based on manual because it failed to provide any "disciplinary procedures short of termination"). *See generally* Ira M. Shepard et al., *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 207 (1989) (noting that employers are not required to establish "a formal progressive discipline policy," but that "judges and juries expect employers to provide their employees with reasonable notice of shortcomings and an opportunity to correct them").

In conclusion, the Lipton manual's wide distribution and the definiteness and comprehensiveness of its termination policy could reasonably lead an employee to expect that the manual created enforceable employment obligations.

Finally, Lipton claims that if this Court finds that an implied employment contract arises from its manual under these circumstances, the employment-at-will presumption will be nullified in New Jersey. It argues that *any* manual that broadly deals with employee relations will now "give rise to an implied contract to discharge only for cause, even if the manual does not promise continued employment and does not contain a comprehensive termination policy."

In New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine. *English v. College of Medicine & Dentistry,* 73 N.J. 20, 23 (1977). An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise. *See Bernard v. IMI Sys., Inc.,* 131 N.J. 91, 105–06 (1993) ("Today, both employers and employees commonly and reasonably expect employment to be at-will, unless specifically stated in explicit, contractual terms."); *Erickson v. Marsh & McLennan Co., Inc.,* 117 N.J. 539, 561 (1990) ("A 'contentious' 'at-will' employee can be fired but it is not illegal."); *Velantzas v. Colgate–Palmolive Co.,* 109 N.J. 189, 191 (1988) ("An employer can fire an at-will employee for no specific reason or simply because an employee is bothering the boss.").

The employment-at-will doctrine does have exceptions, however. For example, an employer may not fire a worker for a discriminatory reason. *See, e.g.,* N.J.S. 10:5–1 to –28 (prohibiting discrimination on basis of race, creed, sex, age, marital status, ancestry, national origin, family status, or sexual orientation). Similarly, an employer may not fire an employee if the "discharge is contrary to a clear mandate of public policy." *Pierce v. Ortho Pharmaceutical Corp.,* 84 N.J. 58, 73 (1980) ("[E]mployers will know that unless they act contrary to public policy, they may discharge employees at will for any reason.").

Woolley, unlike those statutory and judicial exceptions to the employment-at-will doctrine, affirms the at-will presumption. It recognizes that "as always, the employer and employee are free to contract for terms and conditions of employment, such as termination only 'for cause.' " Donovan & Reilly, *supra,* 22 *Seton Hall L.Rev.* at 816; *see also McQuitty v. General Dynamics Corp.,* 204 *N.J.Super.* 514, 520 (App.Div.1985) ("*Woolley* is not ... 'an exception to the at-will doctrine' ... but, rather, a recognition of basic contract principles concerning acceptance of unilateral contracts.").

As this Court in *Woolley* recognized in its discussion of New Jersey's employment-at-will rule:

> [T]he issue is not whether the rules applicable to individual lifetime or indefinite long-term employment contracts should be changed, but rather whether a correct understanding of the "underlying interests involved" ... in the relationship between the employer and its workforce calls for compliance by the employer with certain rudimentary agreements voluntarily extended to the employees.
>
> [99 *N.J.* at 292 (quoting *Pierce, supra,* 84 *N.J.* at 291).]

Consequently, under *Woolley,* if a plaintiff can prove that an employment manual containing job-security and termination procedures could reasonably be understood by an employee to create binding duties and obligations between the employer and its employees, the manual will constitute, in effect, a unilateral offer to contract that an employee may accept through continued employment. 99 *N.J.* at 309. Only in those circumstances will an employment manual overcome the presumption that the employment is at will.

IV

We conclude that the matter should be remanded for a jury to determine whether an employee could reasonably expect that the Lipton manual provided job security, thereby creating an implied contract of employment. *See Giudice v. Drew Chem. Corp.,* 210 *N.J.Super.* 32, 36 (App.Div.) (noting that *Woolley* claims tend to present questions of material fact, thereby precluding summary judgment), *certif. denied,* 104 *N.J.* 465 (1986). The Appellate Division, correctly ruling that "the terms and conditions of the employee manual create a factual question of an employment contract," reversed the trial court's summary judgment in favor of defendant. The court reasoned that a jury could find that the comprehensive nature of the job security provisions of the Lipton manual and its wide distribution created an implied contract of employment.

If the fact-finders determine that a contract exists, the jury must then determine whether under the employment manual Witkowski was guilty of "[s]tealing or unauthorized possession of Company property" by having the can of oil in his locker. *See Cooper v. Singer,* 118 *N.J.L.* 200, 202 (E. & A.1937) (holding that whether foreman was fired because of employer's dissatisfaction or some other reason was jury issue); *Jorgensen v. Pennsylvania R.R. Co.,* 38 N.J. Super. 317, 338 (App.Div.1955) (ruling that whether employee discharged for appropriating company property was factual issue for jury), *certif. denied,* 20 N.J. 308 (1956); *see also Toussaint v. Blue Cross & Blue Shield,* 408 Mich. 579 (1980) ("The jury is always permitted to determine the employer's true reason for discharging the employee."); 1 Lex K. Larson & Philip Borowsky, *Unjust Dismissal* § 9.02[3] (1993) ("Allowing the trier of fact to decide the issue in cases where the reason for discharge is disputed will more effectively balance the rights of employers and employees.").

As the Appellate Division properly noted in reversing the trial court's grant of summary judgment, "plaintiff was charged with a listed example, stealing or unauthorized possession of Company property. Whether he was guilty of this violation is a contested matter which cannot be determined on summary judgment." If he is guilty of the alleged offense, then Lipton can terminate him for cause.

In addition, we note that the Lipton manual contains a purported disclaimer. Under *Woolley* an implied contract based on an employment manual may be negated by the inclusion of a clear and prominent disclaimer. 99 *N.J.* at 285; *Nicosia, supra,* 136 *N.J.* at 412. However, in its motion for summary judgment defendant did not ask the court to address the adequacy of the manual's disclaimer: "Our position is that

even without a disclaimer, the manual in our case ... does not meet the standards of *Woolley*." The existence and enforceability of that disclaimer was not adjudicated below. As defendant stated, "there's a fact issue with respect to that [disclaimer] ... we understand that ... and on summary judgment ... do not ask the Court to resolve the fact issue." As noted, the only issue determined by the trial court was whether the Lipton manual creates an implied employment contract. At the trial below the issue whether the disclaimer is effective to overcome the conditions of the manual will have to be resolved. We have considered that question in the companion case of *Nicosia, supra,* at 412, and that opinion should govern the trial court's disposition of the "disclaimer" issue.

V

The Appellate Division judgment is affirmed and the matter remanded for further proceedings.

United States District Court
D. New Jersey

Lisa LUONGO, Plaintiff,
v.
VILLAGE SUPERMARKET, INC. and The Shop Rite of Greater Morristown, Defendants.

Signed 06/02/2017

OPINION

Kevin McNulty, United States District Judge

The gist of this action is an employee's hybrid claim under Section 301 of the Labor Management Relations Act of breach of a collective bargaining agreement and her union's duty of fair representation that she was wrongfully discharged. The defendants filed a motion (ECF no. 4) to dismiss the original complaint for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The plaintiff filed a brief in response (ECF no. 7), but simultaneously filed a proposed amended complaint. (ECF no. 6) The defendants then filed a reply brief (ECF no. 8), which was directed to the allegations of the proposed amended complaint. The Court granted leave to file the amended complaint and deemed the defendants' motion to dismiss to be directed to the amended complaint. (ECF no. 9) The plaintiff, with leave of the court, filed a surreply. (ECF no. 12) The matter is now fully briefed and ripe for decision.

Count[] Two of the amended complaint … will be dismissed…..

I. The Amended Complaint

* * * *

Count Two: Breach of contract based on employee manual
Through an Employee Manual disseminated widely to employees, and long-standing practices and procedures in the workplace, the Company entered into an implied contract with Luongo. That contract included a commitment to abide by certain procedures, including the use of corrective action, prior warnings, and consistency in the application of discipline to employees. The discharge of Luongo without warning or corrective action breached that contract.

II. Standard on a Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). In deciding a motion to dismiss, a court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) ("reasonable inferences" principle not undermined by later Supreme Court *Twombly* case, *infra*).

Fed. R. Civ. P. 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and

conclusions, and formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, such that it is "plausible on its face." *See id.* at 570; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556 (1955). While "[t]he plausibility standard is not akin to a 'probability requirement' ... it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678 (2009). [Footnote omitted.]

The Court in considering a Rule 12(b)(6) motion is confined to the allegations of the complaint, with certain exceptions:

> "Although phrased in relatively strict terms, we have declined to interpret this rule narrowly. In deciding motions under Rule 12(b)(6), courts may consider "document[s] integral to or explicitly relied upon in the complaint," *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis in original), or any "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," *PBGC v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993)."

In re Asbestos Products Liability Litigation (No. VI), 822 F.3d 125, 134 n.7 (3d Cir. 2016). *See also Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) ("However, an exception to the general rule is that a 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion to dismiss into one for summary judgment.' ") (quoting *In re Burlington Coat Factory*, 114 F.3d at 1426); *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

A copy of the collective bargaining agreement ("CBA") is attached to the Defendants' reply submission. (ECF no. 8–1) The CBA is integral to and explicitly relied on by Counts One and Three of the amended complaint. A copy of the Village Supermarket Associate Handbook ("Employee Handbook") is attached to the Defendants' motion. (ECF no. 4–1) The Employee Handbook is integral to and explicitly relied on by Counts Two and Three of the amended complaint. I therefore consider both documents on this Rule 12(b)(6) motion.

III. Analysis

* * * *

B. Breach of Contract (Employee Manual)

Under New Jersey law, a breach of contract claim has three essential elements: (1) the existence of a valid and enforceable contract, (2) a breach of that contract, and (3) damages. *Murphy v. Implicito*, 392 N.J.Super. 245 (Ct. App. Div. 2007); *accord Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007). As to Count Two, the Defendants argue that the breach of contract claim founders on the first element: the existence of an enforceable contract. The Employee Manual, they say, is not a binding contract, and in fact it clearly and conspicuously disclaims contractual status. The plaintiff does not respond to this argument. Nevertheless I analyze the point briefly, and find myself in agreement with the defendants.

"In New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine." *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 397 (1994) (citation

omitted). "An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise." *Id.* Such an agreement may be found "if a plaintiff can prove that an employment manual containing job-security and termination procedures could reasonably be understood by an employee to create binding duties and obligations between the employer and its employees." *Id.* at 399. In such a case, the employment manual is treated as a contract of employment: "[T]he manual will constitute, in effect, a unilateral offer to contract that an employee may accept through continued employment." *Id.* (citing *Woolley v. Hoffmann–La Roche, Inc.*, 99 N.J. 284, 309, *modified*, 101 N.J. 10 (1985)).

Employers who are wary of creating contractual rights, however, may protect themselves. Many have included disclaimers in their employment manuals, and such disclaimers have been found effective. It is well established that an implied contract based on an employment manual may be negated by the inclusion of a "clear and prominent" disclaimer. *Id.* at 400 (citing *Woolley,* 99 N.J. at 285); *see also Polonsky v. Verizon Communications Corp.*, No. 09-CV-4756, 2011 WL 5869585, at *9 (D.N.J. Nov. 22, 2011); *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401 (1994). To be effective, a disclaimer must be "expressed in language such that no one could reasonably have thought [the manual] was intended to create legally binding obligations." *Nicosia*, 136 N.J. at 413 (internal quotation omitted). "Such a disclaimer serves 'to provide adequate notice to an employee that she or he is employed only at will and is subject to termination without cause.' " *Armato v. AT & T Mobility LLC*, A–2754–11T2, 2013 WL 149671 (N.J. Super. Ct. App. Div. Jan. 15, 2013) (quoting *Nicosia*, 136 N.J. at 412).

The Employee Manual relied upon by Luongo here contains just such a prominent disclaimer, set off and printed on a single page:

> **IMPORTANT NOTICE–READ THIS**
>
> This Village Super Market, Inc. and Associates Handbook is for your information only. It is NOT an employment contract. The rules and policies contained in this handbook may be changed at any time by Village Super Market, Inc. without prior notice to anyone. The interpretation of these rules will be solely by the Village Super Market, Inc. Also, remember that there are many other rules that apply to you and your job which are not contained in this handbook.
>
> This handbook is not a binding contract. Neither this handbook, nor anything else you receive in writing from Village Super Market, Inc., nor anything you are told by someone from Village Super Market, Inc., is a promise to you of a job with Village. You are not guaranteed that you will be hired or that you will continue to be employed by Village under any circumstances.
>
> You may quit Village at any time for any reason, with or without notice. You may be fired from Village at any time for any reason, with or without notice. The only exceptions to your right to quit or Village's right to fire you at any time for any reason with or without notice would be in the form of a written agreement such as a collective bargaining agreement.
>
> This notice is important. If you do not understand this notice, you must ask your Manager for help now. We will be happy to explain anything to you that you do not understand. Be sure to get help if you need it because you will be held responsible to understand this notice, as well as to understand and obey the contents of this handbook.

Employee Handbook at 3.

"When the language and placement of a disclaimer is not disputed, as in this case, the sufficiency of the disclaimer can be decided as a matter of law." *Warner v. Fed. Express Corp.*, 174 F.Supp.2d 215, 228 (D.N.J.2001) (citations omitted). *See also Darling v. Wegmans Food Markets, Inc.*, No. CIV. 13-5885 FLW, 2014 WL 4544095, at *5 (D.N.J. Sept. 12, 2014) ("Plaintiff's only response in her brief as to what additional discovery may be necessary is that Plaintiff would seek discovery of the company policy manual. But Wegmans has produced the material documents in this case—namely, the employee handbook and the policy manual—and Plaintiff's claims can be adjudicated based on those documents and undisputed facts.")

Although those cases decided summary judgment motions, they relied on the face of the manual and the disclaimer; in essence, these courts read the manual just as an employee would. Here, there is no dispute as to the genuineness of the Employee Manual, which is cited and relied upon in the complaint. Particularly in light of the plaintiff's failure to make any argument or assertion to the contrary, I find the language of the disclaimer in the Employee Manual to be sufficiently plain and conspicuous.

As for plainness, as I stated in an earlier case, "the language of the disclaimer is clear. ... The disclaimer does not contain legalese or the kind of confusing language found to render a disclaimer ineffective in *Nicosia, supra." Michaels v. BJ'S Wholesale Club, Inc.*, No. CIV. 2:11-05657 KM, 2014 WL 2805098, at *14 (D.N.J. June 19, 2014), *aff'd*, 604 Fed.Appx. 180 (3d Cir. 2015). The two initial sentences state: "This Village Super Market, Inc. and Associates Handbook is for your information only. It is NOT an employment contract." The first sentence of the second paragraph states: "This handbook is not a binding contract." The third paragraph states: "You may be fired from Village at any time for any reason, with or without notice." The Notice explicitly informs the employee that her rights against the Company may be found in the CBA. Twice, it stresses that the notice is important, and it urges that the employee seek help if she does not understand it.

As for conspicuousness, as I stated in *Michaels*, "the disclaimer is sufficiently prominent. 'The "prominence" requirement can be met in many ways. Basically, a disclaimer must be separated from or set off in a way to attract attention.' *Nicosia*, 136 N.J. at 415." 2014 WL 2805098, at *15. This disclaimer has its own entry—the initial entry in fact—in the Table of Contents. It appears alone, without any other material, on the first page following the Table of Contents. It bears a title, printed in a large sans-serif font that contrasts with the type used in the text of the Handbook: **IMPORTANT NOTICE–READ THIS**.

Seemingly no two disclaimers are alike, but this one resembles those found sufficient in the case law. *See, e.g., Darling*, 2014 WL 4544095, at *4 ("Each handbook clearly states at the outset that it should not be viewed as a contract, does not alter the 'at-will' status of its employees, and that employees 'may be terminated at any time, by either party, for any reason or no reason and with or without notice.' .... Such a disclaimer easily meets the 'clear and prominent' standard articulated in *Woolley.*") (citing *Wiegand v. Motiva Enterprises*, LLC, 295 F.Supp.2d 465, 478 (D.N.J. 2003) (finding there was "no question" that an employer's disclaimer on an employment manual precluded the manual from being construed as an employment contract where the disclaimer stated, "THIS HANDBOOK ... DOES NOT CONSTITUTE AN EMPLOYMENT CONTRACT" and that "THE COMPANY IS ... FREE TO TERMINATE THE EMPLOYEE AT ANY TIME FOR ANY REASON.")); *Lopez v. Lopez*, 997 F.Supp.2d 256, 277 (D.N.J. 2014) ("Verizon's Code of Conduct explicitly states that it is 'not an employment contract' and that it does not 'give [employee] rights of any kind.' .... The disclaimer is located in the introductory section of the Code of Conduct under the heading 'Legal Notice.' "); *Warner v. Federal Express Corp.*, 174 F.Supp.2d 215, 226–27 (D. N.J. 2001) (where handbook stated, "'[t]he Company wants you to understand that The Federal Express Employee Handbook should not be considered a contract of employment," and other document confirmed that

employee " 'understand[s] that The Federal Express Employee Handbook contains guidelines only and that the Company can modify this publication by amending or terminating any policy, procedure, or employee benefit program at any time,' " this language "ma[de] the employee aware that the provisions of the handbook are only guidelines and that the handbook does not establish a contract of employment ... [or] provide any contractual rights.").

In short, reading the disclaimer through the eyes of an employee, I find it clear and prominent, and I hold that it is effective as a matter of law.

* * * *

CONCLUSION

For the foregoing reasons, the defendants' Rule 12(b)(6) motion (ECF no. 4) to dismiss the complaint, now deemed a motion to dismiss the amended complaint (ECF no. 6) for failure to state a claim, is … granted as to Count[] Two of the amended complaint, which [is] dismissed.

United States District Court
S.D. New York

Robert BURCK d/b/a The Naked Cowboy, Plaintiff,
v.
MARS, Incorporated and Chute Gerdeman, Inc., Defendants.

No. 08 CIV. 1330.
February 11, 2008.

Complaint

Kevin T. Mulhearn, P.C. Kevin T. Mulhearn, Esquire (KM2301), 60 Dutch Hill Rd., Suite 8, Orangeburg, NY 10962, Phone: (845) 398-0361, Fax: (845) 398-3836, kmulhearn@ktmlaw.net, Attorneys for Plaintiff.

Halberstadt Curley LLC, Scott M. Rothman, Esquire, 1100 E. Hector Street, Suite 425, Conshohocken, PA 19428, Phone: (610) 834-8819, Fax: (610) 834-8813, srothman@halcur.com Of Counsel for Plaintiff.

Judge Chin.

1. Parties

1. Plaintiff herein is Robert Burck d/b/a The Naked Cowboy ("Burck"), an adult individual residing in the State of New Jersey.

2. Defendants herein are:

(A) Mars, Incorporated ("Mars"), a corporation with a principal place of business at 6885 Elm Street, McLean, Virginia, 22101; and

(B) Chute Gerdeman, Inc. ("Chute Gerdeman"), a corporation with a principal place of business at 455 South Ludlow Street, Columbus, Ohio, 43215.

(C) Moreover, each of the Defendants herein is subject to the personal jurisdiction of this Court because, as alleged herein, each Defendant had sufficient contacts with New York State, and purposely availed itself of the benefits and protections of New York State's laws by establishing substantial contacts with New York State. Indeed, specific jurisdiction over each Defendant exists because each Defendant, as alleged herein, had numerous, prolonged and substantial contacts with New York State which arise from or are directly related to Plaintiff's causes of action.

Statement of Jurisdiction

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 as Plaintiff has pled causes of action arising under federal trademark law.

4. Venue is proper in this judicial district given that all or substantially all of the acts giving rise to Plaintiffs

claims occurred in New York City.

Statement of Facts

5. Over the past decade, Plaintiff Burck has performed as a street entertainer in New York City's Times Square under the persona known as The Naked Cowboy.

6. Always in character, Burck has performed live for hundreds of thousands of people in his trademarked get-up, which features a white cowboy hat, white cowboy boots, white underpants, and an acoustic guitar.

7. The Naked Cowboy's street performances, also known as "busking," have become a fixture of New York City culture, as well as one of the top tourist attractions for visitors to Times Square.

8. Burck began his street performance career in 1998 after a shoot at Playgirl, and first appeared on Venice Beach. After some disappointing starts, a friend had suggested to him that he dress only in his underwear.

9. The suggestion proved to be a good one, as The Naked Cowboy's unmistakable persona, underwear included, has been the sine qua non of a surging career as the most famous busker in the entertainment capital of the world.

10. Burck's character, in addition to being a Times Square staple, has appeared in a variety of media.

11. He auditioned in character for "American Idol" during its first season, as well as for the talent show "Star Search"

12. His character is part of USA Network's "Characters Welcome" campaign.

13. He appeared briefly in the PBS documentary Origins to give his opinion on the possibility of extraterrestrial life.

14. He is featured singing in the video game "True Crime: New York City at Times Square."

15. He has appeared in several movies and television programs, including "Starship Dave,""Survive This,""Mulva: Zombie Ass Kicker,""Steve Harvey's Big Time,""New York Minute,""Creature Feature,""Lonely Planet,""Troma's Edge," "American Icon," and "The Howard Stern Show."

16. He appeared on an episode of the game show "Street Smarts," and featured in the music clip for a song by the rock band "Cake."

17. He also appeared in a music video for the song "Rockstar" by the multi-platinum artist "Nickelback."

18. He recently released an album featuring many of his own original songs which he performs for live audiences.

19. In addition to his live appearances in Times Square, he is a regular in the streets of the French Quarter during the New Orleans Mardi Gras season and the Labor Day Riverfest Festival in Cincinnati, Ohio. He has also appeared in Austin, Texas during the South by Southwest Music Conference.

20. The Naked Cowboy is a prominent and well-known persona, particularly in the area where the infringements described below have taken place.

21. The Naked Cowboy's name and likeness are registered trademarks owned by Burck.

22. Burck has licensed The Naked Cowboy name and/or likeness to companies for the purposes of advertising and endorsement.

23. The Naked Cowboy, for instance, appeared in a Chevrolet commercial which debuted during Super Bowl XLI.

24. As one would expect, in light of the trademarks held by Burck for his persona, he requires compensation for the use of his name and/or likeness for commercial purposes.

25. Defendants Mars and Chute Gerdeman, however, decided to exploit and trade upon The Naked Cowboy's well-recognized likeness without a license and without furnishing any compensation.

26. Since April 2007, on two oversize video billboards situated in the heart of Times Square, Mars has been running an animated cartoon advertisement featuring a blue "M&M" dressed up exactly like The Naked Cowboy - white underwear, white cowboy hat, white cowboy boots, and white guitar included.

27. The M&M in question is unmistakably a reference to, and incorporation of, The Naked Cowboy's trademarked likeness.

28. Just like The Naked Cowboy does on a daily basis in Times Square, the M&M is not only dressed as "The Naked Cowboy," it is playing The Naked Cowboy's distinctive white guitar in the cartoon.

29. This video ad has evidently been running around the clock every three minutes or so since April 2007.

30. There is also a pictorial version of the "Naked Cowboy" M&M. This version depicts a yellow M&M posing in the same trademarked get-up described in paragraph 25. ***

31. Burck seeks to be compensated for the ongoing infringement of both his federal trademark rights, as well as the infringement of his rights of publicity under New York law.

32. Upon information and belief, Defendant Chute Gerdeman is the agency which created both the video ad and the pictorial ad featuring the "Naked Cowboy" M&M, and sold same to Defendant Mars for profit and for the purpose of helping Defendant Mars increase its sales and profits with respect to its products.

33. Upon information and belief, Mars is the purveyor of the M&M product, as well as the company which retained Chute Gerdeman to produce the infringing ads.

34. By correspondence dated January 2, 2008, Burck, through his counsel, demanded that the Defendants cease and desist the infringements of his trademark rights and right to publicity. The correspondence to Mars read as follows:
This law firm has been retained to represent the interests of Robert Burck d/b/a The Naked Cowboy (hereinafter "Mr. Burck") in connection with the apparent infringement by Mars, Incorporated ("Mars")

of certain trademark - and other - rights owned by and inuring to the benefit of Mr. Burck. As we understand the facts, Mars has featured an advertisement featuring an animated blue M&M trading upon the likeness and persona of Mr. Burck' s trademarked and proprietary character, The Naked Cowboy. The video version of the ad advertisement has been running on a Times Square video billboard every 3 minutes around the clock, dating back to at least April 1, 2007. Further, a pictorial version of a yellow M&M dressed in the same manner has also been utilized.

As you may be aware, Mr. Burck deems the above unlicensed use of his likeness and persona objectionable and illegal. Not only does the use amount to a violation of the federal Lanham Act protecting registered trademark rights, it is also a clear violation of New York's statutory prohibition on infringements of one's "right of publicity." New York law provides some of the most expansive protection for individuals whose image, likeness and/or persona is exploited without their consent for a commercial purpose. As observed by the United States District Court for the Southern District of New York in Ali v. Playgirl, Inc., 447 F. Supp. 723, "the right of publicity [under New York law] recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona."' Lest there be any doubt as to the prominence of Mr. Burck' s character, it must be noted that over the past ten years, The Naked Cowboy has grown to be one of Times Squares' most recognized and sought-after attractions. The fact that the infringement of Mr. Burck's rights has resulted from a Times Square video billboard only accentuates the illegality of the exploitation.

At this point, unless Mars agrees to adequately compensate Mr. Burck for the continued use of his likeness in the above-described ad (or in any other marketing medium of any kind), we are hereby making demand that Mars - together with any of its affiliates, representatives, agents, subsidiaries, or assignees - immediately cease and desist all such unauthorized use of same. We further demand that Mr. Burck be appropriately compensated for all instances of past infringement in an amount equal to $1,500,000.00.

Please contact me within ten days to (1) advise that Mars will, without delay, cease and desist all use of The Naked Cowboy's likeness and persona, and (2) discuss the above monetary demand. Failing to hear from you within that time, we intend to file suit on Mr. Burck's behalf in a federal court of competent jurisdiction without further notice.

35. A correspondence with substantially the same content was likewise sent to Defendant Chute Gerdeman on the same date.

36. Following the demand to cease and desist the infringements, neither Defendant has done so, nor have they communicated any intention to do so. The advertisements at issue have continued to run. Defendants, therefore, despite Plaintiff's demands to cease and desist, are knowingly and maliciously continuing to wrongfully use and exploit Plaintiff's trademarks, persona, image, likeness, picture, and/or name.

37. Chute Gerdeman has actually denied that they were involved in the production of the ad, despite content on their own website which indicates otherwise.

38. Counsel for Mars wrote to the Plaintiff's undersigned Pennsylvania counsel several weeks ago merely to acknowledge receipt of the cease and desist letter, and promised to provide a substantive response. No such substantive response has been received by Plaintiff's counsel to date.

39. Burck has satisfied all conditions precedent to his right to recover pursuant to the provisions of federal and state law set forth below.

COUNT I
Violation of 15 U.S.C. § 1125(a)

40. Burck incorporates the foregoing allegation of this Complaint as if set forth at length herein.

41. Defendants, individually and/or jointly, have effected a false endorsement of the M&M product by featuring The Naked Cowboy in the above-described advertisements. Defendants' conduct has implied, falsely, that Burck's character, The Naked Cowboy, endorses the M&M product.

42. Defendants' conduct further amounts to a misappropriation of The Naked Cowboy's celebrity persona, the trademark of which is owned by Burck.

43. Defendants' conduct further amounts to both false association and unfair competition as defined in the Lanham Act.

44. Defendants' conduct has caused Burck to suffer losses in an amount equal to the full extent of recoverable damages permitted under the Lanham Act. Specifically, he seeks to recover his actual damages (including a reasonable license fee), the Defendants' profits, treble damages, attorney's fees, costs of suit, and interest.

COUNT II
Violation of N.Y. Civil Rights Law §51

45. Burck incorporates the foregoing allegations of this Complaint as if set forth at length herein.

46. By reason of the aforesaid, Defendants knowingly, intentionally, and maliciously, used, published, and disseminated, and continue to knowingly use, publish and disseminate, Plaintiff's likeness, persona, picture, image, and/or name, within the State of New York, for purposes of advertising and/or trade, to promote the sale of Mars's products, without Plaintiff's written consent; and Defendants have caused to be transferred, circulated, sold, distributed, used, displaced, advertised, reproduced and/or published, both directly and indirectly, through diverse media, certain unauthorized representations of Plaintiff's likeness, persona, picture, image and/or name. Defendants' conduct, which continues unabated, constitutes an unauthorized use of The Naked Cowboy's likeness, persona, picture, image, and/or name, for an advertising and/or trade purpose, as defined under and/or pursuant to N.Y. Civil Rights Law § 51.

47. Defendants' conduct has caused Burck to suffer losses in an amount equal to the full extent of the damages permitted under N.Y. Civil Rights Law § 51. Specifically, he seeks to recover his actual damages (including a reasonable license fee), the Defendants' ill-gotten profits gained from the aforesaid wrongful conduct, punitive damages, costs of suit, and interest.

48. Defendants have engaged in this selfish exploitation of Plaintiff's identity and persona for their own personal and commercial gain, and said Defendants have maliciously and unlawfully invaded Plaintiffs privacy and/or publicity rights in violation of §§ 50 and 51 of the N.Y. Civil Rights Law.

49. Defendants have caused Plaintiff to suffer serious irreparable harm, and caused him to be held to

public view in a damaging manner, and as a direct and proximate result, Plaintiff has suffered and continues to suffer severe damages, including but not limited to a loss of personal and professional reputation and goodwill, lost earnings, and lost potential earnings, all in a sum not less than $2,000,000.00.

50. Plaintiffs measure of compensatory damages, likewise, includes the extent to which Defendants' use of Plaintiff's image, persona, likeness, picture, and/or name, increased, and continues to increase, Defendant Mars's profits.
51. In addition, the reprehensibility of Defendants' conduct, in knowingly and maliciously using, publishing, and disseminating Plaintiffs image, persona, likeness, picture, and/or name, and Defendants' prolonged knowing and malicious continued use, publication and dissemination, as aforesaid, in wanton and reckless disregard of the harm caused to Plaintiff, and for the selfish motivation of increasing their profits, gives rise to punitive damages in favor of Plaintiff and against Defendants in a sum not less than $2,000,000.00.

WHEREFORE, based on the aforesaid, Plaintiff respectfully requests that this Court issue a judgment in its favor and against Defendants, jointly and severally, as follows:
1. With respect to Count I, compensatory damages in a sum not less than $2,000,000.00, plus treble damages, and attorney's fees;

2. With respect to Count II, compensatory damages in a sum not less than $2,000,000.00, plus punitive damages in a sum not less than $2,000,000.00, and attorney's fees; and

3. The costs and disbursement incurred in this action, along with any other, different or further relief as to this Court may seem just, proper, or necessary.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all counts pled herein.

Dated: February 8, 2008 Orangeburg, New York

United States District Court, S.D. New York.

Robert BURCK d/b/a The Naked Cowboy, Plaintiff,
v.
MARS, INCORPORATED,
and
CHUTE GERDEMAN, INC., Defendants.

No. 108CV01330.
April 25, 2008.

Memorandum of Law in Support of Defendant Chute Gerdeman, Inc.'s Motion to Dismiss and Defendant Mars, Incorporated's Motion for Judgment on the Pleadings

Arent Fox LLP, Leslie K. Mitchell, N.Y. Bar No. LM2811, Joseph R. Price (admitted pro hac vice), Ross Q. Panko, Arent Fox LLP, 1675 Broadway, New York, New York 10019, Telephone: (212) 484-3900, Facsimile: (212) 484-3990, Price.joseph@arentfox.com, Counsel for Defendants.

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Defendants Chute Gerdeman, Inc. ("Chute") and Mars, Incorporated ("Mars") (collectively, "Defendants"), by and through counsel, hereby submit this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on behalf of Chute and motion for judgment on the pleadings[1] pursuant to Federal Rule of Civil Procedure Rule 12(c) on behalf of Mars ("Motion"). Because Burck's Complaint ("Complaint") fails to state a claim upon which relief may be granted, Defendants' Motion should be granted.

[1] Mars filed its Answer in this matter on March 17, 2008

Burck's Complaint asserts two causes of action: (1) violation of Burck's right of publicity under section 51 of the New York Civil Rights Law; and (2) false endorsement under section 43 of the Lanham Act, 15 U.S.C. § 1125(a). Burck contends that his rights under section 51 and the Lanham Act were violated by Defendants displaying in a mural and a video at Mars's Times Square M&M'S WORLD store two images of Mars's famous M&M'S Characters "dressed up exactly like" Burck's public persona, "The Naked Cowboy - white underwear, white cowboy hat, white cowboy boots, and white guitar included." As fully set forth below, these allegations fail to state a claim under either section 51 or the Lanham Act.

Burck' s right of publicity claim fails because he does not allege that Defendants have used his image, "portrait or picture," which is all that section 51 prohibits. Accepting Burck's allegations as true - that Mars dressed up its M&M'S Characters in the same attire worn by Burck - this does not amount to use of Burck' s "portrait or picture" for purposes of section 51. Courts have narrowly construed the "portrait or picture" language of section 51, holding that a defendant's use is actionable only if consumers are likely to think that the image is *actually a portrait or picture of the plaintiff himself.* Within those guidelines, courts have stated that it is permissible for a defendant to use clothing and props that are suggestive of the plaintiff's public persona. Here, by dressing the famous M&M'S Characters in cowboy attire, Defendants have, at most, suggested aspects of Burck' s public persona. However, no consumer would mistake the disputed images - animated characters with the facial and physical attributes of the famous M&M'S Characters - for a portrait or picture of Burck himself. Because Burck has failed to allege use of his "portrait or picture," he has failed to state a claim under section 51.

Burck's Lanham Act-false endorsement claim also fails because Burck has not alleged facts, which if proven, could support the reasonable finding that Defendants' M&M'S Characters attired in cowboy paraphernalia are anything other than parodies. As this Court has previously observed, "'parody is not really a separate 'defense' as such, but merely a way of phrasing the traditional response that customers are not likely to be confused as to source, sponsorship or approval."'[2] Here, on the facts alleged, there is simply no basis to find that the M&M'S Characters allegedly attired as the Naked Cowboy would be confused by consumers as having been produced, sponsored or approved by Burck.

[2] *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC,* 221 F. Supp. 2d 410, 416 (S.D.N.Y. 2002) (citation omitted) (granting summary judgment for defendant and finding permissible parody where defendant's "Timmy Holedigger" pet perfume constituted an "adaptation of Hilfiger' s famous mark [which] likely allows consumers both immediately to recognize the target of the joke and to appreciate the obvious changes to the marks that constitute the joke").

This is particularly true in light of the fact that neither of the M&M'S "Cowboy" Characters is depicted alone. Rather, both are part of parodies of the New York City "experience." For example, in both the mural and video other M&M'S Characters are depicted in familiar New York scenes and experiences, e.g., one M&M'S Character is seen climbing the Empire State Building like King Kong; another is dressed like the Statue of Liberty standing in the harbor; another attempts to get in a taxi cab but is bumped out of the

way by an M&M'S Character who then jumps in the cab; and in yet another scene an M&M'S Character takes a ride in a horse-drawn carriage through Central Park. Both the mural and video are parodies of the New York City experience and each of the M&M'S Characters, including the M&M'S "Cowboy" Character, considered in this context, are unequivocally parodies of iconic New York City experiences and are clearly viewed by consumers as such.[3]

[3] *See Spring Mills, Inc. v. Ultracashmere House, Ltd.,* 689 F.2d 1127, 1130 (2d Cir. 1982) (quoting McGregor-Coniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1133 (2d Cir. 1979) ("[A]n inquiry into the degree of similarity between two marks does not end with a comparison of the marks themselves ....'the setting in which a designation is used affects its appearance and colors the impression conveyed by it."').

Because the facts as alleged cannot support a reasonable finding that consumers would be confused regarding the source, sponsorship or approval of the images, Burck' s Lanham Act-false endorsement claim also fails. Consequently, Burck has failed to state a claim for relief under either section 51 or the Lanham Act and Defendants' Motion therefore should be granted.

BURCK'S FACTUAL ALLEGATIONS

Burck alleges that over the past decade, he has "performed as a street entertainer in New York City's Times Square under the persona known as the Naked Cowboy." (Compl. ¶ 5.) Burck alleges that he "has performed live for hundreds of thousands of people in his trademarked get-up, which features a white cowboy hat, white cowboy boots, white underpants, and an acoustic guitar." (*Id.* ¶ 6.) According to Burck's Complaint, his "name and likeness are registered trademarks" and as a result of his appearances in a variety of television programs, movies and music videos, Burck is a "prominent and well-known persona." (*Id.* ¶¶ 10-17, 20- 21.)

Burck contends that Defendants have violated his rights because "[s]ince April 2007, on two oversize video billboards situated in the heart of Times Square, Mars has been running an animated cartoon advertisement featuring a blue 'M&M' dressed up exactly like The Naked Cowboy - white underwear, white cowboy hat, white cowboy boots, and white guitar included." (Compl. ¶ 26.) Burck asserts that this usage is "unmistakably a reference to, and incorporation of, The Naked Cowboy's trademarked likeness." (*Id.* ¶ 27.) In addition, Burck asserts that "[t]here is also a pictorial version of the 'Naked Cowboy' M&M ... [which] depicts the yellow M&M posing in the same trademarked get-up" used by Burck. (*Id.* ¶ 30.) The two M&M'S Character images with which Burck takes issue are hereinafter referred to as the "M&M'S Cowboy Characters."

Burck alleges that "Chute Gerdeman is the agency which created both the video ad and the pictorial ad featuring the 'Naked Cowboy' M&M, and sold same to Defendant Mars for profit. ..." (*Id.* ¶¶ 32-33.) Burck therefore asserts that Defendants are liable for false endorsement under Lanham Act Section 43(a) and for violating his right of publicity under section 51 of the New York Civil Rights Law.

ARGUMENT

A. Standard of Review

A Rule 12(b)(6) motion "is designed to test the legal sufficiency of the complaint." *De Jesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 69 (2d Cir. 1996). In deciding the motion, the Court "must accept as true [the] well-pleaded factual allegations in the Complaint and view them in the light most favorable to [the] Plaintiff[]." *Id.* However, "[b]ald contentions, unsupported characterizations, and legal conclusions are not

well-pleaded allegations and will not defeat" a motion to dismiss. *Telenor East Invest AS v. Altimo Holdings & Invs. Ltd.,* No. 07 Civ. 4829(DC), 2008 WL 782733, at *6 (S.D.N.Y. Mar. 25, 2008) (Chin, J.) (citations and internal quotation marks omitted); *see also First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 771 (2d Cir. 1994) ("conclusions of law or unwarranted deductions of fact are not admitted") (citation omitted)

The same standard applies to a motion for judgment on the pleadings pursuant to Rule 12(c). *See D'Alessio v. New York Stock Exch., Inc.,* 258 F.3d 93, 99 (2d Cir. 2001) (A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is analyzed under the same standard applicable to a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ.P. 12(b)(6).). In reviewing a Rule 12(b)(6) or Rule 12(c) motion, the "court may consider the pleadings and attached exhibits, documents incorporated by reference, and matters subject to judicial notice." *Telenor East Invest AS,* 2008 WL 782733, at *6; *see also Life Prod. Clearing, LLC v. Angel,* 530 F. Supp. 2d 646, 652 (S.D.N.Y. 2008) (Chin, J.).

B. Burck Has Failed to State a Claim for Relief Under Section 51 of the New York Civil Rights Law

Section 51 of the New York Civil Rights Law provides a cause of action for injunctive relief and damages to "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without ... written consent. ..." N.Y Civil Rights Law § 51 (McKinney Supp. 2008). To state a claim under section 51, "a plaintiff must prove three elements: (1) defendants used his name, portrait, picture, or voice (2) for purposes of trade or advertising, (3) without his written consent." *Cerasani v. Sony Corp.,* 991 F. Supp. 343, 356 (S.D.N.Y. 1998) (Chin, J.).

Significantly, unlike some other jurisdictions, **New York does not recognize a common law cause of action for violation of the right of publicity,** and section 51 of the Civil Rights Law provides the sole vehicle for such claims. *See Allen v. Nat'l Video, Inc.,* 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (citing *Stephano v. News Group Publ'ns,* 474 N.E.2d 580, 584 (N.Y. 1984)).

Under section 51, a plaintiff must establish that the defendant used the plaintiff's "portrait or picture" without authorization. *Cerasani,* 991 F. Supp. at 356. A plaintiff's "portrait or picture" "is not restricted to photographs, but generally comprises those representations which are recognizable as likenesses of the complaining individual." *Ali v. Playgirl, Inc.,* 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (citation omitted). However, this Court has held that the provisions of section 51 "must be construed narrowly." *Cerasani,* 991 F. Supp. at 356. In this regard, "[m]erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait, or picture, is not actionable under the statute." *Allen,* 610 F. Supp. at 621 (citing *Wojtowicz v. Delacorte Press,* 374 N.E.2d 129, 130 (N.Y. 1978)).

This Court's discussion of the "portrait or picture" element of New York's right of publicity statute in *Allen v. National Video, Inc.,* is instructive. 610 F. Supp. 612, 621 (S.D.N.Y. 1985). In Allen, the plaintiff, film actor and director Woody Allen, sought to enjoin the defendant's use of a celebrity look-alike in an advertisement for a video rental store. Allen alleged that the defendant's physical resemblance to Allen, as well as his "pose, expression, and props," rendered the photograph of defendant a "portrait or picture" of Allen under New York law. *Id.* at 624. The court rejected this argument, explaining that defendant's use of a celebrity look-alike, as a matter of law, was not a "portrait or picture" of Allen, because no consumer would conclude that the photograph at issue was actually a photograph of Allen. *Id.* In reaching its decision, the court framed its analysis as follows:

> [T]he question before the court is not whether some, or even most, people will be reminded of plaintiff when they see this advertisement. ***In order to find that the photograph contains***

> ***plaintiff's "portrait or picture," the court would have to conclude that most persons who could identify an actual photograph of plaintiff would be likely to think that this was actually his picture.*** This standard is necessary since we deal not with the question of whether an undisputed picture of plaintiff is recognizable to some, but whether an undisputed picture of defendant Boroff should be regarded, as a matter of law, to be a portrait or picture of plaintiff.

Id. (emphasis added). Under this framework, the *Allen* court observed that "there are several physical differences between plaintiff's face and that of defendant Boroff," including the defendant's "hair style and expression," which were "out of step with plaintiff's post-'Annie Hall' appearance." *Id.* Given those differences, the court concluded that although "the advertisement at bar clearly makes reference to plaintiff," the court could not conclude that the photograph was, as a matter of law, Allen's "portrait or picture." *Id.*

The *Allen* court compared its facts with those at issue in *Onassis v. Christian Dior-New York, Inc.,* 122 Misc. 2d 603 (S. Ct. N.Y. Co. 1983), another well known New York right of publicity case in which the plaintiff Jacqueline Kennedy Onassis won an injunction against a magazine advertisement featuring a model who was made up to look like she was actually Jacqueline Kennedy Onassis. In the *Allen* court's view, the *Onassis* decision was "consistent with the long-standing requirement under section 51 that the commercial use complained of amount to a 'portrait or picture' of an individual, not merely the suggestion of some aspect of a person's public persona." *Allen,* 610 F. Supp. at 623. Thus, "[w]hen, as in Onassis, the look-alike seems indistinguishable from the real person and the context of the advertisement clearly implies that he or she is the real celebrity, a court may hold as a matter of law that the look-alike's face is a 'portrait or picture' of plaintiff." *Id.*

Applying the same analysis, Burck's allegation that the M&M'S Characters, attired in the Naked Cowboy's "trademarked get-up," simply cannot give rise to a violation of section 51. No reasonable consumer, when viewing Defendants' famous[4] M&M'S Cowboy Characters dressed in Burck's alleged "trademark get-up" could conclude that those animated images were actually a *picture of Burck,* nor that the images were "indistinguishable" from Burck. Quite the opposite, the disputed images are readily recognizable as the world-famous M&M'S Characters with the facial features and physical attributes that consumers have come to associate with the famous M&M'S Characters. At most, Defendants have merely *suggested* certain characteristics of Burck' s public persona by dressing the M&M'S Characters in Burck' s alleged Naked Cowboy attire. Under *Allen* and *Onassis,* merely suggesting Burck' s persona in this manner simply does not and cannot amount to use of his "portrait or picture."

[4] *See Hershey Foods Corp. v. Mars, Inc.,* 998 F. Supp. 500, 506 (M.D. Pa. 1998) (noting that the M&M'S "candy pieces are 'cultural icons' and [are] highly recognizable by the public. They serve to identify the M&M's brand candies to consumers"); *Masterfoods USA v. Arcor USA, Inc.,* 230 F. Supp. 2d 302, 310 (W.D.N.Y. 2002) ("Mars's M&M'S(R) mark is conceded by defendant to be famous and 'instantly recognizable'."); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.,* 625 F. Supp. 571, 582 (D.N.J. 1985) ("M&M'S' [is a] very strong mark [], easily categorized as arbitrary or fanciful").

In correspondence with the Court, Burck has suggested that his section 51 claim is based on the Ninth Circuit's decision in *White v. Samsung Electronics America, Inc.,* 971 F.2d 1395 (9th Cir. 1992). Burck's reliance on *White* is misplaced. In fact, that decision, which is arguably one of the most plaintiff-favorable right of publicity decisions to date, supports dismissal of Burck' s section 51 claim. In *White,* celebrity game show hostess Vanna White sued Samsung for an ad featuring a robot dressed in a dress and blonde wig standing on what was plainly meant to be the "Wheel of Fortune" game show stage. In her complaint White alleged violation of California's right of publicity statute (Cal. Civil Code § 3344), which is

substantively identical to New York's statute, as well as violation of California's common law right of publicity, and violation of her rights under the Lanham Act. The trial judge granted summary judgment against White on all three claims and she appealed.

Affirming the trial judge's grant of summary judgment against White on her statutory right of publicity claim, the Ninth Circuit held that the California statute protects a person's "photograph or likeness," and that "a robot with mechanical features, and not, for example, a manikin molded to White's precise features ... was not White's 'likeness' within the meaning of section 3344."[5] *Id.* at 1397. The Ninth Circuit went on to hold that California's common law right of publicity was more expansive than California's statute, as it protected not only a person's photograph or likeness, but their "persona." *Id.* at 1398. As New York's section 51 is substantively identical to California's section 3344, and **because New York has no common law right of publicity,**[6] the *White* decision provides no support for Burck's claim and indeed, to the contrary, provides further authority warranting its dismissal.

[5] Similarly, in *Nurmi v. Peterson,* 10 U.S.P.Q.2d 1775 (C.D. Cal. 1989) the court dismissed a plaintiff's right of publicity claim under the California statute, where the defendant's character copied certain "props, clothes and mannerisms" associated with the plaintiff's character. *Id.* at 1778. In the Nurmi court's view, because "the word 'likeness' has been employed by the California Supreme Court to mean an exact copy of another's features and not merely a suggestive resemblance," the plaintiff could not prevail. *Id.* at 1777-78.

[6] *Stephano v. News Group Publ'n,* 474 N.E.2d at 584 ("[T]he 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which ... is exclusively statutory in this State....").

Likewise, here, the facts as pled do not legally permit a finding that the blue or yellow M&M'S Character attired in "white underwear, white cowboy hat, white cowboy boots, and white guitar," (Compl. ¶¶ 26, 30), is the "portrait or picture" of Burck, anymore than a robot in a blonde wig and dress, even when clearly meant to represent Vanna White, could legally be held to be her "likeness." Indeed, even if a consumer were to conclude that the M&M'S Cowboy Characters bore a "suggestive resemblance" to Burck, no consumer would conclude that those characters were actually images of Burck himself. Consequently, Burck has failed to plead facts showing that Defendants used his "portrait or picture" as defined by section 51. Burck' s Complaint therefore fails to state a claim for violation of his right of publicity under section 51 and should be dismissed.

C. Burck Has Failed to State a Claim for Relief For False Endorsement Under Section 43 of the Lanham Act.

To properly plead a Lanham-Act false endorsement claim, Burck must allege facts, that if proved, would establish that the M&M'S Cowboy Characters were likely to mislead an appreciable number of consumers into believing that Burck sponsored, endorsed or otherwise approved of Mars's use of his "trademarked likeness." *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC,* 221 F. Supp. 2d 410, 416 (S.D.N.Y. 2002).

In deciding whether consumer confusion is likely, a court applies the factors first enunciated in *Polaroid Corp. v. Polarad Electronics Corp.,* 287 F.2d 492, 495 (2d Cir. 1961), namely: (1) the strength of the plaintiff's trademark; (2) the degree of similarity between the parties' marks; (3) the proximity of the products; (4) the likelihood that the plaintiff will "bridge the gap" between the products; (5) the existence of actual confusion; (6) the defendant's good faith; (7) the quality of the defendant's product; and (8) the sophistication of the consumers. *Merck & Co. v. Mediplan Health Consulting, Inc.,* 425 F. Supp. 2d 402, 411 (S.D.N.Y. 2006).

In addition, in a case like this, where the Defendants have argued that their use is protected fair use in the form of parody, the court must also consider that in its analysis of the sufficiency of the Plaintiff's allegations. It has long been established that a parody is "a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 415 (quoting *L.L. Bean, Inc. v. Drake Publishers, Inc.,* 811 F.2d 26, 34 (1st Cir. 1987)). To be deemed a permissible parody, rather than an infringement, "[a] parody must convey two simultaneous - and contradictory - messages: that it is the original, but also that it is not the original and is instead a parody." *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc.,* 886 F.2d 490, 494 (2d Cir. 1989). "To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused." *Id.* In this regard, parody "is not really a separate 'defense' as such, but merely a way of phrasing the traditional response that customers are not likely to be confused as to source, sponsorship or approval." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 416 (citation omitted).

Although the *Polaroid* factors "plainly involve factual inquiries, the application of these factors to the ultimate question of likelihood of confusion is a question of law." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 416. Where the factors, assessed based on the facts as alleged, fall in the defendant's favor as a matter of law, dismissal or judgment on the pleadings is appropriate. *Accord id.* Here, analysis of the *Polaroid* factors invariably leads to the conclusion that the facts as alleged can only support a finding that the M&M'S Cowboy Characters would be viewed by consumers as parodies, and that consumers are not likely to be confused into believing that Burck has sponsored, approved or endorsed Defendants' use of his alleged "trademarked likeness."

1. Strength of the Plaintiff's Mark

Burck's Complaint alleges that his trademark is strong. (*See, e.g.,* Compl. ¶ 9 (alleging that Burck's "trademarked likeness" is "the *sine qua non* of a surging career as the most famous busker in the entertainment capital of the world"); *id.* at ¶ 25 (Burck' s likeness is "well- recognized").) In an ordinary trademark infringement case, the strength of a plaintiff's mark weighs in favor of the plaintiff. In cases of parody however, the opposite is true. *See Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 416 (quoting 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31:153 (4th ed. 2001) ("The strength and recognizability of the [plaintiff's] mark may make it easier for the audience to realize that the use is a parody and a joke on the qualities embodied in the trademarked word or image."). Indeed, "it is precisely because of the mark's fame and popularity that confusion is avoided, and it is this lack of confusion that a parodist depends upon to achieve the parody." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 416. Moreover, where the defendant's mark is also strong, the likelihood of confusion is even further reduced. *See Yankee Publ'g Inc. v. News Am. Publ'g Inc.,* 809 F. Supp. 267, 273 (S.D.N.Y. 1992) ("Where the plaintiff's mark is being used as part of a jest or commentary ... [and] both plaintiff ['s] and defendant's marks are strong, well recognized, and clearly associated in the consumers' mind with a particular distinct ethic ... confusion is avoided ....").

In *Tommy Hilfiger Licensing, Inc.,* the Court denied Plaintiff Hilfiger's claim for trademark infringement, and found that the defendant's use of the name "Timmy Holedigger" for a brand of pet perfume was a permissible parody of Hilfiger's trademarks. 221 F. Supp.2d at 416. The Court reasoned that "Nature Labs' adaptation of Hilfiger's famous mark likely allows consumers both immediately to recognize the target of the joke and to appreciate the obvious changes to the marks that constitute the joke. A distinctive mark will not favor plaintiff in these circumstances." *Id.* at 416.

Accepting Burck' s allegations as true, the same circumstances would exist here. The alleged strength and recognizability of Burck' s "trademarked likeness" will allow consumers immediately to recognize the target of the parody - Burck - and to appreciate the obvious changes to the marks that constitute the parody: namely, the fact that the alleged Naked Cowboy's attire appears on an M&M'S Character, and not on Burck. Moreover, as in *Yankee Publishing,* the fact that Mars's marks - the M&M'S Characters - are widely recognized by consumers, further alleviates the possibility of consumer confusion. *See Hershey Foods Corp. v. Mars, Inc.,* 998 F. Supp. 500, 506 (M.D. Pa. 1998) (noting that the M&M'S "candy pieces are 'cultural icons' and [are] highly recognizable by the public. They serve to identify the M&M's brand candies to consumers"); *Masterfoods USA v. Arcor USA, Inc.,* 230 F. Supp. 2d 302, 310 (W.D.N.Y. 2002) ("Mars's M&M'S(R) mark is conceded by defendant to be famous and 'instantly recognizable"); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.,* 625 F.Supp. 571, 582 (D.N.J. 1985) ("M&M'S' [is a] very strong mark [], easily categorized as arbitrary or fanciful"). Consequently, this factor weighs in favor of Defendants.

2. Similarity of the Marks

This factor considers the visual similarities between the parties' marks, as well as the context in which those marks are used. In cases of parody, "[i]t is necessary for the [defendant] to conjure up the [plaintiff's trademark] ... for there to be a parody at all." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 417. However, "a parody also relies on 'equally obvious dissimilarit[ies] between the marks' to produce its desired effect." *Id.* (quoting *Tetley, Inc. v. Topps Chewing Gum, Inc.,* 556 F. Supp. 785, 790 (E.D.N.Y. 1983); *see also Jordache Enters. v. Hogg Wyld, Ltd.,* 828 F.2d 1482, 1486 (10th Cir. 1987) ("A parody relies upon a difference from the original mark, presumably a humorous difference, in order to produce its desired effect"). In addition, the context in which the parody is displayed also may serve to prevent confusion. *See Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 417 (quoting McCarthy § 31:155 ("If the difference in wording or appearance of the designation together with the context and overall setting is such to convey to the ordinary viewer that this is a joke, not the real thing, then confusion as to source, sponsorship, affiliation, or connection is unlikely.").

Here, the marks at issue are Burck's alleged "trademarked likeness" (consisting of Burck dressed in a white cowboy hat, underpants, and boots while holding a guitar) and Defendants' famous M&M'S Characters, which consist of the famous yellow and blue M&M'S Characters with the visible "M" on their M&M'S bodies, white gloves, mouths, large oval eyes, eyebrows, hands and feet,[7] attired in the alleged Naked Cowboy "trademarked get-up." On the facts as alleged, Defendants' Characters are classic examples of parody. The images conjure up just enough of Burck's trademark (specifically, the hat, boots, underpants and guitar) for consumers to recognize the target of the parody, while at the same time making "obvious changes to the marks that constitute the joke," namely, the depiction of the cowboy attire on the bodies of animated M&M'S Characters, rather than on Burck himself. *See Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 416.

[7] While Burck' s Complaint does not detail the characteristics of the M&M's Characters, the Court may take judicial notice of them as they are available on Mars's M&M'S website at http://us.mms.com/us/about/characters. *See* Fed. R. Evid. 201; *Bridgeway Corp. v. Citibank,* 45 F. Supp. 2d 276, 278 n.2 (S.D.N.Y. 1999) (taking judicial notice of historical information on Liberia on the "Geocities" Web site). *See also Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.,* 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of information regarding a bank's ownership from the bank's Web site).

Numerous decisions have found parody, and not false endorsement, in similar circumstances. For example, the court in *Eveready Battery Co. v. Adolph Coors, Inc.,* 765 F. Supp. 440, 450 (N.D. Ill. 1991), found parody, not false endorsement, where the defendant used actor Leslie Nielsen dressed in rabbit

ears, tail and feet and banging a drum in a television commercial to parody the well-known "Energizer Bunny" trademark. *Id.* Given the insertion of Mr. Nielsen into the bunny attire associated with the plaintiff, the court held that no consumer confusion would occur because "the unmistakable *differences* between the Energizer Bunny and Leslie Nielsen in modified rabbit attire arguably generate much of the humor in the Coors parody." *Id.*

Similarly, the court in *World Wrestling Fed'n v. Big Dog Holdings, Inc.,* 280 F. Supp. 2d 413, 434 (W.D. Pa. 2003) held that "dogified" images of professional wrestlers and related slogans used on defendant's t-shirts would be perceived by consumers as a parody of the wrestlers, not as implying endorsement by them. *Id.* The court emphasized that the significant differences between the plaintiffs marks and the "dogified" images used by defendant would clearly convey the parody. *See id.* ("[T]he most obvious difference is that WWE's images of THE ROCK are photographs of Dwayne Johnson, while Big Dog's 'Rock-weiler' graphic is a sketch of a dog caricatured as the WWE character ... [thus,] it remains obvious that the Big Dog graphic is a dog, not THE ROCK"). Consequently, the *WWE* court explained, "the difference in wording and appearance of the phrases together with the use of dogs as wrestling characters conveys to the ordinary consumer that this is an obvious joke." *Id.* at 435; *see also Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 417 (granting summary judgment for the defendant, and finding permissible parody where defendant's "Timmy Holedigger" pet perfume was an "adaptation of Hilfiger' s famous mark [which] likely will allow consumers both immediately to recognize the target of the joke and to appreciate the obvious changes to the marks that constitute the joke"); *Hormel Foods Corp. v. Jim Henson Prods., Inc.,* 73 F.3d 497, 503-04 (2d Cir. 1996) (visual dissimilarities between defendant's "Spa'am" mark and plaintiffs SPAM mark, and the "parodic context in which the name 'Spa'am' appears will distinguish the marks in the consumer's mind").

The same is true here. Although the M&M'S Cowboy Characters evoke certain aspects of Burck's alleged trademark, the M&M'S Characters embody obvious changes to the mark that constitute a "joking variation on the original" alleged Naked Cowboy character. *See Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 417. These changes "reinforce the imitative, yet comedic scheme inherent in a humorous takeoff." *Id.*

Moreover, the context in which the M&M'S Cowboy Characters are displayed further reinforces the comedic and parodic intent of the images, and alleviates any possibility of consumer confusion. The M&M'S Cowboy Characters were displayed as part of mural depicting a number of the M&M'S Characters and as part of an animated video shown on video billboards near Times Square. (Compl., at ¶¶ 26-30.) As noted previously, both displayed the M&M'S Cowboy Characters not in isolation, but rather as part of a series of parodies of the "New York City experience." For example, in both the mural and video, other M&M'S Characters are depicted in familiar New York scenes and experiences, e.g., one M&M'S Character is seen climbing the Empire State Building acting like King Kong; another is dressed like the Statue of Liberty standing in the harbor; yet another attempts to get in a taxi cab but is bumped out of the way by an M&M'S Character who then jumps in the cab; and in another scene an M&M'S Character takes a ride in a carriage through Central Park.

Both the mural and video are parodies of the New York City experience and each of the M&M'S Characters, including the M&M'S Cowboy Characters, considered in this context, are unequivocally parodies of iconic New York City scenes and experiences, and will clearly be viewed by consumers as such. *See Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 417-18 (defendant's presentation of its "Timmy Holedigger" pet perfume alongside "a variety of other parody pet colognes, such as CK-9 and Pucci ... reinforces the message that the perfumes are a parody, and that they come from a single source rather

than the multiple sources of the parodied marks"); *Hormel Foods Corp.,* 73 F.3d at 503 (given that defendant's parody was "another in a long line of Muppet lampoons" consumers were "likely to see the name 'Spa'am' as the joke it was intended to be"). As such, the similarity of the marks factor should be weighed in favor of Defendants.

3. Proximity of the Products

Burck has not alleged, nor could he, that the parties' products are similar. Indeed, the products offered under Mars and Burck' s respective marks are wholly dissimilar. Burck offers "street performances" under his "trademarked likeness." (Compl. at ¶ 7.) Mars, on the other hand, offers chocolate candies under its M&M'S Characters trademarks. Because the parties' products are completely unrelated, this factor should be weighed in favor of Defendants. *See Eveready Battery Co.,* 765 F. Supp. at 450 (no likelihood of confusion where the parties' products "do not overlap in any significant manner").

4. Likelihood of Bridging the Gap

This factor examines "the likelihood that the senior user will enter the junior user's market in the future, or that consumers will perceive the senior user as likely to do so." *Star Indus., Inc. v. Bacardi & Co. Ltd.,* 412 F.3d 373, 387 (2d Cir. 2005). Thus, in this case, the relevant inquiry is the likelihood that Burck will enter Mars's market and begin selling chocolate candies under his "trademarked likeness." Burck's Complaint contains no allegations that Burck intends to begin selling chocolate candies, and instead pleads only that Burck has used his "trademarked likeness" in connection with "street performances." (Compl. ¶ 7.) As such, this factor weighs in favor of Defendants. *See Hormel,* 73 F.3d at 504 (weighing the "likelihood of bridging the gap" factor in favor of defendant where "Hormel has shown no intention of entering the field of puppet entertainment ... and there is no evidence that consumers would relate Hormel to such an enterprise").

5. Actual Confusion

Burck's Complaint contains no allegations that Mars's use of the M&M'S Cowboy Characters has caused any actual confusion among consumers. Although evidence of actual confusion is not required in order for a plaintiff to prevail, "[i]f consumers have been exposed to two allegedly similar trademarks in the marketplace for an adequate period of time and no actual confusion is detected ... that can be [a] powerful indication that the junior trademark does not cause a meaningful likelihood of confusion." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 419 (citations and internal quotation marks omitted). Burck alleges that Mars has displayed the M&M'S Cowboy Characters "[s]ince April 2007 ... on two oversized video billboards situated in the heart of Times Square." (Compl. ¶ 26.) Despite the alleged duration and prominence of Mars's display of the disputed images, Burck does not allege that they have caused any actual consumer confusion. Consequently, this factor also weighs in favor of Defendants.

6. Defendants' Bad Faith

The bad faith factor evaluates whether the defendant acted with "an intent to capitalize on consumer deception or hitch a free ride on plaintiff's good will." *Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 419. However, "an intent to parody is not an intent to confuse the public." *Jordache Enters., Inc.,* 828 F.2d at 1486. In this regard, a parodist's "intent is not ... to confuse the public but rather to amuse. *Id.; see also Tommy Hilfiger Licensing, Inc.,* 221 F. Supp. 2d at 419-20 (quoting *Anheuser-Busch, Inc. v. L&L Wings, Inc.,* 962 F.2d 316, 321-22 (4th Cir. 1992)) ("The commercial success of a parodist's product is attributable to

consumers who purchased because 'they were amused by the cleverness of [the] design,' and not because they believed it to be the original."). Here, Defendants' intent in adapting Burck' s "trademarked likeness" was to create a parody, not to cause consumer confusion. Consequently, this factor also weighs in favor of Defendants. Incidentally, it is arguably the case that if anyone benefited from Defendants' parody of the Naked Cowboy's "trademarked get-up" on the famous M&M'S Characters on large video billboards "in the entertainment capital of the world," (Compl. ¶ 25), it was Burck, not Defendants.

7. Quality of Defendants' Product

Where a defendant's product is inferior or equal in quality to the plaintiff's products, this factor weighs in favor of the plaintiff. *See Hormel Foods,* 73 F.3d at 505 ("[A]n inferior product may cause injury to the ... trademark owner because people may think that the senior and junior products came from the same source ... or ... products of equal quality may tend to create confusion as to source because of this very similarity."). Burck's Complaint contains no allegations as to the quality of Mars's or Burck's goods and services. Therefore, this factor weighs in favor of Defendants. *See Funrise Canada (HK) Ltd. v. Zauder Bros., Inc.,* No. 99-CV- 1519 (ARR), 1999 WL 1021810, at *24 (E.D.N.Y. July 2, 1999) (weighing this factor in defendants' favor where plaintiff provided "no evidence or argument that defendants' products are of inferior quality").

8. Sophistication of Consumers

The final factor to be considered is the sophistication of the consumers and the degree of care likely to be exercised in purchasing the parties' products. As a general rule, "[t]he more sophisticated the consumers, the less likely they are to be misled by similarity in marks." *Katz v. Modiri,* 283 F. Supp. 2d 883, 898 (S.D.N.Y. 2003). Burck's Complaint does not contain any allegations regarding the sophistication of the parties' consumers, nor the level of care likely to be exercised by consumers when making purchasing decisions. This factor, therefore, should be weighed in favor of Mars. *See Lemme v. Nat'l Broad. Co.,* 472 F. Supp.2d 433, 451 (E.D.N.Y. 2007).

Consequently, because each of the *Polaroid* factors, analyzed based on the facts alleged by Burck weighs in favor of Defendants, Burck's Complaint fails to state a claim upon which relief may be granted for false endorsement under section 43 of the Lanham Act and dismissal and judgment on the pleadings is proper.

CONCLUSION

For the foregoing reasons, Burck has failed to state a claim upon which relief may be granted for: (1) violation of his right of publicity under section 51 of the New York Civil Rights Law; or (2) false endorsement under section 43 of the Lanham Act. Consequently, the Court should grant Defendant Chute's motion to dismiss pursuant to Rule 12(b)(6), and Defendant Mars's motion for judgment on the pleadings pursuant to Rule 12(c).