

Constitutional Process
Spring 2009
Professor David Franklin
First-Day Reading Assignment

The casebook for this course is Stone, Seidman, Sunstein, Tushnet, and Karlan, *Constitutional Law* (5th ed. 2005). There is also a photocopied handout, which is available on the law school web site and in hard copy. The reading for our first class (Monday, January 12) is casebook pages xliii-lix (The United States Constitution); casebook pages 1-29; handout pages 1-6; and casebook pages 29-36.

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Syllabus and Handout Packet

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The Basics

Class meetings: Mondays and Wednesdays, 5:50 – 7:30 p.m. in Room 905
My office hours: Mondays and Wednesdays, 2:30 – 3:30 p.m.
My office: Room 717
My phone number: 312-362-5226
My email address: DFRANKL2@depaul.edu

Course Requirements

You are required to

- (a) do the reading carefully and on time,
- (b) show up to class on time and participate thoughtfully in class discussion,
- (c) hand in the group assignment by Monday, January 26, and
- (d) take the final exam.

The casebook for this course is Stone, Seidman, Sunstein, Tushnet, and Karlan, *Constitutional Law* (5th ed. 2005). Unless otherwise indicated, page numbers in the syllabus refer to pages in the casebook. There is also a photocopied handout. Readings from the handout are marked “H”.

The attached Syllabus lists the reading assignments for the course. Reading assignments are delineated by Arabic numerals (1, 2, 3...). We will meet 28 times during the semester, but you will notice that there are only 26 reading assignments. That is because I expect us to fall behind (my fault, not yours). If we fall further behind than I expect, or get ahead of ourselves, I will make adjustments on the fly. But for now, please assume unless I tell you otherwise that we will read one reading assignment per class.

Important note on reading assignments: as you can see by scanning the syllabus, the reading for Mondays will usually cover two topics rather than just one, and so will typically be longer than the reading for Wednesdays. For instance, the first reading of the semester, for Monday, January 12, includes both general background material on the Constitution and the (very challenging) *Marbury* case. So you should allot more time for Monday reading than for Wednesday reading.

You should also be aware that I call on students in class by name, at random, and without warning. If you are unprepared to participate thoughtfully in a given class, you must tell me beforehand, preferably by email. It is a bad idea to be unprepared.

Two notes on in-class decorum: 1) Please arrive for class on time. A steady stream of late-arriving students during the first ten minutes of class is extremely distracting. 2) Please do not use your laptop computer during class for things other than taking notes. This too is extremely distracting.

Grading Policy

Your grade will be determined largely on the basis of the final exam. In addition, I reserve the right to add or subtract one grade step (e.g., from a B to a B+ or vice versa) based on classroom participation. Classroom participation will be measured by the quality and not the quantity of your contributions. It is possible to show high quality participation without ever volunteering to speak, so long as your contributions are good when I call on you. Being unprepared to discuss assigned material when called upon is a form of low-quality participation. Asking good questions is a form of high-quality participation, but it does not relieve you of the obligation to answer the questions I ask.

Recommended Reading

Some background in American history is helpful in this course. If you believe you need assistance in this regard, I recommend the following books, which I have asked the library to place on reserve. The first two (Chemerinsky and May & Ides) are aimed at summarizing constitutional law for the non-specialist reader. The other two (Fisher & Devins and Farber & Sherry) are constitutional history books that place important constitutional cases and moments in historical context.

- Erwin Chemerinsky, *Constitutional Law: Principles and Policies*
- Christopher N. May & Allan Ides, *Constitutional Law: National Power and Federalism—Examples & Explanations*
- Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law*
- Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution*

The Exam

Anything we cover in the reading is fair game for the exam, even if we don't end up discussing it in class. You will hear more about the exam around the middle of the course. I will not talk about the exam before then, so please do not ask.

A note on Notes: You will soon discover that the casebook includes *lots* of non-primary-case material labeled "Notes," including excerpts from cases and law review articles, irritating questions without answers, and other such things. You can expect the exam to focus primarily on the ideas and doctrines articulated in the primary cases rather than on the Notes (unless we discuss a particular Note at length in class)—but the Notes are still important. So read them.

Group Assignment

On pages 2-4 of the handout you will find a list of 30 questions designed to make you actually read the Constitution. You are not expected to do any research for this assignment beyond the text of the Constitution itself. You may work on this assignment individually or in groups of up to six people. Written answers to these questions (one copy per group) are to be handed in to me by Monday, January 26.

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Syllabus

I. Introduction: The Constitution and the Role of the Federal Courts

1. *Background: the United States Constitution* (xliii-lix); 1-29; H 1-5

Marbury and the invention of judicial review: U.S. Const., Art. III; H 6; 29-36
2. *The “countermajoritarian difficulty”*: 41-50; H 7
3. *Tools and methods of constitutional interpretation: 61-70; H 8-11; 70-74*

Justiciability I—advisory opinions, standing, ripeness, mootness: 89-117, 158-59
4. *Justiciability II—political questions: 119-25; 126-27 (Powell v. McCormack); 137-44*

II. Federalism and the Powers of Congress

5. *Commerce power I—an introduction: U.S. Const., Art. I; 163-75, 185-91*

Commerce power II—from “nine old men” to a “switch in time”: 192-200; H 12-17; 200-06; 175-77
6. *Commerce power III—from the civil rights era to today: 208-24; H 18-27*
7. *The spending and taxing powers: 280-93 (through note 2)*

The treaty power: 330-33
8. *Implied limits on congressional power—the “traditional governmental functions” doctrine and the anti-commandeering principle: H 28; 333-36, 180-82 (note 3), 336-56*

III. States as Regulators (and More Questions of Federalism)

9. *Protection against economic discrimination: 229-38; 247-49*

Facially neutral state regulations: 254-63; 265-71; 277-78 (Note)

IV. Federal Executive Power

10. *The question of inherent presidential power: U.S. Const., Art. II; 357-75*

11. *The foreign affairs power, and war power I*: 375-78, 128-30 (*Goldwater v. Carter*); H 29-40

War power II: 383-94; H 41-49

V. Protection of Individual Rights: Background Issues and Principles

12. *Historical background (before and after the Civil War)*: 74-77; 453-60; U.S. Const., Amends. XIII, XIV, and XV; 724-33

13. *The incorporation debate*: 734-41

The state action doctrine: 1583, 1626-28, 1609-12, 1621-25, 1601-03

14. *Originalism and its rivals*: 717-24, H 50-66

VI. Implied Fundamental Rights

15. *The rise and fall of Lochner*: 741-68

Reproductive autonomy I—from Griswold to Roe: 845-73

16. *Reproductive autonomy II—from Roe to Casey*: 884-904

17. *Family autonomy*: 916-22, 924-26 (Note 6)

The “right to die”: 950-65

18. *Sexual intimacy*: 930-48

VII. Equality and the Constitution

19. *The Equal Protection Clause from 1868 to Brown v. Board of Education*: 457-60; 524-25; 461-64 (note 3); 464-67; 525-29; 473-82

20. *The rational basis test*: 501-04; 516-20; 507-09; 669-78

21. *Strict scrutiny and the problem of discriminatory intent*: H 67-70; 529-31; H 71-76; 546-49; H 77; 550-53; 569-73

Affirmative action I: 576-89; 594-606; 608-11

22. *Affirmative action II*: 487-88 (note 4 on *Swann*); Supp. 121-50

23. *Sex discrimination*: 622-26; 629-38 (through note 2); 640-47; 665-66

Equal protection of fundamental interests I—procreation, travel, welfare, education: 768-71; 815-20; 826-27; 830-37; 838-43

24. *Equal protection of fundamental interests II—voting*: 773-79; 781-86; 790-94; 144-52; Supp. 178-79

VIII. Putting It All Together—Congressional Power Revisited

25. *Section Five of the Fourteenth Amendment I—congressional power to enforce constitutional rights: 299-303; H 78-83; 306-309; 1584-87 (The Civil Rights Cases); 328-29 (Note 2 on United States v. Morrison)*
26. *Section Five of the Fourteenth Amendment II—congressional power to abrogate state sovereign immunity: 310-18; H 84-94*

Big Questions

Keep these three questions in mind as we move through the course:

1) *Why have a constitution in the first place?*

- a) Or, to be more precise, why adopt a *written* constitution? (Courts in the United Kingdom and Israel sometimes talk about a national “constitution,” but there is no single written document meeting that description.)
- b) And even assuming there is a written constitution, why not adopt one in the form of an ordinary Act of Congress? (Note that until recently an ordinary Act of the British Parliament constituted what was in effect the Constitution of Canada. Similarly, Congress has adopted Organic Acts for some of the American territories.) In other words, why make the thing so darned hard to amend?
- c) Why on earth did I ask you to read the excerpt from the *Odyssey* reproduced at page 5 of this Handout? (I mean, law professors are supposed to be weird, but that’s *really* weird, isn’t it? Or is it?)

2) *By what rules or methods should the Constitution be interpreted?*

- a) Should a constitutional provision written in 1787 be understood as it would have been understood in 1787? If so: as it would have been understood *by whom*? Can we recapture this sort of “original understanding”? How? At what level of specificity?
- b) What role, if any, should subsequent historical experience, current political realities, or changing social values play in interpreting the Constitution?
- c) Which of the following considerations are most important in interpreting the Constitution: i) the document’s text; ii) its overall purposes; iii) tradition; iv) precedent; v) morality; vi) justice; vii) consequences; viii) current public consensus? Is any of these considerations *inappropriate*?
- d) If the Constitution turns out to contain some stupid provisions, should those provisions nonetheless be enforced, or should they be ignored in the interest of making the Constitution “the best it can be”?

3) *Who is authorized to do the interpreting?*

- a) Okay, that’s an easy one: the Supreme Court. But is it really so easy? Where *in the Constitution* does it say that the Supreme Court is authorized to interpret the Constitution?
- b) Are members of Congress authorized to interpret the Constitution? Are they obliged to do so? How about the President and her Cabinet? The governor of Michigan? Police officers on the beat? Practicing lawyers? Ordinary citizens?
- c) If the branches of government differ in their constitutional interpretations, who wins?

Group Assignment

Before we turn to the materials in the casebook and consider what various people—primarily justices of the Supreme Court—have said about the Constitution, let’s begin with the document itself. Carefully read the Constitution, including its amendments (pages xliii-lix of your casebook) and answer the following questions.

There is no need to write lengthy answers; most questions can be answered with nothing more than a few words. Some questions are more open-ended and require a bit of thought in addition to careful reading. Please cite to the relevant provision(s) of the Constitution where appropriate.

You may work in groups of up to four students. Each group must hand in its set of written answers to me by Monday, January 26.

General questions

1. Let’s start with an easy one: How many times is the word *democracy* mentioned in the Constitution? How about *democratic*? *Republican*? *Party* (as in political party)?
2. How many times does the original Constitution of 1787 (which ends at page li of your casebook) mention the word *slave(ry)*? *Right(s)*? *Equal(ity)*?
3. How is the Constitution amended? Are there any provisions of the Constitution that cannot be amended in this way? Which one(s)?
4. One provision of the Constitution defines a criminal offense and establishes the evidentiary standard for proving that offense. What is it?
5. Most of the Constitution’s provisions tell us what *public officials* can and can’t do. One currently operative provision, however, prohibits *private conduct*. What is it?

Congress

6. Which provision of the Constitution, if any, permits Congress* to establish an Air Force?
7. A member of the House of Representatives cannot be sued for libel for falsely calling her opponent in the upcoming election a “depraved child molester” during a speech on the House floor. Why not?

* With the help of the President’s signature, of course. Phrases like “enacted by Congress” are a slightly inaccurate but commonly used shorthand. When you see such phrases, please assume (absent contrary indication) that they mean “passed by both houses of Congress and signed by the President in accordance with Article I, section 7 of the Constitution.”

8. Can Congress nullify a state law if most of its members think the state law is unconstitutional? How? What if most members of Congress think the state law is just dumb? Can they still nullify it? How?
9. Congress, tired of wrangling over military spending and hoping to facilitate long-range planning by the Department of Defense, enacts a law that appropriates money for the military over the next five years. Constitutional?
10. May the United States Congress pass a law mandating a particular grading curve at the Depaul Law School? If not, why not?

The President

11. It's 2016. Barack Obama has had a happy and successful eight years years in office. Can he run again? Can he run for Vice President?
12. Can Congress vote the President a bonus if they feel the President is doing a particularly good job? Can the legislature of the state of Hawai'i do so?
13. Can Congress pass a law stating that, in the case of the death of both the President and the Vice President, the Secretary of Homeland Security shall become President? How about a law stating that the Speaker of the House shall become President?

The Supreme Court and Judicial Review

14. Which provision of the Constitution, if any, authorizes the Supreme Court to strike down a state law as unconstitutional?
15. Could Congress pass a law increasing the number of Supreme Court justices from nine to twelve? Could Congress reduce the number of justices from nine to five? To one?
16. Could Congress pass a law eliminating all federal district and circuit courts?
17. Imagine that Senator Orrin Hatch introduces a bill to tax the income of all federal employees, including judges, an extra 5%. The bill passes the Senate and the House, and is signed into law by the President. Constitutional?

The Lawmaking Process

18. Both houses of Congress pass a bill dealing with the "taxation of boats," but, because of a typographical error en route to the White House, the bill signed by the President deals with the "taxation of goats." Is there a law? What does it say?
19. Imagine that the President goes on vacation beginning August 30th. Congress unanimously passes and sends to the White House a bill on September 1st and goes out of session on September 2nd. The President returns from vacation on September 12th and vetoes the bill. Is it law? What if Congress had remained in session the whole time?

The States

20. Can Oklahoma place tariffs on imports from Texas?
21. Can Mississippi declare that only people with Mississippi driver's licenses may drive on its roads?
22. Can North Dakota and South Dakota enter into a treaty concerning preservation of wildlife in the northern Great Plains? Can North Dakota enter into a similar treaty with Canada?
23. Could Governor Blagojevich dub me "Duke of Chicago" (perhaps in return for a campaign contribution)?
24. Could the Illinois legislature unilaterally declare Chicago to be the new "State of Chicago"?

Elections

25. Is there anything in the federal Constitution that would prohibit the state of Illinois from choosing the members of its state legislature in Springfield by a lottery among all candidates, culminating in a random drawing on television involving numbered ping-pong balls?
26. Article I, § 2, cl. 3, says that congressional representatives shall be apportioned according to a numerical formula which includes the phrase "three fifths of all other Persons." Who were these "other Persons"? Is this provision still in effect?

Officers of the United States

27. Can a person simultaneously be a member of the House of Representatives and Postmaster General?
28. In what ways can the Secretary of Health and Human Services be removed from office (during her lifetime and during the tenure of the President who appointed her)?
29. Can army generals be impeached?
30. Could Congress validly give the Chief Justice the power to appoint the Attorney General?

From The Odyssey, by Homer

(translated by Richmond Lattimore)

Book 12, lines 36-54

Then the queenly Circe spoke in words and addressed me:
"So all that has been duly done. Listen now, I will tell you
all, but the very god himself will make you remember.
You will come first of all to the Sirens, who are enchanters
of all mankind and whoever comes their way; and that man
who unsuspecting approaches them, and listens to the Sirens
singing, has no prospect of coming home and delighting
his wife and little children as they stand about him in greeting,
but the Sirens by the melody of their singing enchant him.
They sit in their meadow, but the beach before it is piled with boneheaps
of men now rotted away, and the skins shrivel upon them.
You must drive straight on past, but melt down sweet wax of honey
and with it stop your companions' ears, so none can listen;
the rest, that is, but if you yourself are wanting to hear them,
then have them tie you hand and foot on the fast ship, standing
upright against the mast with the ropes' ends lashed around it
so that you can have joy in hearing the song of the Sirens;
but if you supplicate your men and implore them to set you
free, they must tie you fast with even more lashings."

Lines 177-200

One after another, I stopped the ears of all my companions,
and they bound me hand and foot in the fast ship, standing
upright against the mast with the ropes' ends lashed around it,
and sitting then to row they dashed their oars in the gray sea.
But when we were as far from the land as a voice shouting
carries, lightly plying, the swift ship as it drew nearer
was seen by the Sirens, and they directed their sweet song toward us:
"Come this way, honored Odysseus, great glory of the Achaians,
and stay your ship, so that you can listen here to our singing;
for no one else has ever sailed past this place in his black ship
until he has listened to the honey-sweet voice that issues
from our lips; then goes on, well pleased, knowing more than ever
he did; for we know everything that the Argives and the Trojans
did and suffered in wide Troy through the gods' despite.
Over all the generous earth we know everything that happens."
So they sang, in generous utterance, and the heart within me
desired to listen, and I signaled my companions to set me
free, nodding with my brows, but they leaned on and rowed hard,
and Perimedes and Eurylochos, rising up, straightaway
fastened me with even more lashings and squeezed me tighter.
But when they had rowed on past the Sirens, and we could no longer
hear their voices and lost the sound of their singing, presently
my eager companions took away from their ears the beeswax
with which I had stopped them. Then they set me free from my lashings.

Seven Questions About *Marbury v. Madison*

- 1) Should the Court have addressed the question of whether Marbury had a right to his commission?**

- 2) Did Marbury have a right to his commission?**

- 3) When can a federal court review executive actions?**

- 4) Was section 13 of the Judiciary Act of 1789 unconstitutional?**

- 5) Should the Court have addressed the question of whether section 13 of the Judiciary Act of 1789 was constitutional?**

- 6) Does the Supreme Court have the power to declare federal statutes unconstitutional?**

- 7) Who won the case?**

Learned Hand, THE BILL OF RIGHTS 73-74 (1958)

Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. No one can fail to recognize the perils to which the last forty years have exposed such governments. We are not indeed forced to choose between absolutism and the kind of democracy that so often prevailed in Greek cities in the sixth to fourth centuries before our era. The Founding Fathers were acutely, perhaps overacutely, aware of the dangers that had followed that sort of rule, though, as you all know, they differed widely as to what curbs to impose. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.

President Andrew Jackson
Veto Message Regarding the Bank of the United States
July 10, 1832

The bill “to modify and continue” the act entitled “An act to incorporate the subscribers to the Bank of the United States” was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

A bank of the United States is in many respects convenient for the Government and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections. I sincerely regret that in the act before me I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the Constitution of our country. ...

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the

Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that conclusion, I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power “to make all laws which shall be necessary and proper for carrying those powers into execution. “ Having satisfied themselves that the word “*necessary*” in the Constitution means “*needful,*” “*requisite,*” “*essential,*” “*conducive to,*” and that “a bank” is a convenient, a useful, and essential instrument in the prosecution of the Government’s “fiscal operations,” they conclude that to “use one must be within the discretion of Congress “ and that “ the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution;” “but, “ say they, “*where the law is not prohibited and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.*”

The principle here affirmed is that the “degree of its necessity,” involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is “necessary and proper” to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution. ...

This act authorizes and encourages transfers of its stock to foreigners and grants them an exemption from all State and national taxation. So far from being “*necessary and proper*” that the bank should possess this power to make it a safe and efficient agent of the Government in its fiscal operations, it is calculated to convert the Bank of the United States into a foreign bank, to impoverish our people in time of peace, to disseminate a foreign influence through every section of the Republic, and in war to endanger our independence.

The several States reserved the power at the formation of the Constitution to regulate and control titles and transfers of real property, and most, if not all, of them have laws disqualifying aliens from acquiring or holding lands within their limits. But this act, in disregard of the undoubted right of the States to prescribe such disqualifications, gives to aliens stockholders in this bank an interest and title, as members of the corporation, to all the real property it may acquire within any of the States of this Union. This privilege granted to aliens is not “*necessary*” to enable the bank to perform its public duties, nor in any sense “*proper*,” because it is vitally subversive of the rights of the States. ...

It is maintained by some that the bank is a means of executing the constitutional power “to coin money and regulate the value thereof.” Congress have established a mint to coin money and passed laws to regulate the value thereof. The money so coined, with its value so regulated, and such foreign coins as Congress may adopt are the only currency known to the Constitution. But if they have other power to regulate the currency, it was conferred to be exercised by themselves, and not to be transferred to a corporation. If the bank be established for that purpose, with a charter unalterable without its consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter. It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional.

By its silence, considered in connection with the decision of the Supreme Court in the case of *McCulloch* against the State of Maryland, this act takes from the States the power to tax a portion of the banking business carried on within their limits, in subversion of one of the strongest barriers which secured them against Federal encroachments. Banking, like farming, manufacturing, or any other occupation or profession, is a *business* ...

Upon the formation of the Constitution the States guarded their taxing power with peculiar jealousy. They surrendered it only as it regards imports and exports. In relation to every other object within their jurisdiction, whether persons, property, business, or professions, it was secured in as ample a manner as it was before possessed. ...

There is no more appropriate subject of taxation than banks, banking, and bank stocks, and none to which the States ought more pertinaciously to cling.

It can not be *necessary* to the character of the bank as a fiscal agent of the Government that its private business should be exempted from that taxation to which all the State banks are liable, nor can I conceive it “*proper*” that the substantive and most essential powers reserved by the States shall be thus attacked and annihilated as a means of executing the powers delegated to the General Government. ...

If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which “is not prohibited, and is really calculated to effect any of the objects intrusted to the Government,” although, as in the case before me, it takes away powers expressly granted to Congress and rights scrupulously reserved to the States, it becomes us to proceed in our legislation with the utmost caution. Though not directly, our own powers and the rights of the States may be indirectly legislated away in the use of means to execute substantive powers. ... We may

not pass an act prohibiting the States to tax the banking business carried on within their limits, but we may, as a means of executing our powers over other objects, place that business in the hands of our agents and then declare it exempt from State taxation in their hands. Thus may our own powers and the rights of the States, which we can not directly curtail or invade, be frittered away and extinguished in the use of means employed by us to execute other powers. That a bank of the United States, competent to all the duties which may be required by the Government, might be so organized as not to infringe on our own delegated powers or the reserved rights of the States I do not entertain a doubt. Had the Executive been called upon to furnish the project of such an institution, the duty would have been cheerfully performed. In the absence of such a call it was obviously proper that he should confine himself to pointing out those prominent features in the act presented which in his opinion make it incompatible with the Constitution and sound policy. ...

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves—in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit. ...

[Full text available at <http://www.yale.edu/lawweb/avalon/presiden/veto/ajveto01.htm>]

President Franklin D. Roosevelt
Radio Address on Reorganization of the Judiciary
March 9, 1937

...Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office. I am reminded of that evening in March, four years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis. Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States. Today's recovery proves how right that policy was.

But when, almost two years later, it came before the Supreme Court its constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation. ...

If we learned anything from the Depression [it is that] we will not allow ourselves to run around in new circles of futile discussion and debate, always postponing the day of decision. The American people have learned from the Depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection—not after long years of debate, but now. The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. ...

I want to talk with you very simply about the need for present action in this crisis—the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.

I hope that you have re-read the Constitution of the United States in these past few weeks. Like the Bible, it ought to be read again and again. It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original thirteen States tried to operate after the Revolution showed the need of a National Government with power enough to handle national problems. In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the

Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers “to levy taxes ... and provide for the common defense and general welfare of the United States.” That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, “to form a more perfect union ... for ourselves and our posterity.”

For nearly twenty years there was no conflict between the Congress and the Court. Then Congress passed a statute which, in 1803, the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: “It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.”

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws.

That is not only my accusation. It is the accusation of most distinguished justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was “a departure from sound principles,” and placed “an unwarranted limitation upon the commerce clause.” And three other justices agreed with him. ...

In the face of such dissenting opinions, it is perfectly clear that, as Chief Justice Hughes has said, “We are under a Constitution, but the Constitution is what the judges say it is.” The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power—in other words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized.

How then could we proceed to perform the mandate given us? It was said in last year's Democratic platform, "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security." In other words, we said we would seek an amendment only if every other possible means by legislation were to fail.

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have judges who will bring to the Courts a present-day sense of the Constitution—judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

In forty-five out of the forty-eight States of the Union, Judges are chosen not for life but for a period of years. In many States Judges must retire at the age of seventy. Congress has provided financial security by offering life pensions at full pay for Federal Judges on all Courts who are willing to retire at seventy. In the case of Supreme Court Justices, that pension is \$20,000 a year. But all Federal Judges, once appointed, can, if they choose, hold office for life, no matter how old they may get to be.

What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries. The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Why was the age fixed at seventy? Because the laws of many States, the practice of the Civil Service, the regulations of the Army and Navy, and the rules of many of our Universities and of almost every great private business enterprise, commonly fix the retirement age at seventy years or less.

The statute would apply to all the courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to “pack” the Supreme Court and that a baneful precedent will be established. What do they mean by the words “packing the Court”? Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase “packing the Court” it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called “packing the Courts,” then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of justices has been changed several times before, in the Administration of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.

I suggest only the addition of Justices to the bench in accordance with a clearly defined principle relating to a clearly defined age limit. Fundamentally, if in the future, America cannot trust the Congress it elects to refrain from abuse of our Constitutional usages,

democracy will have failed far beyond the importance to it of any kind of precedent concerning the Judiciary. We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make independent on upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Court Judges and a few members of the Supreme Court. Until my first term practically every President of the United States has appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice; President Wilson, three; President Harding, four, including a Chief Justice; President Coolidge, one; President Hoover, three, including a Chief Justice. Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal indecision of individuals.

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgement of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present. This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine the process.

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial groups within the Congress or outside it who are agreed on any single amendment. It would take months or years to get substantial agreement upon the type and language of the amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of the Congress. Then would come the long course of ratification by three-fourths of all the States. No

amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And thirteen states which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it. ...

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court Bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

This proposal of mine will not infringe in the slightest upon the civil or religious liberties so dear to every American. My record as Governor and President proves my devotion to those liberties. You who know me can have no fear that I would tolerate the destruction by any branch of government of any part of our heritage of freedom. ...

I am in favor of action through legislation. First, because I believe that it can be passed at this session of the Congress. Second, because it will provide a reinvigorated, liberal-minded Judiciary necessary to furnish quicker and cheaper justice from bottom to top. Third, because it will provide a series of Federal Courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

During the past half century the balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.

[Full text available at <http://www.mhric.org/fdr/chat9.html>.]

GONZALES

v.

RAICH

545 U.S. 1 (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. 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.

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, 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.... The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician....

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.... 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....

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) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. ...

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.

...[P]rompted 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 [of 1970]. 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. 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. ...

Respondents in this case do not dispute that passage of the CSA ... was well within Congress' commerce power. 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. ...

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. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as

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).

commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” We have never required Congress to legislate with scientific exactitude....

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. 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, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. 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. ...

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. 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. 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. ...

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. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, 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.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases.... Those two cases, of course, are *Lopez* and *Morrison*. 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."

At issue in *Lopez* 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. 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. ...

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 ... was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." ... Marijuana was listed as the 10th item in the third 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*. Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court's holding in *Morrison*. The Violence Against Women Act of 1994 created a federal civil remedy for the victims of gender-motivated crimes of violence. 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. ...

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.... Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

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."... 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. ...

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.

[L]imiting 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. ... Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress’ plenary commerce power. ...

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.

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.

...[O]ur 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. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden*. 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, ... 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. And the category of “activities that substantially affect interstate commerce” 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.

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.* That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. ...

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,”—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. 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,” 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.” ...

Although this power “to make ... regulation effective” commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, 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 ... *Lopez* ... suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power. ...

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, and *Morrison* did not even discuss the possibility that it was....

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. Moreover, they may not be otherwise “prohibited” and must be “consistent with the letter and spirit of the constitution.” ...

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....

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. 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* (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. Exercising those powers, California ... 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 ... 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* and *Morrison*. Accordingly I dissent.

I

Our decision [in *Lopez*] about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. 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.” 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....” Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce. Third, we found telling the absence of legislative findings about the regulated conduct’s impact on interstate commerce. 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. Later in *Morrison*, we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act 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

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.... 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," 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.'" 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.... 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....

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, 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 *Wickard*. 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)....

A number of objective markers are available to confine the scope of constitutional review here.... Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, ... 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.

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.... [T]he Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach. ...

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. See *Lopez*. ...

The Court suggests that *Wickard*, which we have identified [in *Lopez*] as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” 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.... In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. ... *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. ...

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. ... Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. ... 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....

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.

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.

[The dissenting opinion of Justice THOMAS is omitted.]

Note on the Tenth Amendment

As you know by now, the first question to ask yourself when you confront the issue of whether the federal government has the power to do a particular thing is “What in the Constitution, if anything, confers that power?” So when you read about the *National League of Cities* case on page 334 of the casebook, make sure ask yourself whether Congress had the power to pass the minimum wage law at issue. (The same law was at issue in the *Garcia* case excerpted at pp. 334-36, so your answer for *National League of Cities* should hold for *Garcia* as well.)

As the casebook tells you, in *National League of Cities* the Court held that Congress had the power to pass a minimum wage law, but that the application of that law to state employees was unconstitutional. Unfortunately, the casebook does not tell you which constitutional provision was the basis for the Court’s decision. So I’m going to tell you. According to Justice Rehnquist’s majority opinion in *National League of Cities*, the relevant constitutional rule is to be found in the Tenth Amendment.

Read the Tenth Amendment (it’s at page liii of the casebook). Does it support the holding in *National League of Cities*? Here’s a quote from Justice Rehnquist’s opinion: “The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” Do you agree?

When you get to the “anticommandeering” cases (*New York v. United States*, p. 337; and *Printz v. United States*, p. 348) ask yourself again whether the Tenth Amendment supports the holding in those cases.

EX PARTE MILLIGAN
71 U.S. 2 (1866)

MR. JUSTICE DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction*, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did not military commission that tried him derive their authority? Certainly no part of judicial power of the country was conferred on them; because the Constitution expressly vests it ‘in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,’ and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is ‘no unwritten criminal code to which resort can be had as a source of jurisdiction.’

But it is said that the jurisdiction is complete under the ‘laws and usages of war.’

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he ‘conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,’ the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,’ language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, ‘*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;’ and

the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever

lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war

really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.' ...

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

THE CHIEF JUSTICE delivered the following opinion.

Four members of the court ... think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety,—a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

...

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

EX PARTE QUIRIN
317 U.S. 1 (1942)

Argued July 29, 30, 1942.
Decided July 31, 1942.
Extended opinion filed Oct. 29, 1942

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

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various

points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared that 'all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States * * * through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals'.

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress and are illegal and void.

...

We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to 'provide for the common defence'. The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. But the Articles also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that 'the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions * * * or other military tribunals'. ...

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by

Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury. ...

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars. During the Civil War the military commission was extensively used for the trial of offenses against the law of war. ...

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems'. And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to 'the law of war'.

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. These

authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war. ...

It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agent similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused. ...

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Article III, the Judiciary Article, had provided: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury', and had directed that 'such Trial shall be held in the State where the said Crimes shall have been committed'.

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article.

In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts. ...

The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal. ...

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case that the law of war 'can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed'. Elsewhere in its opinion, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission. ...

It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

BOUMEDIENE

v.

BUSH

554 U.S. ____ (June 12, 2008)

[In military actions since September 11, 2001, the United States has gained custody of hundreds of foreign nationals whom it has designated as “enemy combatants” and detained at the United States Naval Station at Guantanamo Bay, Cuba. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that the then-existing statutory scheme vested jurisdiction in the federal district court in the District of Columbia to entertain petitions for habeas corpus—the traditional mechanism by which courts rule on the legality of Executive Branch detention of individuals—filed by detainees at Guantanamo. In response to *Rasul* and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (which struck down the president’s system of military commissions for trying alleged enemy combatants), Congress enacted the Military Commissions Act of 2006, which stripped all United States courts of habeas jurisdiction over Guantanamo detainees. In place of habeas, Congress provided for limited review in the D.C. Circuit Court of Appeals of determinations by Combatant Status Review Tribunals (CSRTs), the military panels that had been set up by the Department of Defense and approved by Congress in the Detainee Treatment Act of 2005 (DTA). Under the DTA, review in the D.C. Circuit is limited to whether the CSRTs acted in accordance with applicable law and procedures specified by the Secretary of Defense.]

[Petitioners are detainees at Guantanamo. Some were apprehended on the battlefield in Afghanistan, others in places as diverse as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT, was determined to be an enemy combatant, and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.]

[Petitioners argue that by stripping federal courts of habeas jurisdiction and replacing it with limited review of CSRT determinations, the MCA and DTA violated the Suspension Clause, Art. I, § 9, cl. 2, which provides that “[t]he 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,” and thus implicitly guarantees that the writ of habeas will be available unless suspended. In response, the Government conceded that Congress had not formally suspended the writ, but argued (1) that the Suspension Clause does not make the writ available to noncitizens held outside the United States; (2) that such individuals have no constitutional rights to vindicate via habeas in any case; and (3) that even if the first two arguments failed, there was no Suspension Clause violation because the DTA provided enough judicial review to serve as an adequate substitute for habeas.]

JUSTICE KENNEDY delivered the opinion of the Court.

[The Suspension Clause] ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. See *Hamdi* (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause. ...

The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that “at the absolute minimum” the

Clause protects the writ as it existed when the Constitution was drafted and ratified. ...

In none of the cases cited [by the parties] do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief. ... [T]he Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention. [Admittedly,] Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." [But] the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles. ...

Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired ... Puerto Rico, Guam, and the Philippines. ... In a series of opinions later known as the Insular Cases, the Court ... held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position [particularly if the United States planned to grant independence to the territory]. These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part [and, generally, only in cases involving fundamental rights] in unincorporated Territories.

Practical considerations likewise influenced the Court's analysis a half-century later in *Reid v. Covert*, 354 U.S. 1 (1957). The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury. ...

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

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

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the

United States.” The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading. ...

[B]ecause the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. [Moreover, the Government’s reading of *Eisentrager*] overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

The Government’s formal sovereignty-based test raises troubling separation-of-powers concerns as well. ... The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. ... Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.” *Marbury v. Madison*. These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

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

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court’s assertion that they were “enemy alien[s].” In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but the procedural protections afforded to the detainees in the CSRT hearings are far more limited [than the trials afforded to the detainees in *Eisentrager*] and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a “Personal Representative” to assist him during CSRT proceedings, ... that person is not the detainee’s lawyer or even his “advocate.” The Government’s evidence is accorded a presumption of validity. The detainee is allowed to present “reasonably available” evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, [Guantanamo] is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the

Suspension Clause applicable in a case of military detention abroad. [But] we do not find them dispositive. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. ...

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

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay [and that this] Court may not impose a *de facto* suspension by abstaining from these controversies. In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals provides an adequate substitute. ...

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

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

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

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to “cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound,

the Suspension Clause remains applicable and the writ relevant. ...

The DTA might be read ... to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. ... The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. [But assuming that] the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings. ... There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him. ...

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the ... habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. ...

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

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. ... In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. ...

The only law we identify as unconstitutional is MCA § 7, [the provision that bars habeas review]. Accordingly, both the DTA and the CSRT process remain intact. ... Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status. ...

We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the

District Court will use its discretion to accommodate this interest to the greatest extent possible. These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

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

There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. ... The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

[JUSTICE SOUTER's concurrence, in which JUSTICES GINSBURG and BREYER joined, is omitted.]

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

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants. ...

The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. ... If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. ...

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

The scope of federal habeas review is traditionally more limited in some contexts than in others,

depending on the status of the detainee and the rights he may assert.... The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. The Court hints darkly that the DTA may suffer from other infirmities, but it does not bother to name them, making a response a bit difficult. ... [The] CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D.C. Circuit has the authority to say so on review. ... While the majority is correct that the DTA does not contemplate the introduction of “newly discovered” evidence before the Court of Appeals, ... the DTA *does* permit the D.C. Circuit to remand a detainee’s case for a new CSRT determination. In the event a detainee alleges that he has obtained new and persuasive exculpatory evidence that would have been considered by the tribunal below had it only been available, the D.C. Circuit could readily remand the case to the tribunal to allow that body to consider the evidence in the first instance. ...

The Court objects to the detainees’ limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should *generally* refrain from entertaining detainee challenges until after the petitioner’s CSRT proceeding has finished. But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled “habeas”? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? ... Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its “habeas” remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects. ...

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine—through democratic means—how best” to balance the security of the American people with the detainees’ liberty interests, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

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

[The] writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely *ultra vires*....

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. ... At least 30 of [the] prisoners hitherto released from Guantanamo Bay have returned to the battlefield. [These] were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. ...

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. ... During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities. ...

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

[The] Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.

[The Court relies on *Eisentrager*, but here is what Justice Jackson wrote for the Court in that case: "We are cited to [*sic*] no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." ... *Eisentrager* mentioned practical concerns, to be sure—but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*. [And the Insular Cases are inapplicable because they concerned sovereign territories of the United States.] ...

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

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad... The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners ... But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous commentary stating that habeas was confined to the dominions of the Crown.

[Today the Court] breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

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

DISTRICT OF COLUMBIA

**v.
HELLER**

554 U.S. ____ (June 26, 2008)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities.

Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of “functional firearms within the home.” ...

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” Although this structure of the Second

Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, “A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.” That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause (“The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.” The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. ... Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

1. Operative Clause.

a. “Right of the People.” The first salient feature of the operative clause is that it codifies a “right of the people.” The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”). All three of these instances unambiguously refer to individual rights, not “collective” rights, or rights that may be exercised only through participation in some corporate body. ...

What is more, in all six other provisions of the Constitution that mention “the people,” the term unambiguously refers to all members of the political community, not an unspecified subset.... This contrasts markedly with the phrase “the militia” in the prefatory clause. As we will describe below, the “militia” in colonial America consisted of a subset of “the people”—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to “keep and bear Arms” in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as “the people.”

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. “Keep and bear Arms.” We move now from the holder of the right—“the people”—to the substance of the right: “to keep and bear Arms.”

Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “weapons of offence, or armour of defence.” Timothy Cunningham’s important 1771 legal dictionary defined “arms” as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” ...

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases “keep arms” and “bear arms.” Johnson defined “keep” as, most relevantly, “[t]o

retain; not to lose,” and “[t]o have in custody.” Webster defined it as “[t]o hold; to retain in one’s power or possession.” No party has apprised us of an idiomatic meaning of “keep Arms.” Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.” ...

At the time of the founding, as now, to “bear” meant to “carry.” When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose—confrontation. Although the phrase implies that the carrying of the weapon is for the purpose of “offensive or defensive action,” it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.” It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit. ...

The phrase “bear Arms” also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or “to wage war.” But it *unequivocally* bore that idiomatic meaning only when followed by the preposition “against,” which was in turn followed by the target of the hostilities. ... Giving “bear Arms” its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. Worse still, the phrase “keep and bear Arms” would be incoherent. The word “Arms” would have two different meanings at once: “weapons” (as the object of “keep”) and (as the object of “bear”) one-half of an idiom. It would be rather like saying “He filled and kicked the bucket” to mean “He filled the bucket and died.” Grotesque. ...

Justice Stevens places great weight on James Madison’s inclusion of a conscientious-objector clause in his original draft of the Second Amendment: “but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” He argues that this clause establishes that the drafters of the Second Amendment intended “bear Arms” to refer only to military service. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families.... Thus, the most natural interpretation of Madison’s deleted text is that those opposed to carrying weapons for potential violent confrontation would not be “compelled to render military service,” in which such carrying would be required. ...

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” ...

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be

extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: “That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.” (1689). This right has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia. ...

By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, “constituted the preeminent authority on English law for the founding generation,” cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, “the natural right of resistance and self-preservation,” and “the right of having and using arms for self-preservation and defence.” Other contemporary authorities concurred. Thus, the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. ... They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone’s Commentaries (by the law professor and former Anti-Federalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the “right of self-preservation” as permitting a citizen to “repe[l] force by force” when “the intervention of society in his behalf, may be too late to prevent an injury.”

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State ...”

a. “Well-Regulated Militia.” In *United States v. Miller* (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources.

Petitioners take a seemingly narrower view of the militia, stating that “[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15-16).” Although we agree with petitioners’ interpretive assumption that “militia” means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create (“to raise ... Armies”; “to provide ... a Navy,” Art. I, § 8, cls. 12-13), the militia is assumed by Article I already to be *in existence*. Congress is given the power to “provide for calling forth the militia,” § 8, cl. 15; and the power not to create, but to “organiz[e]” it—and not to organize “a” militia, which is what one would expect if the militia were to be a federal creation, but to organize “the” militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. ... Finally, the adjective “well-regulated” implies nothing more than the imposition of proper

discipline and training.

b. “Security of a Free State.” The phrase “security of a free state” meant “security of a free polity,” not security of each of the several States... . It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free state” and close variations seem to have been terms of art in 18th-century political discourse, meaning a “free country” or free polity. Moreover, the other instances of “state” in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—“each state,” “several states,” “any state,” “that state,” “particular states,” “one state,” “no state.” And the presence of the term “foreign state” in Article I and Article III shows that the word “state” did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be “necessary to the security of a free state.” First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29. Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship between Prefatory Clause and Operative Clause

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer’s assertion that individual self-defense is merely a “subsidiary interest” of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right’s *codification*; it was the *central component* of the right itself.

Besides ignoring the historical reality that the Second Amendment was not intended to lay down a “novel principl[e]” but rather codified a right “inherited from our English ancestors,” petitioners’ interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a “citizens’ militia” as a safeguard against tyranny. For

Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. ... Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. [The Court discusses these at length.] We ... believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. Other States did not include rights to bear arms in their pre-1789 constitutions... .

Between 1789 and 1820, nine States adopted Second Amendment analogues. ... That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. ... The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

C

Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.... Justice Stevens' view ... relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with Justice Stevens' equating of these sources with postenactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive task. "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. "Postenactment legislative history," a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

[The Court then discussed at length the early-nineteenth-century writings of St. George Tucker, William Rawle, and Joseph Story, as well as pre-Civil War case law, before moving on to post-Civil War

legislation.]

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. ... Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated:

“[T]he right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery”

Similar discussion attended the passage of the Civil Rights Act of 1875 and the Fourteenth Amendment. ... It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.*

[The Court then discussed the work of post-Civil War commentators such as Thomas Cooley, concluding that they, too, interpreted the Second Amendment to secure an individual right unconnected with militia service.]

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment. ...

Justice Stevens places overwhelming reliance upon this Court's decision in *United States v. Miller* (1939), [arguing that it held that] the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons.”

Nothing so clearly demonstrates the weakness of Justice Stevens' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was ... that the *type of weapon at issue* was not eligible for Second Amendment protection: “In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment

* [Relocated footnote:] With respect to [the continuing validity of *United States v. Cruikshank* (1876), which held that the Second Amendment did not apply against the States], a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.

guarantees the right to keep and bear *such an instrument*” (emphasis added). “Certainly,” the Court continued, “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that “have some reasonable relationship to the preservation or efficiency of a well regulated militia”). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. ... *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. The Government’s *Miller* brief ... provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion. As for the text of the Court’s opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word (*not a word*) about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case. ...

We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. ... Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, and it was not until after World War II that we held a law invalid under the Establishment Clause. Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. It is demonstrably not true that, as Justice Stevens claims, “for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.” For most of our history the question did not present itself.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed

weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

[Finally, the Court went on to strike down the D.C. handgun ban, holding that it “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society” for the lawful purpose of self-defense.]

Justice Breyer ... criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U. S. 43 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation,

* We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home. ...

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

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

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller* provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Upholding a conviction under that Act, this Court held that, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption. ...

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment’s text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court’s decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself would prevent most jurists from endorsing such a dramatic upheaval in the law. As Justice Cardozo observed years ago, the “labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” *The Nature of the Judicial Process* (1921).

I

“A well regulated Militia, being necessary to the security of a free State”

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies. While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers. ...

The preamble ... both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*.

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment’s operative provision and returning to the preamble merely “to ensure that our reading of the operative clause is consistent with the announced purpose.” That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some “logical connection” between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to “find” its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court’s approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

“The right of the people”

The centerpiece of the Court’s textual argument is its insistence that the words “the people” as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution’s preamble, section 2 of Article I, and the Tenth Amendment—“the term unambiguously refers to all members of the political community, not an unspecified subset.” But the Court *itself* reads the Second Amendment to protect a “subset” significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to “law-abiding, responsible citizens.” But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements. ...

[T]he words “the people” in the Second Amendment refer back to the object announced in the Amendment’s preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States’ share of the divided sovereignty created by the Constitution.

“To keep and bear Arms”

As a threshold matter, it is worth pausing to note an oddity in the Court’s interpretation of “to keep and bear arms.” ...[T]he Court limits the Amendment’s protection to the right “to possess and carry weapons in case of confrontation.” No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment’s text *does* justify a different limitation: the “right to keep and bear arms” protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term “bear arms” is a familiar idiom; when used unadorned by any additional words, its meaning is “to serve as a soldier, do military service, fight.” Oxford English Dictionary. ... One 18th-century dictionary defined “arms” as “weapons of offence, or armour of defence,” and another contemporaneous source explained that “[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, & c. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions.” Had the Framers wished to expand the meaning of the phrase “bear arms” to encompass civilian possession and use, they could have done so by the addition of phrases such as “for the defense of themselves,” as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of “bear arms,” by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts. The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble. But when discussing these words, the Court simply ignores the preamble. ...

[T]he clause protects only one right, rather than two. It does not describe a right “to keep arms” and a separate right “to bear arms.” Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary. Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden. And the Court’s emphatic reliance on the claim “that the Second Amendment ... codified a *pre-existing* right,” is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

II

... Two themes relevant to our current interpretive task ran through the debates on the original Constitution. “On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.” ... On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members “as the primary means of providing for the common defense”; during the Revolutionary War, “[t]his force,

though armed, was largely untrained, and its deficiencies were the subject of bitter complaint.” In order to respond to those twin concerns, a compromise was reached: Congress would be authorized to raise and support a national Army and Navy, and also to organize, arm, discipline, and provide for the calling forth of “the Militia.” U.S. Const., Art. I, § 8, cls. 12-16. The President, at the same time, was empowered as the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Art. II, § 2. But, with respect to the militia, a significant reservation was made to the States: Although Congress would have the power to call forth, organize, arm, and discipline the militia, as well as to govern “such Part of them as may be employed in the Service of the United States,” the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress. Art. I, § 8, cl. 16.

But the original Constitution’s retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army. For it was perceived by some that Article I contained a significant gap: While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia’s *disarmament*. ... This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents. The Anti-Federalists were ultimately unsuccessful in persuading state ratification conventions to condition their approval of the Constitution upon the eventual inclusion of any particular amendment. But a number of States did propose to the first Federal Congress amendments reflecting a desire to ensure that the institution of the militia would remain protected under the new Government. [Justice Stevens then describes amendments proposed by several States, including Virginia.] Notably, each of these proposals used the phrase “keep and bear arms,” which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning. ... [Other states proposed amendments guaranteeing a more personal right of arms-bearing.]

Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the Second Amendment. He had before him, or at the very least would have been aware of, all of these proposed formulations. ... With all of these sources upon which to draw, it is strikingly significant that Madison’s first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”

Madison’s decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison’s initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text. ... Specifically, there was concern that Congress “can declare who are those religiously scrupulous, and prevent them from bearing arms.” The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment—to protect against congressional

disarmament, by whatever means, of the States' militias. ...

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed. As we explained in *Miller*: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments newly ascertained; the Court is unable to identify any such facts or arguments.

III

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history.* All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion.

The English Bill of Rights

The Court's reliance on Article VII of the 1689 English Bill of Rights—which, like most of the evidence offered by the Court today, was considered in *Miller*—is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the Second Amendment, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose. ... The Court may well be correct that the English Bill of Rights protected the right of *some* English subjects to use *some* arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right—adopted in a different historical and political context and framed in markedly different language—tells us little about the meaning of the Second Amendment.

Blackstone's Commentaries

The Court's reliance on Blackstone's Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English Bill of Rights. Blackstone's invocation of "the natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and

* The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters. As has been explained, "The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'—which presumably means the *post*-enactment history of a statute's consideration and enactment—is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expression *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.... In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan v. Finkelstein* (1990) (Scalia, J., concurring in part).

defence” referred specifically to Article VII in the English Bill of Rights. The excerpt from Blackstone offered by the Court, therefore, is, like Article VII itself, of limited use in interpreting the very differently worded, and differently historically situated, Second Amendment.

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. ... Blackstone explained that “[i]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament.” In light of the Court’s invocation of Blackstone as “the preeminent authority on English law for the founding generation,” its disregard for his guidance on matters of interpretation is striking.

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others post-dating it by close to a century. Those scholars are for the most part of limited relevance in construing the guarantee of the Second Amendment: Their views are not altogether clear, they tended to collapse the Second Amendment with Article VII of the English Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment. [Justice Stevens then discussed at length Joseph Story’s commentary on the Second Amendment, concluding that he understood the right to be limited to military uses of arms.]

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention, such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation. What is more, ... it is quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members.

IV

The brilliance of the debates that resulted in the Second Amendment faded into oblivion during the ensuing years, for the concerns about Article I’s Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the Second Amendment were short lived.

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish “an Uniform Militia throughout the United States.” The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to “provide himself with a good musket or firelock” and other specified weaponry. The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. The statute they enacted, however, “was virtually ignored for more than a century,” and was finally repealed in 1901. ...

In 1901 the President revitalized the militia by creating “the National Guard of the several States”; meanwhile, the dominant understanding of the Second Amendment’s inapplicability to private gun ownership continued well into the 20th century. ... Thus, for most of our history, the invalidity of

Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial. ... After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have “some reasonable relationship to the preservation or efficiency of a well regulated militia.”

The key to that decision did not, as the Court belatedly suggests, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellee in *Miller* did not file a brief or make an appearance... . But, as our decision in *Marbury v. Madison*, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. ... The Court is reduced to critiquing the number of *pages* the Government devoted to exploring the English legal sources [in its *Miller* brief]. Only two (in a brief 21 pages in length)! Would the Court be satisfied with four? Ten?

The Court is simply wrong when it intones that *Miller* contained “*not a word*” about the Amendment’s history. The Court plainly looked to history to construe the term “Militia,” and, on the best reading of *Miller*, the entire guarantee of the Second Amendment. After noting the original Constitution’s grant of power to Congress and to the States over the militia, the Court explained:

“With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion. The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators.”

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights “enshrine[d]” in the Constitution. But the right the Court announces was not “enshrined” in the Second Amendment by the Framers; it is the product of today’s law-changing decision. The majority’s exegesis has utterly failed to establish that as a matter of text or history, “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is “elevate[d] above all other interests” by the Second Amendment.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms

so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citizen" the right to keep and use weapons in the home for self-defense is "off the table." Given the presumption that most citizens are law-abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.*

I do not know whether today's decision will increase the labor of federal judges to the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

[JUSTICE BREYER's dissent, which was joined by JUSTICES STEVENS, SOUTER, and GINSBURG, is omitted. It argues that even if the Second Amendment protects an individual right to own weapons for self-defense, the District's regulation was nonetheless a reasonable attempt to solve a serious public safety problem and therefore should have been upheld.]

* It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils that would attend this Court's entry into the "political thicket" of legislative districting. *Colegrove v. Green* (1946). The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate—or indeed on the Court itself—is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.

Strict scrutiny for racial classifications: possible rationales

Since *Korematsu*, the Supreme Court has consistently held that laws expressly classifying people on the basis of race or ethnicity must be subjected to “the most rigid scrutiny.” More recently, the Court has made clear that such laws will be invalidated unless they are narrowly tailored to further a compelling state interest. This has come to be known as the strict scrutiny test.

As we shall soon see, ordinary legislative classifications are subject to the much more lenient rational basis test. The question therefore arises: Why strict scrutiny for racial classifications? The answer cannot be found in the text of the Equal Protection Clause, which does not mention race, let alone levels of scrutiny.

As you read the cases in this section of the course, ask yourself which of the following possible rationales for strict scrutiny of racial classifications are most (or least) persuasive. Is any of them fully persuasive? Do you disagree with any of their premises? Do any of them justify applying strict scrutiny to laws that disadvantage people other than racial or ethnic minorities? (E.g., racial majorities? Women? Gays and lesbians? Non-citizens? Children born out of wedlock? Opticians?)

1. ***The originalist rationale.*** Racial classifications are especially suspect because the framers of the Fourteenth Amendment intended to outlaw such classifications.
2. ***The historical rationale.*** Because of our nation’s long history of slavery and racism, all racial classifications must be reviewed with special vigilance.
3. ***The antistatutory rationale.*** Because of our history, those laws that perpetuate the subordination of traditionally disadvantaged groups must be closely scrutinized.
4. ***The political process rationale.*** Because the democratic process long excluded racial minorities and is still pervaded by prejudice, aggressive review by courts is appropriate.
5. ***The stereotypes rationale.*** Because laws that classify according to race are especially likely to be based on inaccurate and invidious generalizations, strict scrutiny is proper.
6. ***The immutable characteristics rationale.*** Because race is a trait that most people cannot change, racial classifications are especially unfair and especially stigmatizing.
7. ***The moral rationale.*** Because race is always morally irrelevant to the allocation of social benefits and burdens, laws that classify people by race are inherently wrong.

The famous “Footnote Four”

The Supreme Court made its earliest systematic attempt to identify the circumstances that might justify heightened judicial scrutiny in Justice Stone’s opinion for the Court in *United States v. Carolene Products* (1938). You read *Carolene Products* earlier in the course (it’s on page 762 of the casebook). It was, as you may recall, a rational basis case, so the Court’s discussion of heightened scrutiny was dicta. Even worse: the discussion was in a footnote!

Still, Footnote Four from *Carolene Products* is the most famous footnote in the history of American constitutional law. Unfortunately, it is somewhat obliquely written. Here it is:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [Citations omitted.]

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [The Court then cited cases involving restrictions on the right to vote, on the dissemination of information, on interferences with political association, and on peaceable assembly.]

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*.

Take another look at the possible rationales for strict scrutiny described on the previous page of this handout. Which of those rationales is the Court relying on in Footnote Four?

YICK WO
v.
HOPKINS

118 U.S. 356 (1886)

[Yick Wo was convicted of violating a San Francisco city ordinance prohibiting operation of a laundry not located in a brick or stone building without the consent of the board of supervisors. He alleged that he and 200 other persons of Chinese ancestry had petitioned the board for permission to continue their laundries in wooden buildings, but that all such petitions were denied, and that all but one of the petitions filed by non-Chinese were granted.]

JUSTICE MATTHEWS delivered the opinion of the Court.

... The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China. ... The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: '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.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. ...

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the fourteenth amendment, and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances,—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them. ...

In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. ...

The present cases, as shown by the facts disclosed in the record, are within this class. It appears

that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged. ...

GOMILLION

v.

LIGHTFOOT

364 U.S. 339 (1960)

JUSTICE FRANKFURTER delivered the opinion of the Court.

This litigation challenges the validity, under the United States Constitution, of Local Act No. 140, passed by the Legislature of Alabama in 1957, redefining the boundaries of the City of Tuskegee. Petitioners, Negro citizens of Alabama who were, at the time of this redistricting measure, residents of the City of Tuskegee, brought an action in the United States District Court for the Middle District of Alabama for a declaratory judgment that Act 140 is unconstitutional, and for an injunction to restrain the Mayor and officers of Tuskegee and the officials of Macon County, Alabama, from enforcing the Act against them and other Negroes similarly situated. Petitioners' claim is that enforcement of the statute, which alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure, will constitute a discrimination against them in violation of the Equal Protection Clause[] of the Fourteenth Amendment and will deny them the right to vote in defiance of the Fifteenth Amendment. ...

Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure.... The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. ...

If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote. ...

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. ...

According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. ...

[The concurring opinions of Justice Douglas and Justice Whittaker are omitted.]

PALMER
v.
THOMPSON

403 U.S. 217 (1971)

JUSTICE BLACK delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the ... Fourteenth Amendment[], and asking an injunction to forbid such practices. After hearings the District Court entered a judgment declaring that enforced segregation denied equal protection of the laws but it declined to issue an injunction. The Court of Appeals affirmed, and we denied certiorari. The city proceeded to desegregate its public parks, auditoriums, golf courses, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which the city owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and operate them on a desegregated basis. The District Court found that the closing was justified to preserve peace and order and because the pools could not be operated economically on an integrated basis. It held the city's action did not deny black citizens equal protection of the laws. The Court of Appeals sitting en banc affirmed, six out of 13 judges dissenting. That court rejected the contention that since the pools had been closed either in whole or in part to avoid desegregation the city council's action was a denial of equal protection of the laws. We granted certiorari to decide that question. We affirm.

Petitioners rely chiefly on the first section of the Fourteenth Amendment which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." There can be no doubt that a major purpose of this amendment was to safeguard Negroes against discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded white people. History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well. See, e.g., *Slaughter-House*. Thus the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States. Here there has unquestionably been "state action" because the official local government legislature, the city council, has closed the public swimming pools of Jackson. The question, however, is whether this closing of the pools is state action that denies "the equal protection of the laws" to Negroes. It should be noted first that neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools. Furthermore, this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities. See, e. g., *Brown v. Board of Education*. ...

[Petitioners argue] that respondents' action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. ...

First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. E.g., *Gomillion*. But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. ...[I]n *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. Moreover, there is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites. ...

It has not been so many years since it was first deemed proper and lawful for cities to tax their citizens to build and operate swimming pools for the public. Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound. Should citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here.

JUSTICE WHITE, with whom Justices Brennan and Marshall join, dissenting:

To me it is beyond cavil that ... the city is adhering to an unconstitutional policy and is implementing it by abandoning the [swimming] facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are denied use of public services. The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. ...

I am quite unpersuaded by the majority's assertion that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive. Congress has long provided civil and criminal remedies for a variety of official and private conduct. In various situations these statutes and our interpretations of them provide that such conduct falls within the federal proscription only upon proof of forbidden racial motive or animus [citing federal antidiscrimination laws]. ... Official conduct is no more immune to characterization based on its motivation than is private conduct, and we have so held many times. ...

On May 24, 1962, nine days after the District Court's [desegregation] decision, the Jackson Daily News quoted Mayor Thompson as saying, "'if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling.' ... He said the City now has legislative authority to sell the pools or close them down if they can't be sold." ... [A year later,] the same newspaper carried a front page article stating that "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation." ...

The officials' sworn affidavits, accepted by the courts below, stated that loss of revenue and danger to the citizens would obviously result from operating the pools on an integrated basis. Desegregation, and desegregation alone, was the catalyst that would produce these undesirable consequences. Implicit in this official judgment were assumptions that the citizens of Jackson were of such a mind that they would no longer pay the 10- or 20-cent fee imposed by the city if their swimming and wading had to be done with their neighbors of another race, that some citizens would direct violence against their neighbors for using pools previously closed to them, and that the anticipated violence would not be controllable by the authorities. Stated more simply, although the city officials knew what the Constitution required ..., their judgment was that compliance with that mandate, at least with respect to swimming pools, would be intolerable to Jackson's citizens. ...

Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. ...

[I]t is untenable to suggest that the closing of the swimming pools—a pronouncement that Negroes are somehow unfit to swim with whites—operates equally on Negroes and whites. Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.

[Concurring opinions by Chief Justice Burger and Justice Blackmun and dissenting opinions by Justices Douglas and Marshall are omitted.]

PALMORE

v.

SIDOTI

466 U.S. 429 (1984)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

[W]hen petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May, 1980, in Florida, the mother was awarded custody of their 3-year-old daughter. In September, 1981, the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later.

[A]fter hearing testimony from both parties and considering a court counselor's investigative report, the [state] court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." [The court] noted the counselor's recommendation for a change in custody because "[t]he wife [petitioner] has chosen for herself, and for her child, a lifestyle unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." (Emphasis added).

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

"The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age, and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.*" (Emphasis added).

[T]he judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what it regarded as the damaging impact on the child from remaining in a racially mixed household. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court

found that “there is no issue as to either party’s devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent.” This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner’s unfitness to continue the custody of her child. The court correctly stated that the child’s welfare was the controlling factor. But that court was entirely candid, and made no effort to place its holding on any ground other than race. Taking the court’s findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. *See Strauder v. West Virginia*. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be “necessary . . . to the accomplishment” of their legitimate purpose. *See Loving v. Virginia*.

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist, or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. “Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.” *Palmer v. Thompson* (1971) (WHITE, J., dissenting).

[T]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Sample questions from the qualifying test for police officers in *Washington v. Davis*:

3. Laws restricting hunting to certain regions and to a specific time of the year were passed chiefly to

- A) prevent people from endangering their lives by hunting
- B) keep our forests more beautiful
- C) raise funds from the sale of hunting licenses
- D) prevent complete destruction of certain kinds of animals
- E) preserve certain game for eating purposes

28. The saying “Straight trees are the first to be felled” means most nearly

- A) Honest effort is always rewarded.
- B) The best are the first chosen.
- C) Ill luck passes no one by.
- D) The highest in rank have farthest to fall.
- E) The stubborn are soon broken.

36. To RETRENCH means most nearly to

- A) impede
- B) replace
- C) counteract
- D) attack
- E) curtail

52. The saying “Habits are at first cobwebs, at last cables” means most nearly

- A) Good work habits make any task easier.
- B) Habits grow stronger with time.
- C) It is sometimes difficult to acquire good habits.
- D) Bad habits are the hardest to break.
- E) Good habits should be acquired early in life.

63. The saying “They wrangle about an egg and let the hens fly away” means most nearly

- A) They dispute at every opportunity.
- B) Attention to details is important.
- C) Arguing is seldom worthwhile.
- D) They have a poor sense of values.
- E) A grasping person had few friends.

73. PROMONTORY means most nearly

- A) marsh
- B) monument
- C) headland
- D) boundary
- E) plateau

**Five understandings of the scope of Congress's power
under Section Five of the Fourteenth Amendment**

1. **The pure remedial model.** Congress may enact laws to punish, enjoin, or provide compensation for actual violations of the rights guaranteed by § 1 of the Fourteenth Amendment as interpreted by the Supreme Court.
2. **The deterrence and prevention model.** Congress may enact laws that not only remedy actual violations, but also deter or prevent potential future violations, of the rights guaranteed by § 1 as interpreted by the Supreme Court.
3. **The Necessary & Proper Clause model.** Congress may enact such laws as may be necessary and proper in its judgment to give meaningful effect to the rights guaranteed by § 1 as interpreted by the Supreme Court.
4. **The one-way ratchet model.** Congress may enact laws that enlarge the scope of rights beyond those guaranteed by § 1 as interpreted by the Supreme Court, but may not enact laws that restrict the scope of rights to less than what is guaranteed by § 1 as interpreted by the Supreme Court.
5. **The two-way ratchet model.** Congress may interpret § 1 for itself, and may enact laws that enlarge the scope of rights beyond those guaranteed by § 1 as interpreted by the Supreme Court, as well as laws that restrict the scope of rights to less than what is guaranteed by § 1 as interpreted by the Supreme Court.

Lawrence Gene Sager
Fair Measure: The Legal Status of Underenforced Constitutional Norms
91 Harv. L. Rev. 1212 (1978) (excerpt)

* * * Views of equal protection may vary, but a reasonable statement of the concept for purposes of this discussion is: "A state may treat persons differently only when it is fair to do so."

In its present incarnation, the federal judicial construct for the application of the equal protection clause appears to comprise three distinct strands. First, there is the permissive strand reflected in the "rational relationship test," which is applied in most situations. ... Second, there is a strand of the doctrine which singles out a few types of classification for the severe scrutiny of the "compelling state interest test," a test which precious few enactments can survive. And third, there is a highly amorphous intermediate strand of equal protection analysis. ...

Under this federal judicial construct of the equal protection clause, only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand. ... There are reasons which explain and to some degree justify federal judicial restraint in the application of the equal protection clause ...; these reasons have been extensively rehearsed in the literature of judicial restraint. In the most general of terms, the claims for restraint typically turn on the propriety of unelected federal judges' displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them. ...

What I want to distinguish between here are reasons for limiting a judicial construct of a constitutional concept which are based upon questions of propriety or capacity and those which are based upon an understanding of the concept itself. The former I will refer to as "institutional," the latter as "analytical." Institutional rather than analytical reasons appear to have prompted the broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary. This is what creates the disparity between this construct and a true conception of equal protection, and thus substantiates the claim that equal protection is an *underenforced constitutional norm*.

It is not only the claims of commercial equity involved in equal protection challenges to schemes of taxation or economic regulation which are rebuffed because of institutional concerns; such concerns have figured in other contexts as well. In *San Antonio Independent School District v. Rodriguez*, for example, Justice Powell, writing for the majority, acknowledged that institutional concerns significantly informed the Court's view that the equal protection clause was not violated by Texas' system of financing public schools largely through local property taxation. Among the concerns voiced by Justice Powell were: (1) the formulation of schemes of taxation requires an "expertise and ... familiarity with local problems" which the Justices of the Supreme Court lack; (2) school finance and management in particular raise very complicated and controversial questions, and an inexperienced and inexpert Supreme Court ought not to impose "inflexible constitutional restraints" which curtail state experimentation; and (3) substantial

federalism concerns are threatened by the prospect of upsetting the “systems of financing public education presently in existence in virtually every State.” Whatever view one takes of these concerns, it is difficult to understand them as speaking even indirectly to the scope or content of the concept of equal protection; rather, they are claims which address the question of to what limits the federal judiciary should reach in interpreting and enforcing that concept. They are, in other words, arguments which support the underenforcement of the equal protection clause by the federal courts. ...

Conventional analysis does not distinguish between fully enforced and underenforced constitutional norms; as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement. ... [Yet] where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a judgment about the scope of the constitutional concept itself.

From this observation flows the thesis which I want to advance here: constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts’ role in enforcing the norm. By “legally valid,” I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins. ...

What is likely to make this view troubling to the contemporary American lawyer is our tendency, reinforced by the practical dominance of the Supreme Court as the final arbiter of our constitutional affairs, to equate the existence of a constitutional norm with the possibility of its enforcement against an offending official. ...

The idea that the judicially enforced scope of a constitutional norm may be narrower than its scope as legal authority in other contexts may be unconventional today, but it enjoys a venerable provenance. James Bradley Thayer’s essay on *The Origin and Scope of the American Doctrine of Constitutional Law* is an important intellectual fount of the judicial restraint thesis. Thayer argued for the rule of clear mistake—that is, that “an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”... The rule of clear mistake ... is not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature. It is a rule of judicial behavior....

The judicial restraint thesis has retained its vitality, and continues to be instrumental in the judicial enforcement of the Constitution, as the federal judicial enforcement of the equal protection clause so clearly indicates. But, under the influence of a vigorous tradition of Supreme

Court enforcement of constitutional norms, we have come to lose sight of the fact that some judicial decisions reflect the tradition of judicial restraint and should not be understood to be exhaustive statements of the meaning of the implicated constitutional norms. ...

In sum, ... judicially underenforced constitutional norms should be regarded as legally valid to their conceptual limits. When the federal courts restrain themselves for reasons of competence and institutional propriety rather than reasons of constitutional substance, it is incongruous to treat the products of such restraint as authoritative determinations of constitutional substance.

* * *

Section 5 of the fourteenth amendment provides: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." ...

At least three questions present themselves in this area: (1) can Congress, in the name of enforcement of the fourteenth amendment's substantive provisions, go beyond the judicially established boundaries of these provisions; (2) if so, how far (and in what directions) does this authority to overreach the Court extend; and (3) what is the analytical basis for this apparently anomalous expansion of authority? Coherent analysis of this nest of section 5 issues is very much advanced if one brings to the task the view that judicially underenforced constitutional norms have a legal vitality which extends beyond the scope of their federal judicial enforcement.

Katzenbach v. Morgan was the occasion for what remains the most generous Supreme Court statement of Congress' authority pursuant to section 5 of the fourteenth amendment. There, the Court upheld section 4(e) of the Voting Rights Acts of 1965, which was enacted principally to prevent the states from using English literacy tests to deny the right to vote to natives of Puerto Rico educated in Spanish. Justice Brennan, writing for the majority in *Katzenbach*, set out two rationales for Congress' authority under section 5 to thus restrict the states' capacity to impose literacy requirements, both of which presupposed that such requirements would not be independently found by the Court to be invalid under the equal protection clause. Congress could be acting to remedy unconstitutional discrimination by conferring on groups like the Puerto Ricans of New York "enhanced political power" with which to secure equal treatment at the hands of public officials. Alternatively, Justice Brennan argued, Congress could have made its own determination that the literacy requirement itself was a violation of equal protection, and the Court should pay broad deference to such a determination.

The first of these propositions is not, in the abstract, controversial. It merely recognizes that Congress can exercise some choice and sophistication in fashioning the means by which fourteenth amendment violations are to be redressed. The second rationale for the *Katzenbach* holding is at once more controversial and more troubling. One obvious difficulty with this premise of deference is that it is to a large degree inconsistent with the role which the Court has assumed in the sphere of constitutional liberties. ... [T]he modern judicial tradition has squarely placed responsibility for interpretation of the personal guarantees of the Constitution in the hands of the Court. ...

A second prominent problem of the deference theory as modeled by Justice Brennan is the

“ratchet” he wished to build into it. Justice Brennan was unwilling to pay what to the dissenters in *Katzenbach* was the inevitable price of deference to Congress, namely the acceptance of future congressional determinations which contracted the scope of fourteenth amendment guarantees and explicitly permitted governmental practices which the Court would otherwise have declared to violate these guarantees. His statement of the ratchet was contained in a footnote: “We emphasize that Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.” The question suggested by this assertion is obvious: if Congress’ judgment is to be deferred to above the judicially established floor, why should not judgments below this floor enjoy the same deference? ...

The idea that underenforced constitutional norms are legally valid beyond the boundaries of their judicial enforcement is a means for overcoming the analytical difficulties which otherwise inhere in the legislative deference rationale of *Katzenbach v. Morgan*. Perceived through this lens, section 5 of the fourteenth amendment can be understood to give Congress the authority to enact legislation which fills in that body’s conception of the equal protection clause. Congress can legislate against a broader swath of state practices than the Court has found or would find to violate the norm of equal protection, because the federal judiciary’s enforcement of that norm fails to exhaust its scope. Congress in such a circumstance is enforcing a judicially unenforced margin of the equal protection clause and thereby moving our legal system closer to a full enforcement of an important but elusive constitutional norm.

The difficulties of the deference rationale of *Katzenbach v. Morgan* are dissipated by this analysis. If the federal judiciary is constrained by institutional concerns from exhausting the concept of equal protection, congressional attempts pursuant to section 5 to enlarge upon the judiciary’s limited construct do no violence to the general notion that the federal judiciary’s readings of the Constitution are dispositive within our system. Congress’ section 5 power to prohibit state conduct which the Supreme Court would not find to violate the substantive norms of the fourteenth amendment is limited to those categories of conduct which the Court has condemned to analytical limbo because of its institutional concerns. Where the Court determines that given conduct violates some norm of the Constitution, Congress cannot undo that result. And where, because of analytical rather than institutional concerns, the Court has determined that given conduct does no violence to the substantive norm of the fourteenth amendment, Congress cannot use section 5 as authority to legislate against that conduct. But where the Court has, on institutional grounds, stopped significantly short of full enforcement of a substantive norm of the fourteenth amendment, Congress is empowered by section 5 to address conduct falling within the unenforced margin of the norm.

The expanded view of the legal status of judicially underenforced constitutional norms can thus explain the result in *Katzenbach v. Morgan*, while avoiding the analytical pitfalls which impede other explanatory efforts. But there is an affirmative virtue to this analysis as well. It depicts a vision of judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms like equal protection can come to be applied. The judiciary remains the guardian of fundamental notions of fair process and just treatment at their core, while the legislature is permitted to refine these notions beyond the capacity of the judiciary to do so. ...

Note on *Employment Division v. Smith* and the Religious Freedom Restoration Act

In *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment (which has been incorporated against the States via the Fourteenth Amendment) does not prohibit the government from enacting and enforcing generally applicable laws, even if those laws substantially burden religious practice. The respondent, Smith, was an adherent to a Native American religion whose rituals involve the smoking of peyote, a controlled substance. State law prohibited the use of peyote, though without any specific reference to religious uses. Smith claimed that the Free Exercise Clause shielded his religious uses of peyote from the force of the law. The Court rejected his claim. It held that laws burdening religious practice violate the Free Exercise Clause only if they are intended to burden or discriminate against such practice. Neutral, generally applicable laws enacted on the basis of legitimate motives do not run afoul of the Free Exercise Clause simply because they have the effect of burdening religious practice.

In response to *Smith*, Congress overwhelmingly passed the Religious Freedom Restoration Act of 1993 (“RFRA”). RFRA provides that no action by federal, state, or local government may substantially burden a person’s religious exercise unless the government can show that its action is the least restrictive means of furthering a compelling government interest.

[Question: Under what authority was RFRA passed?]

TENNESSEE

v.

LANE

541 U.S. 509 (2004)

JUSTICE STEVENS delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.” The question presented in this case is whether Title II exceeds Congress’ power under § 5 of the Fourteenth Amendment.

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment.... The United States intervened to defend Title II’s abrogation of the States’ Eleventh Amendment immunity.

II

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA’s enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. Central among these conclusions was Congress’ finding that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”

Invoking “the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,” the ADA is designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II prohibits any public entity from discriminating against “qualified” persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term “public entity” to include state and local governments, as well as their agencies and instrumentalities. Persons with disabilities are “qualified” if they, “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” Title II’s enforcement provision ... authorizes private citizens to bring suits for money damages.

The Eleventh Amendment renders the States immune from “any suit in law or equity, commenced or prosecuted ... by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Even though the Amendment “by its terms ... applies only to suits against a State by citizens of another State,” our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State’s own citizens. *E.g., Garrett*. Our cases have also held that Congress may abrogate the State’s Eleventh Amendment immunity. To determine whether it has done so in any given case, we “must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.”

The first question is easily answered in this case. The Act specifically provides: “A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.” ... The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer*, we held that Congress can abrogate a State’s sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. This enforcement power, as we have often acknowledged, is a “broad power indeed.” It includes the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text. We have thus repeatedly affirmed that Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct. ... When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

Congress' § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne*. In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." ...

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' § 5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. [W]e concluded Congress' exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination.... Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 enforcement power. It is to that question that we now turn.

The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Cleburne*.

Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to

their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Whether Title II validly enforces these constitutional rights is a question that must be judged with reference to the historical experience which it reflects. While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. ...

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, as of 1979, most States categorically disqualified “idiots” from voting, without regard to individual capacity. The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court’s cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions. The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them “inadequate to address the pervasive problems of discrimination that people with disabilities are facing.” It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. As the Court’s opinion in *Garrett* observed, the “overwhelming majority” of these examples concerned discrimination in the administration of public programs and services.

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with

visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. ...

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: “[D]iscrimination against individuals with disabilities persists in such critical areas as ... education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*.” This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II—unlike ... the other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II’s applications all at once, and to treat that breadth as a mark of the law’s invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II’s other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.

Congress’ chosen remedy for the pattern of exclusion and discrimination described above, Title II’s requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this difficult and intractable problem warranted added prophylactic measures in response.

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only “reasonable modifications” that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. ...

This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts. Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*. It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

[The concurring opinions of JUSTICES SOUTER and GINSBURG are omitted.]

CHIEF JUSTICE REHNQUIST, with whom JUSTICES KENNEDY and THOMAS join, dissenting.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult [than in *Garrett*] because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," the proper inquiry focuses on the scope of those due process rights.

Having traced the metes and bounds of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress identified a history and pattern of violations of these constitutional rights by the States with respect to the disabled. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' § 5 power is appropriately exercised *only* in response to state transgressions." *Garrett* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. This digression recounts historical discrimination against the disabled

through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower “as-applied” inquiry. ...

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court’s evidence concerns discrimination by nonstate governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. ...

With respect to the due process “access to the courts” rights on which the Court ultimately relies, Congress’ failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.⁴ ...

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally “inaccessible” courthouse—*i.e.*, one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an “inaccessible” courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it “accessible.” But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States’ sovereign immunity. ...

[Nor is] Title II congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. ... The ADA’s findings make clear that Congress believed it was attacking “discrimination” in all areas of public services, as well as the “discriminatory effect” of “architectural, transportation, and communication barriers.” In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

⁴ Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante*, at 1982. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ante*, at 1982. The court conducted a preliminary hearing in the first-floor library to accommodate Lane’s disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane’s right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

Despite subjecting States to this expansive liability, the broad terms of Title II do nothing to limit the coverage of the Act to cases involving arguable constitutional violations. By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that “[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.” Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively redefine the States’ legal obligations under the Fourteenth Amendment.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause—in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights.... Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.

The majority concludes that Title II’s massive overbreadth can be cured by considering the statute only “as it applies to the class of cases implicating the accessibility of judicial services.” I have grave doubts about importing an “as applied” approach into the § 5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute’s coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all “services,” “programs,” or “activities” of any “public entity.” Thus, the majority’s approach is not really an assessment of whether Title II is “appropriate legislation” at all, U.S. Const., Amdt. 14, § 5 (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

I fear that the Court’s adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an

undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority’s as-applied approach simply cannot be squared with either our recent precedent or the proper role of the Judiciary. ...

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, *inter alia*, they fail to make “reasonable modifications” to facilities, such as removing “architectural ... barriers.” Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation—*i.e.*, the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being “subjected to discrimination”—a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. ...

JUSTICE SCALIA, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress “shall have power to enforce, by appropriate legislation, the provisions” of that Amendment—including, of course, the Amendment’s Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan*, we decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the Fourteenth Amendment, we held that § 5 authorizes prophylactic legislation—that is, legislation that proscribes facially constitutional conduct, when Congress determines such proscription is desirable to make the amendments fully effective. We said that the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment is the flexible “necessary and proper” standard of *M’Culloch v. Maryland*. We described § 5 as “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” *Morgan*.

... In *City of Boerne*, we confronted Congress’s inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination. There Congress had sought, in the Religious Freedom Restoration Act, to impose upon the States an interpretation of the First Amendment’s Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5, we formulated the “congruence and proportionality” test for determining what legislation is “appropriate.” When Congress enacts prophylactic legislation, we said, there must be “proportionality or congruence between the means adopted and the legitimate end to be achieved.”

I joined the Court’s opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as “proportionality,” because they have a way of turning into vehicles for the implementation of individual judges’ policy preferences. Even so, I signed on to the “congruence and proportionality” test in *Boerne*, and adhered to it in later cases.

I yield to the lessons of experience. The “congruence and proportionality” standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.

Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed....

I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power "to enforce, by appropriate legislation," the other provisions of the Fourteenth Amendment. *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State. That is simply not what the power to enforce means—or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law'"). Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power ... to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." That is not so. One must remember that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution. If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. ... But what § 5 does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is *stare decisis*. A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina v. Katzenbach*. ...

However, *South Carolina* and *Morgan* ... involved congressional measures that were directed

exclusively against, or were used in the particular case to remedy, *racial discrimination*. Giving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. [E.g. *The Slaughter-House Cases*; *Strauder v. West Virginia*.] In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights), and the doctrine of so-called “substantive due process” (which holds that the Fourteenth Amendment’s Due Process Clause protects unenumerated liberties). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of congressional power to interpret § 5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*. ...

Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison*. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

I shall also not subject to “congruence and proportionality” analysis congressional action under § 5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of “enforcement” of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it *ultra vires*. The present legislation is plainly of the latter sort.

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of “enforcing” the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. ... It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion.

[The dissenting opinion of JUSTICE THOMAS is omitted.]